

SECURITIES AND EXCHANGE COMMISSION
(Release No. 58927; File No. SR-BSE-2008-48)

November 10, 2008

Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Notice of Filing of Proposed Rule Change To Establish New Rules for Membership, Member Conduct, and the Listing and Trading of Cash Equity Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 3, 2008, the Boston Stock Exchange (the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes: (i) to adopt new rules governing membership, the regulatory obligations of members, listing, and equity trading, (ii) to amend its certificate of incorporation and by-laws to reflect the proposed change in the name of the Exchange to NASDAQ OMX BX, Inc., (iii) to amend and restate the Operating Agreement of BSX Group LLC (the “Operating Agreement”), which will operate the Exchange’s cash equities trading business, and which will be renamed NASDAQ OMX BX Equities LLC (“BX Equities LLC” or the “Company”), and (iv) to adopt a Delegation Agreement between the Exchange and BX Equities LLC. The text of the proposed rule change is available from the principal office of the Exchange and from the Commission, and is also available at www.nasdaqtrader.com/Trader.aspx?id=BSEPendingRules.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). At the time of this acquisition, the Exchange was not operating a venue for trading cash equities. The Exchange is now proposing to adopt a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equity trading. The new rules, which will be referred to as the "Equity Rules," will be based to a substantial extent on the rules of The NASDAQ Stock Market LLC (the "NASDAQ Exchange"). As is the case with the NASDAQ Exchange, administration and enforcement of many of the rules will be supported by the Financial Industry Regulatory Authority, Inc. ("FINRA") through a regulatory services agreement (the "FINRA Regulatory Contract"). Other rules, such as listing rules, will be administered by personnel who will be dually employed by the Exchange and the NASDAQ Exchange, or solely by the Exchange.

The Exchange's existing rules are divided between the rules currently denominated as the "Rules of the Board of Governors" and the "Rules of the Boston Options Exchange Group LLC" (the "BOX Rules"). The BOX Rules, and certain of the Rules of the Board of Governors that are

cross-referenced in the BOX Rules, currently govern trading on the Exchange's Boston Options Exchange facility ("BOX"). The cross-referenced Rules of the Board of Governors will be referred to herein as the "Grandfathered Rules," and the BOX Rules, together with the Grandfathered Rules, will be referred to as the "Options Rules." The Options Rules, together with the Equity Rules, will be referred to as the "Rules of the Exchange." The Exchange is currently preparing a separate proposed rule change to update the Grandfathered Rules in light of their more limited applicability and to reflect changes in the Exchange's operations and corporate form.

At present, a broker-dealer that is authorized for trading on BOX (an "Options Participant") is not required to become a member of the Exchange, but is nevertheless subject to Options Rules as if it were a member.³ Under the new proposed Rules of the Exchange, this principal (sic) will continue to apply. Thus, the Equity Rules will apply to members, which will be authorized to engage in equity trading on the Exchange, and the Options Rules will apply to Options Participants, which will be authorized to engage in options trading. If a member opts to become an Options Participant (or vice versa), it will be subject to both sets of rules. Members must comply with the application requirements of the Option Rules in order to become Options Participants, and conversely, Options Participants must comply with the membership application procedures of the Equity Rules in order to become members and engage in equity trading.⁴

³ See Chapter 1, Section 2 of the BOX Rules.

⁴ See Equity Rules 1013 and 1014; Chapter II of the BOX Rules.

Equity Rules

0100 Series

The 0100 Series Equity Rules contain general provisions, including definitions of general applicability. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 0120 includes definitions for “Rules of the Exchange”, “Equity Rules”, “Options Rules”, “Grandfathered Rules”, “Options Participant”, and “BOX” consistent with the definitions described above. The rule also defines “BOXR” to mean “Boston Options Exchange Regulation, LLC”, a subsidiary of the Exchange that will continue to regulate BOX under the existing Plan of Delegation of Functions and Authority by the Boston Stock Exchange, Inc., to Boston Options Exchange Regulation, LLC (the “Delegation Plan”), and defines “BOX LLC” to mean Boston Options Exchange Regulation, LLC, the entity that operates BOX.
- As described in greater detail below, the Exchange will operate its cash equities trading business, to be named the NASDAQ OMX BX Equities Market, through BX Equities LLC, and will adopt a Delegation Agreement between the Exchange and BX Equities LLC. Accordingly, Equity Rule 0120 contains definitions of “NASDAQ OMX BX Equities Market”, “NASDAQ OMX BX Equities LLC”, and “Delegation Agreement”.
- Equity Rule 0115 provides that the Equity Rules apply to all members and their associated persons, while the Options Rules apply to all Options Participants. The Equity Rules shall apply to Options Participants only if they are also members of the Exchange.
- Equity Rule 0160 references the Delegation Plan and the Delegation Agreement and states that the staff, books, records and premises of BOXR and BX Equities LLC are the

staff, books, records and premises of the Exchange subject to oversight pursuant to the Act, and all officers, directors, employees and agents of BOXR are the officers, directors, employees and agents of the Exchange for purposes of the Act.⁵

1000 Series

The 1000 Series Equity Rules contain rules governing membership. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 1002(f) provides that a registered broker-dealer that was a member organization in good standing of the Exchange on the date immediately prior to the acquisition of the Exchange by NASDAQ OMX (a “Continuing Member”) is eligible for continued membership in the Exchange if it continues to satisfy the membership requirements adopted in the Equity Rule 1000 Series. Specifically, the Continuing Member must sign a revised membership agreement and maintain registrations of its associated persons as required under the Equity Rules. Associated persons already registered with the Exchange will likewise be eligible for continued registration if they satisfy the requirements under the Equity Rules. Unlike members in the Exchange prior to the NASDAQ OMX acquisition, members under the Equity Rules do not possess an ownership interest in the Exchange.
- In order to ensure that Continuing Members are not subjected to registration requirements that did not previously exist under the Rules of the Exchange, Equity Rules 1022 and 1032 adopt only those categories of principal registration and representative registration that previously existed and that will be relevant to the future operations of the Exchange.

⁵ As described below, BX Equities LLC will have no directors, so the reference to directors is omitted with respect to that entity.

As a result, the Exchange will not be adopting the categories of Limited Principal – Introducing Broker/Dealer Financial and Operations; Limited Principal – Investment Company and Variable Contracts Products; Limited Representative – Investment Company and Variable Contracts Products; Limited Representative – Corporate Securities; Limited Representative – Equity Trader; Assistant Representative – Order Processing; United Kingdom – Limited General Securities Registered Representative; and Canada – Limited General Securities Registered Representative. Similarly, under the Equity Rules, the Exchange is not adopting the categories of Member Exchange and Floor Employee, which were previously recognized by the Exchange, as these categories will no longer be relevant to Exchange operations.

- Because of the similarity between the proposed Equity Rules and both NASDAQ Exchange Rules and FINRA Rules, Equity Rule 1013(a)(5)(C) provides that an approved member of FINRA or the NASDAQ Exchange may apply to become an Exchange member and register with the Exchange all associated persons whose registrations are approved with FINRA or the NASDAQ Exchange (as applicable) in categories of registration recognized by the Exchange through an expedited process by submitting a Short Form Membership Application and Agreement. NASDAQ Exchange Rule 1013 provides for a comparable process for FINRA members becoming NASDAQ Exchange members.

2000 and 3000 Series

The Equity Rule 2000 Series establishes business conduct rules applicable to members, and the Equity Rule 3000 Series establishes the responsibilities of associated persons and employees of members. In each case, they are substantively identical to the comparable rules of

the NASDAQ Exchange. The Exchange is, however, amplifying the regulatory requirements applicable to index warrants, currency index warrants, and currency warrants contained in the Equity Rule 2480 Series, and expects the NASDAQ Exchange to adopt a conforming rule change.

4000 Series

The Equity Rule 4000 Series contains marketplace rules governing listing and trading of cash equities on the Exchange.

Listing Rules

The proposed listing standards for the Exchange are based on the standards of the NASDAQ Exchange. The NASDAQ Exchange, however, has three listing tiers – the Nasdaq Capital Market, the Nasdaq Global Market, and the Nasdaq Global Select Market – with progressively higher listing standards applicable at each tier. In contrast, the Exchange will have only one listing tier, with listing standards for primary and secondary classes of common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, American Depositary Receipts (“ADRs”), and limited partnership interests that are substantively identical to those of the Nasdaq Capital Market, the tier with the most permissive listing standards.⁶ The standards for initial and continued listing of these securities are set forth in the Equity Rule 4300 Series. In addition, the Exchange will adopt, in Equity Rules 4420 and 4450, initial and continued listing standards for Selected Equity-linked

⁶ The Exchange notes, however, that securities listed on the Nasdaq Capital Market are “covered securities” for purposes of Section 18 of the Securities Act of 1933 (the “Securities Act”), and are therefore exempted from State law registration requirements. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2008) (File No. S7-18-06). Accordingly, following adoption of these Rules, the Exchange expects to petition the Commission to amend Rule 146 under the Securities Act for purposes of recognizing securities listed on the Exchange as covered securities.

Debt Securities (“SEEDS”), units, index warrants, portfolio depository receipts, index fund shares, trust issued receipts, linked securities, managed fund shares, and “other securities” that are substantively identical to those of the NASDAQ Global Market, because the Nasdaq Capital Market does not have standards applicable to any of these securities other than units.⁷ Provisions of NASDAQ Rules 4420 and 4450 that establish higher initial and continued listing standards for common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, ADRs, and limited partnership interests seeking inclusion on the NASDAQ Global Market are omitted and replaced with a reference back to the Equity Rule 4300 Series, where the standards for such securities are found. In addition, the listing standards for SEEDS and “other securities” differ slightly from the comparable NASDAQ Exchange standards, in that they require issuers of securities listed thereunder to be eligible for listing on the NASDAQ Exchange or NYSE or to be affiliates of companies that are so eligible, rather than being required to be actually so listed. This difference recognizes the fact that an issuer seeking to list a SEED or “other security” on the Exchange would not necessarily also have a security listed on the NASDAQ Exchange or NYSE, but it would nevertheless be required to demonstrate ability to meet such other listing standards before listing the SEED or “other security.” Finally, NASDAQ Rules 4426 and 4427, which establish standards for NASDAQ’s Global Select Market tier, are omitted in their entirety.⁸

⁷ The Exchange’s proposed listing standards for units combine elements of the standards of the Nasdaq Capital Market and the Nasdaq Global Market, in that they require the equity component of a unit to satisfy standards equivalent to Nasdaq Capital Market standards but allow the inclusion of a debt component that is not itself eligible for listing but that meets the requirements of Rule 4420(h)(1)(B).

⁸ The Rule 4600 Series is being reserved for the Exchange’s listing fees, which will be included in a separate filing.

Trading System Rules

The Exchange's system for trading cash equities, designated in the Equity Rules as the "NASDAQ OMX BX Equities Market" or the "System", will operate using NASDAQ OMX's INET technology, in accordance with rules based to a significant extent on the rules of the Nasdaq Market Center. As a result, the NASDAQ OMX BX Equities Market will feature an electronic central limit order book, with executions occurring in price/time priority (but with displayed orders receiving priority over non-displayed orders). The differences between the two systems will be as follows:

- The NASDAQ OMX BX Equities Market will operate from 8:00 a.m. to 7:00 p.m. Eastern Time (rather than from 7:00 a.m. to 8:00 p.m.). As with the Nasdaq Market Center, regular market hours will be from 9:30 a.m. to 4:00 p.m. (or 4:15 p.m. for any exchange-traded funds that may be so designated by the Exchange).
- The NASDAQ OMX BX Equities Market will not operate an opening cross, a closing cross, or a halt cross. The NASDAQ OMX BX Equities Market will begin to process all eligible Quotes/Orders at 8:00 a.m., adding in time priority all eligible Orders in accordance with each order's defined characteristics. All trades executed prior to 9:30 will be automatically appended with the ".T" modifier. The official opening price for a security listed on the Exchange will be the price of the first trade executed at or after 9:30 a.m. and the official closing price will be the price of the last trade executed at or prior to 4:00 p.m.
- Quoting Market Participants may instruct the Exchange to open their Quotes at 9:25 a.m. at a price of \$0.01 (bid) and \$999,999 (offer) and a size of one round lot in order to

provide a two-sided quotation. In all other cases, the quote of a participant will be at the price and size entered by the participant.

- If trading of a security is halted under Equity Rule 4120, the security will be released for trading at a time announced to market participants by the Exchange. Because the Exchange will not have a halt cross, provisions of NASDAQ Rule 4120 relating to a Display Only Period prior to the execution of the halt cross have been omitted.
- The Exchange's quotation and trade reporting information is disseminated under the Consolidated Quotation Plan ("CQ Plan") and Consolidated Tape Association Plan ("CTA Plan"), rather than the Nasdaq UTP Plan. Accordingly, the NASDAQ Exchange's IM-4390, which relates to securities dually listed on the New York Stock Exchange ("NYSE") and the NASDAQ Exchange is not included in the Equity Rules, since a security listed on the Exchange and NYSE would automatically be included in the CQ Plan and the CTA Plan by virtue of either of its listings.
- Provisions of Rules of the NASDAQ Exchange relating to passive market making under Rule 103 of Regulation M under the Act⁹ are being omitted since that rule does not apply to any other exchange, even if it adopts a similar market structure.
- Equity Rule 4620 provides that an Exchange Market Maker that terminates its registration in a security listed on the Exchange may not re-register as a market maker in that security for a period of twenty business days, with a one-day exclusion period for all other securities. The comparable NASDAQ Exchange rule provides for an exclusion period of twenty days for securities listed on the NASDAQ Exchange and one day for all other securities.

⁹ 17 C.F.R. 242.103.

- In contrast to the NASDAQ Exchange, the Exchange will not support discretionary orders, orders with a “market hours” time-in-force designation (with the exception of “market hours day” orders), or orders with a “system hours good till cancelled” time-in-force designation.
- The Exchange will not support an automatic quotation refresh functionality. Thus, market makers will be required to maintain continuous two-sided quotations without the assistance of the functionality. In addition, the Exchange will not allow market participants to maintain quotes or orders on the book overnight; rather, all quotes and orders will be cancelled at the end of the trading day and must be re-entered, if market participants so desire, the following day. Accordingly, the Exchange will not have a rule such as NASDAQ Exchange Rule 4761, which provides for overnight adjustment of open quotes and orders to reflect corporate events such as dividends and splits. The Exchange believes that these differences will reduce burdens on Exchange system resources, and that market participants will be able to maintain comparable functionality using their own systems if they wish.
- The Exchange will not route orders to other market centers. Rather, to ensure the Exchange’s compliance with Regulation NMS, Equity Rule 4755 provides that in addition to such other designations as may be chosen by a market participant,¹⁰ all orders that are not entered with a time in force of “System Hours Immediate or Cancel”¹¹ must

¹⁰ As is the case with the NASDAQ Exchange, different order designations can be combined. Thus, for example, a Price to Comply Order could be entered with reserve size or as a non-displayed order.

¹¹ A “System Hours Immediate or Cancel” order is an immediate or cancel order that may be entered between 8:00 a.m. and 7:00 p.m. Eastern Time, the hours of operation of the NASDAQ OMX BX Equities Market. If a System Hours Immediate or Cancel order (or

be designated as an Intermarket Sweep Order, a Pegged Order, a Price to Comply Order, or a Price to Comply Post Order, and all orders will be processed in a manner that avoids trading through protected quotations and avoids locked and crossed markets.

- A System Hours Immediate or Cancel Order is compliant with Regulation NMS because it will not, by its terms, execute or post at a price that would result in a trade-through of a protected quotation or lock or cross another market.
- A Pegged Order is compliant with Regulation NMS because it is continually re-priced to avoid locking or crossing.
- In entering an Intermarket Sweep Order, the market participant represents that it is simultaneously routing one or more additional limit orders, as necessary, to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS) in the case of a limit order to sell or buy with a price that is superior to the limit price of the order identified as an Intermarket Sweep Order. These additional routed orders must also be identified as Intermarket Sweep Orders. As provided by Regulation NMS, the Exchange will automatically execute orders identified as Intermarket Sweep Orders. Members will be responsible for ensuring that their use of Intermarket Sweep Orders complies with Regulation NMS, and the Exchange's T+1 surveillance program will monitor members' use of Intermarket Sweep Orders.
- If, at the time of entry, a Price to Comply Order would lock or cross the quotation of an external market, the order will be priced to the current low offer (for bids) or to the current best bid (for offers) but displayed at a price one minimum price

a portion thereof) is not marketable, the order (or unexecuted portion thereof) is canceled and returned to the entering Participant.

increment lower than the offer (for bids) or higher than the bid (for offers). Thus, an incoming order priced to execute against the displayed price will receive the superior undisplayed price.¹² The displayed and undisplayed prices of a Price to Comply order may be adjusted once or multiple times depending upon the method of order entry and changes to the prevailing national best bid/best offer.

- If, at the time of entry, a Price to Comply Post Order would lock or cross the protected quote of an external market or would cause an Order Protection Rule violation, the order will be re-priced and displayed to one minimum price increment (i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or to one penny above the current best bid (for offers).¹³

By requiring all orders to be entered with one of these designations, the Exchange will ensure that all orders will either be priced or cancelled in a manner consistent with avoidance of trade-throughs and locked and crossed markets, or will execute as Intermarket Sweep Orders along with other Intermarket Sweep Orders sent to protected quotes. Because the Exchange will not route to other market centers, its policies and procedures under Rule 611(a) under Regulation NMS will contemplate reliance on information provided by the NASDAQ Exchange for purposes of determining whether another trading center is experiencing a failure, material delay, or malfunction of its systems or equipment within the meaning of Rule 611(b)(1).

¹² For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply order to buy 10,000 shares at \$10.01, the order will display at \$9.99, but will reside on the System book at \$10.00. If a seller then enters an order at \$9.99, it will execute at \$10.00, up to the full 10,000 shares of the order.

¹³ For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply post order to buy at \$10.01, the order will be repriced and displayed at \$9.99. If a seller enters an order at \$9.99, it will execute at that price.

Affiliation with NASDAQ Execution Services, LLC

Although the Exchange will not route to other market centers, the Exchange will receive orders routed to it by other market centers, including the NASDAQ Exchange. Nasdaq Execution Services, LLC (“NES”) is the approved outbound routing facility of the NASDAQ Exchange for cash equities. Rules 4751 and 4758 of the NASDAQ Exchange establish the conditions under which the NASDAQ Exchange is permitted to own and operate NES in its capacity as a facility of the NASDAQ Exchange that routes orders from the NASDAQ Exchange to other market centers. These conditions include requirements that: (1) NES is operated and regulated as a facility of the NASDAQ Exchange; (2) NES will not engage in any business other than as an outbound router for the NASDAQ Exchange and any other activities as approved by the Commission;¹⁴ (3) the primary regulatory responsibility for NES lies with an unaffiliated self-regulatory organization; (4) use of NES for outbound routing is optional for other NASDAQ Exchange members; and (5) the NASDAQ Exchange will not route orders to an affiliated exchange, such as the Exchange, unless they check the NASDAQ Exchange book prior to routing.

In connection with the Exchange’s resumption of equity trading pursuant to this filing, the NASDAQ Exchange will file a proposed rule change to modify the last of these conditions to allow it to route all forms of orders, including Directed Orders, to the Exchange on a one-year pilot basis.¹⁵ Directed Orders are orders that route directly to other exchanges on an immediate-

¹⁴ Because only NASDAQ Exchange members may enter orders into the NASDAQ Exchange, it also follows that routing by NES is conducted only with respect to orders of NASDAQ Exchange members.

¹⁵ This proposal and the anticipated Nasdaq proposal to permit NES to route Directed Orders to the Exchange marks a departure from the Exchange’s representation in Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008) (SR-BSE-2008-23), that NES would not route Directed Orders to the Exchange or its

or-cancel basis without first checking the NASDAQ Exchange book for available liquidity. In order to appropriately address concerns previously raised by the Commission regarding the potential for conflicts of interest and informational advantages that may arise from the use of affiliated members to route orders between exchanges owned by a common parent, the Exchange is proposing certain restrictions and undertakings.

In order to manage the concerns raised by the Commission regarding conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange notes that, with respect to orders routed to the Exchange by NES in its capacity as a facility of the NASDAQ Exchange, NES is subject to independent oversight and enforcement by FINRA, an unaffiliated SRO that is NES's designated examining authority. In this capacity, FINRA is responsible for examining NES with respect to its books and records and capital obligations and also has the responsibility for reviewing NES's compliance with intermarket trading rules such as SEC Regulation NMS. In addition, the Exchange intends to enter into a regulatory services agreement with FINRA as well as an agreement with FINRA pursuant to the provisions of Rule 17d-2 under the Act,¹⁶ under which FINRA staff will review NES's compliance with the Exchange's rules through FINRA's examination program. FINRA and the Exchange¹⁷ will also monitor NES for compliance with the Exchange's trading rules, subject, of course, to SEC oversight of the regulatory program of the Exchange and FINRA. The Exchange will, however, retain ultimate responsibility for enforcing its rules with respect to NES except to

facilities. Email from John Yetter Vice President and Deputy General Counsel, Nasdaq, to Heidi Pilpel, Attorney, Commission, November 6, 2008.

¹⁶ 17 CFR 240.17d-2.

¹⁷ Employees of the Exchange performing real-time oversight of equity trading may also be employed by the NASDAQ Exchange to perform similar functions with respect to its rules.

the extent that they are covered by an agreement with FINRA pursuant to Rule 17d-2, in which case regulatory responsibility will be allocated to FINRA as provided in Rule 17d-2(d).

Furthermore, in order to minimize the potential for conflicts of interest, the Exchange and FINRA will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the NASDAQ Exchange, routing orders to the Exchange) is identified as a participant that has potentially violated applicable SEC or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the SEC's Office of Compliance Inspections and Examinations. FINRA will then provide a report to the Exchange's Chief Regulatory Officer, on at least a quarterly basis, which (i) quantifies all alerts (of which the Exchange and FINRA become aware) that identify NES as a participant that has potentially violated Exchange or SEC rules and (ii) quantifies the number of all investigations that identify NES as a participant that has potentially violated Exchange or SEC rules.¹⁸

In order to address the Commission's concerns about potential for information advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members, the Exchange is proposing Rule 2140(c). Rule 2140(c) will require the implementation of policies and procedures that are reasonably designed to prevent NES from acting on non-public information regarding Exchange systems prior to the time that such information is made available generally to all members of such entity performing inbound routing functions. These policies and procedures would include systems development protocols to facilitate an audit of the efficacy of these policies and procedures.

¹⁸ The Exchange, FINRA, and SEC staff may agree going forward to reduce the number of applicable or relevant surveillances that form the scope of the agreed upon report.

Specifically, new Rule 2140(c) shall provide as follows:

The NASDAQ OMX Group, Inc., which is the holding company owning both the Exchange and NASDAQ Execution Services, LLC, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound routing to the Exchange.

In addition, the NASDAQ Exchange, in its filing regarding routing to the Exchange, will amend Rule 4758 to provide that NES will establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the NASDAQ¹⁹ Exchange and its facilities (including the NES), and any other entity (including the Exchange). The Exchange believes these measures will effectively address the concerns identified by the Commission regarding the potential for informational advantages favoring NES vis-à-vis other non-affiliated Exchange members.

5000, 6000, and 8000 Series

As with the NASDAQ Exchange Rules, the Equity Rule 5000 Series will be reserved for future use. The Equity Rule 8000 Series governs investigations and sanctions of members by the Exchange, and is substantively identical to the comparable rules of the NASDAQ Exchange. The Equity Rule 6000 Series contains rules implementing a version of the Order Audit Trail

¹⁹ Email from John Yetter Vice President and Deputy General Counsel, Nasdaq, to Heidi Pilpel, Attorney, Commission, November 6, 2008.

System (“OATS”) for the Exchange. The Exchange believes that as an affiliate of the NASDAQ Exchange, it should ensure that its regulatory requirements are generally consistent with those of the NASDAQ Exchange. As provided in NASDAQ Exchange rules, Exchange members that are also FINRA members must comply with the FINRA OATS rules requiring daily reporting of audit trail information for transactions in securities listed on the NASDAQ Exchange. In addition, as provided in NASDAQ Exchange rules, Exchange members that are not FINRA members must compile and maintain audit trail information for securities listed on the NASDAQ Exchange, but are required to transmit this information to FINRA only if requested. Similarly, the Exchange will require all members to maintain audit trail information for securities listed on the Exchange, and to transmit the information to FINRA upon request, but will not require daily OATS reporting for securities listed on the Exchange.²⁰ As is true with respect to the NASDAQ Exchange, OATS data will be used by the Exchange for regulatory purposes only.²¹

9000 Series

The 9000 Series governs procedures for disciplinary proceedings against members and associated persons. The sole substantive difference between these rules and the corresponding NASDAQ Exchange rules pertains to the permissible composition of a Hearing Panel authorized to hear cases under the rule series. Under NASDAQ Exchange rules, a hearing panel is composed of a Hearing Office and two Panelists. Panelist may be drawn from a pool consisting of persons who previously served on the Nasdaq Review Council (the “appellate body” that

²⁰ The Rule 7000 Series is reserved for the Exchange’s fees other than listing fees, which will be included in a separate filing.

²¹ See Securities Exchange Act Release No. 53128 (January 13, 2006); 71 FR 3350 (January 23, 2006) (File No. 10-131).

reviews disciplinary matters) or a subcommittee thereof; previously served as a director of the NASDAQ Exchange; previously served on FINRA's National Adjudicatory Council or a subcommittee thereof prior to the date that the NASDAQ Exchange commenced operating as a national securities exchange; or currently serves or previously, within the past four years, served on the NASDAQ Exchange Market Regulation Committee. Under NASDAQ Exchange rules, however, current and former members of the Market Regulation Committee may serve on a Panel only if the case involves quotations of securities, execution of transactions, reporting of transactions, or trading practices.

The Exchange's rules regarding Hearing Panel composition will allow Panelists to be drawn from a pool consisting of persons who previously served on the Exchange Review Council, the appellate body comparable to the Nasdaq Review Council or a subcommittee thereof; previously served as a director of the Exchange or as a Governor of the exchange prior to its acquisition by NASDAQ OMX; or currently serves or previously, within the past four years, served on the Exchange's Market Regulation Committee. Former members of the FINRA National Adjudicatory Council would not be eligible for service on a Panel, however, since that aspect of the NASDAQ Exchange's rules is a function of the NASDAQ Exchange's genesis as a subsidiary of the National Association of Securities Dealers, FINRA's predecessor. However, to ensure that there is an adequate supply of Panelists available to hear cases under the 9000 Series rules, the Exchange will not limit the types of cases that may be heard by Panelists currently or previously serving on the Exchange's Market Regulation Committee. The absence of this limitation is reflected in Equity Rules 9212, 9221, 9231, and 9232, all of which differ from corresponding NASDAQ Exchange rules in this respect.

The 9000 Series also contains, in IM-9216, a list of rules being added to the Exchange's Minor Rule Violation Plan. These are in addition to the existing provisions of the Plan, as described in Chapter X of the Options Rules and Chapter XXXIV of the Grandfathered Rules, which remains in effect with respect to BOX.

10000 Series

The Equity Rule 10000 Series incorporates by reference the NASD Code of Arbitration Procedure for Customer Disputes and the NASD Code of Arbitration Procedure for Industry Disputes. The Exchange's arbitration program will be administered by FINRA under the FINRA Regulatory Contract. The Equity Rule 10000 Series is substantively identical to the corresponding rules of the NASDAQ Exchange.

11000 Series

The Equity Rule 11000 Series adopts the Uniform Practice Code as rules of the Exchange, and is substantively identical to the corresponding NASDAQ Exchange rules. Exchange Rule 11890 governs nullification and modification of clearly erroneous transactions on the Exchange, and is generally consistent with the corresponding NASDAQ Exchange rule. Trades in securities listed on the Exchange will be adjudicated under the standards applicable to NASDAQ Exchange-listed securities under that rule. In addition, language in the rule pertaining to trades occurring in the closing or opening crosses is omitted, since the Exchange will not be operating crossing sessions.

Certificate and By-Laws

The Exchange proposes to amend its Certificate of Incorporation and By-Laws to adopt NASDAQ OMX BX, Inc. as the new name of the Exchange.

NASDAQ OMX BX Equities LLC

The Exchange will operate the NASDAQ OMX BX Equities Market through BSX Group LLC, the same entity that operated the Exchange's cash equities trading business prior to the acquisition of the Exchange by NASDAQ OMX. However, to reflect the limited liability company's status as a closely held subsidiary of the Exchange, whose only members are the Exchange and the Exchange's parent corporation, NASDAQ OMX, the Exchange proposes to amend and restate the Operating Agreement to vest management rights directly in the Exchange, rather than in a Board of Directors. The model for this corporate form is The NASDAQ Options Market LLC, which operates the NASDAQ Options Market as a subsidiary of the NASDAQ Exchange, but with management rights vested in the NASDAQ Exchange. The Exchange also proposes to change the name of the entity from BSX Group LLC to NASDAQ OMX BX Equities LLC. Although NASDAQ OMX will remain a Member of the Company to avoid certain adverse tax consequences that would be associated with contributing its ownership interest to the Exchange, the amendments to the Operating Agreement will leave it with no direct management role in the operation of the entity, with the exception of its role as "tax matters member" under Sections 10.9 and 12.6 and in the definition of "Capital Account," and its limited rights with regard to dissolution of the entity under Article 11 and capital contributions under Section 7.4.

In addition, and also in keeping with the model established by the NASDAQ Exchange and the NASDAQ Options Market LLC, the Exchange and BX Equities LLC will enter into a Delegation Agreement, under which the Exchange will delegate certain authority to BX Equities LLC, and BX Equities LLC will agree to abide by certain regulatory requirements. The Delegation Agreement is described in greater detail below.

BX Equities LLC will be an extension of the Exchange, and the NASDAQ OMX BX Equities Market and BX Equities LLC will be subject to self-regulation by the Exchange and oversight by the Commission. As a facility of the Exchange, the NASDAQ OMX BX Equities Market will be subject to the Exchange's self-regulatory organization functions and the Exchange will have regulatory responsibility for the activities of the NASDAQ OMX BX Equities Market. The Exchange represents that it has the ability to discharge all regulatory functions related to the facility that it has undertaken to perform by virtue of operating the NASDAQ OMX BX Equities Market as a facility of the Exchange.

The amended and restated Operating Agreement for BX Equities LLC contains provisions relating to the governance of the Company that will ensure that the Exchange has authority over the Company to fulfill the Exchange's responsibility for all regulatory functions related to the NASDAQ OMX BX Equities Market. Thus, this rule filing is intended to establish that the Exchange's corporate and self-regulatory structures along with the proposed structure of BX Equities LLC as a controlled subsidiary of the Exchange are sufficient to ensure that BX Equities LLC and the NASDAQ OMX BX Equities Market will be operated and regulated in a manner that is consistent with the Act.

Corporate Structure

The Commission, in approving the Exchange's amended and restated Certificate of Incorporation and By-Laws in connection with its acquisition by NASDAQ OMX, determined that the Exchange's current structure and self-regulatory functions are adequately designed to ensure the completeness and independence of regulation of the Exchange.²² NASDAQ OMX is currently organized as a holding company with multiple subsidiaries, including the Exchange

²² Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; -23; -25; SR-BSECC-2008-01).

and the NASDAQ Exchange. Although NASDAQ OMX does not itself carry out regulatory functions, its activities with respect to the operation of the Exchange were designed to be consistent with, and not interfere with, the Exchange's self-regulatory obligations. Thus, NASDAQ OMX's corporate documents include provisions that maintain the independence of the Exchange's self-regulatory function from NASDAQ OMX, enable the Exchange to operate in a manner that complies with the federal securities laws, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

For example, NASDAQ OMX submitted to the Commission's jurisdiction with respect to activities relating to the Exchange, and agreed to provide the Commission with access to its books and records. NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function of the Exchange and not to use such information for any non-regulatory purpose. In addition, the board of directors of NASDAQ OMX, as well as its officers, employees, and agents are required to give due regard to the preservation of the independence of the Exchange's self-regulatory function. NASDAQ OMX's By-Laws require that any changes to the NASDAQ OMX Certificate of Incorporation or By-Laws be submitted to the Board of Directors of the Exchange ("Exchange Board"), and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

NASDAQ OMX's Certificate of Incorporation imposes limits on direct and indirect changes in control, which prevent any stockholder from exercising undue control over the operation of the Exchange. Specifically, no person who beneficially owns NASDAQ OMX common stock or other voting securities in excess of five percent of the total outstanding voting securities may vote the excess shares. The Exchange's rules also prohibit Exchange members

and persons associated with Exchange members from beneficially owning more than twenty percent of the then-outstanding voting securities of NASDAQ OMX. These rules prevent a member that is a stockholder of NASDAQ OMX from exerting a controlling influence to direct or otherwise cause the Exchange to refrain from diligently monitoring and surveiling the member's conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that may violate such provisions.

The protections, limitations, and requirements provided by the structure established in NASDAQ OMX's governing documents will continue to exist and, under this proposal, will apply with equal force to BX Equities LLC as a facility and subsidiary of the Exchange. Moreover, Commission approval would be required in order to modify the protections provided by NASDAQ OMX's governing documents.

In addition to protections contained in the NASDAQ OMX structure, the Exchange structure also provides protections via the composition of its Board of Directors, Board Committees, and several regulatory structures. Under the Exchange's By-Laws, twenty percent of the Directors on the Exchange Board, which is the governing body of the Exchange and possesses all of the powers necessary for the execution of its responsibilities as a self-regulatory organization ("SRO"), must be "Member Representative Directors." In addition, the number of "Non-Industry Directors" must equal or exceed the sum of the number of "Industry Directors" and "Member Representative Directors." The Exchange Board must also include at least one "Public Director" and at least one Director who is representative of issuers and investors. The requirement that twenty percent of the directors be "Member Representative Directors" and the means by which they are selected by members provides for the fair representation of members in the selection of directors and the administration of the Exchange consistent with the requirement

in Section 6(b)(3) of the Act.²³ This requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that the Exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. In the Exchange's view, the protections provided by the composition and selection of the Exchange's Board of Directors carry through to the NASDAQ OMX BX Equities Market by virtue of the fact that all of its participants will be members of the Exchange. As a result, NASDAQ OMX BX Equities Market participants will have an equal opportunity to participate in the selection of Member Representative Directors who, along with the entire Exchange Board, will have a duty to ensure that the NASDAQ OMX BX Equities Market is administered in a fair and equitable manner.

As Exchange members, NASDAQ OMX BX Equities Market participants will also be protected by several committees established by the Exchange's By-Laws that are composed solely of directors: an Executive Committee, a Finance Committee, a Management Compensation Committee, an Audit Committee, and a Regulatory Oversight Committee ("ROC"). In addition, the Exchange has these other committees that are not required to be composed solely of directors: the Exchange Listing and Hearing Review Committee, the Exchange Review Council (the "Review Council"), a Nominating Committee, a Member Nominating Committee, a Quality of Markets Committee, a Market Operations Review Committee, an Arbitration and Mediation Committee, and a Market Regulation Committee. The Exchange's committees enable it to carry out its responsibilities under the Act.

The ROC will play a central role in the regulation of the Exchange and its facilities. It consists of three members, each of whom must be a Public Director and "independent director" as defined by NASDAQ Exchange Rule 4200. The ROC is responsible for monitoring the

²³ 15 U.S.C. 78f(b)(3).

adequacy and effectiveness of the Exchange's regulatory program, assessing the Exchange's regulatory performance, and assisting the Exchange Board in reviewing the Exchange's regulatory plan and the overall effectiveness of the Exchange's regulatory functions. The ROC meets with the Chief Regulatory Officer ("CRO") in executive session at regularly scheduled meetings and at any time upon request of the CRO or any member of the ROC. The ROC is informed about the CRO's compensation, promotion, or termination (including reasons). Finally, the Exchange regulatory budget is presented to the ROC so that its members may inquire as to the adequacy of resources available for the Exchange's regulatory program. Under this proposal, the ROC and the Exchange CRO will assume responsibility for regulating quoting and trading on the NASDAQ OMX BX Equities Market and conduct by its market participants.

The Exchange's CRO has general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions. The CRO will administer the Exchange's regulatory services agreement with FINRA. Although the Exchange is an SRO with all of the attendant regulatory obligations under the Act, it has entered into the Regulatory Contract with FINRA, under which FINRA will perform certain regulatory functions on its behalf. In addition to performing certain membership functions for the Exchange, FINRA will perform certain disciplinary and enforcement functions for the Exchange. Generally, FINRA will investigate members, issue complaints, and conduct hearings pursuant to the Exchange's rules. Appeals of disciplinary hearings, however, will be handled by the Review Council. The Regulatory Contract between the Exchange and FINRA governs the Exchange and its facilities and therefore will automatically govern the NASDAQ OMX BX Equities Market and Exchange members trading on it.

Notwithstanding the Regulatory Contract, the Exchange retains ultimate legal responsibility for the regulation of its members and its market. The Exchange's By-Laws and rules provide that it has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws. The Exchange's rules also permit it to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member. The Exchange's rules also provide for the imposition of fines for minor rule violations in lieu of commencing disciplinary proceedings.

The Exchange's independent Regulation Department will carry out many of the Exchange's regulatory functions, including administering its membership and disciplinary rules, and is functionally separate from the Exchange's business lines. The Regulation Department includes MarketWatch, which will perform real-time intraday surveillance over the Exchange's listed companies and participants in the NASDAQ OMX BX Equities Market. More specifically, MarketWatch will oversee the complete and timely disclosure of issuers' material information to determine if a trading halt is necessary to maintain an orderly market for the release of material news. In addition, MarketWatch, through its automated detection system, will monitor the trading activity of each security and will generate a price and volume alert to aid in the assessment of unusual market activity. MarketWatch will also coordinate and execute the release of initial public offerings; administer market participants' excused withdrawal requests; and handle the clearly erroneous trade adjudication process. If MarketWatch observes any activity that may involve a violation of Commission or Exchange rules, MarketWatch will

immediately refer the activity to FINRA's Market Regulation Department for further investigation and potential disciplinary action.

BX Equities LLC Structure

BX Equities LLC will be established as a facility of and controlled subsidiary owned and operated by the Exchange in a manner designed to extend to cash equities trading on the NASDAQ OMX BX Equities Market each and every regulatory protection provided by the NASDAQ OMX and Exchange structures described above. BX Equities LLC is a limited liability company under the laws of the State of Delaware. BX Equities LLC will be governed by the amended and restated Operating Agreement, filed herewith. The Operating Agreement provides that the Exchange and NASDAQ OMX are the sole members of BX Equities LLC, and Articles 3 and 4 state that the Exchange shall have all powers necessary to act for BX Equities LLC, as well as to exercise all rights and powers conferred to BX Equities LLC under Delaware law. Section 4.2(b) requires BX Equities LLC and its members to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority.

By virtue of BX Equities LLC's structure as a facility of the Exchange, and the Exchange's exclusive management rights, BX Equities LLC will, by that fact, be bound by all of the regulatory obligations of its SRO-member, and it will be endowed with all of the self-regulatory protections provided by the NASDAQ OMX and Exchange governance documents. BX Equities LLC will be under the complete control and discretion of the Exchange and can act only through the action of the Exchange and its officers and directors by virtue of the fact that there will be no separate BX Equities LLC board and all BX Equities LLC officers will be officers of the Exchange. The Exchange, in turn, is governed by its By-Laws, its Exchange

Board, and its Committees, as described above. All actions by BX Equities LLC that, if taken by the Exchange would require a vote of the Exchange Board, will also require a vote of the Exchange Board. Any action by BX Equities LLC that, were it taken by the Exchange would require a proposed rule change under Section 19 of the Act, will require a proposed rule change under Section 19 of the Act.

Not only is BX Equities LLC limited to acting exclusively through the Exchange, it is also limited to acting only through officers of the Exchange. Under Article 5 of the Operating Agreement, each officer of BX Equities LLC will also be an officer of the Exchange with the same powers, obligations, and responsibilities as an officer of the Exchange. Moreover, the Operating Agreement requires BX Equities LLC officers separately to agree to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority and the provisions of the Operating Agreement. Any violation of federal securities laws by an individual officer acting in his or her capacity as a BX Equities LLC officer would also be a violation by an Exchange officer and, in both cases, such violations would be subject to Commission jurisdiction.

Each broker-dealer that participates in trading on the NASDAQ OMX BX Equities Market must be a member of the Exchange. As a result, all cash equities trading and all market participants will operate pursuant to Exchange rules, subject to Exchange regulation, and Commission oversight. The Exchange will regulate NASDAQ OMX BX Equities Market activity via a combination of structural regulation by the Exchange, the Exchange Board, the ROC, and the Exchange CRO, real-time surveillance by the Exchange, and the Regulatory Contract with FINRA.

The specific changes being made to the Operating Agreement to implement the structure described above are as follows:

- The introductory paragraphs are being amended to reflect the new names of the Company and the Exchange, to remove language referring to the possibility of additional members becoming party to the Agreement, and to remove language describing the past history of the entity that is no longer necessary.
- Article I is being amended to remove definitions of the terms “Board”, “BSE Facilities Services Agreement”, “BeX”, “DGCL”, “Directors”, “Disclosing Member”, “Excess Units”, “Initial Funding Date”, “Member Entities”, “Member Information”, “Ownership Concentration Limit”, “Regulatory Services Provider”, “Self-Regulatory Organization”, “Senior Executive”, “Total Votes”, “Transfer”, “Transferee”, and “Transferring Member”. The Article is also being amended to add a new definition of “Officer”, to simplify the definition of “Confidential Information,” to reflect the new name of the Exchange, to reflect NASDAQ OMX’s role as the tax matters member of the Company, and to amend the definition of “Member” to clearly reflect that NASDAQ OMX and the Exchange are the sole Members of the Company.
- Article 16 and Sections 2.1, 2.8, 7.1, 18.1, and 18.6, as well as Schedules 1, 2, and 3, are being amended to reflect the new names of the Company and the Exchange.
- Section 2.2 is amended to provide that the Exchange may determine the principal place of business of the Company.
- Articles 6, 15, and 16 and Sections 2.2, 2.4, 2.5, 2.8, 7.3, 7.4, 7.5, 7.6, 9.1, 9.2, 11.1, 12.1, 12.2, 14.1, 18.1 are amended to reflect that management authority is vested in the Exchange directly, rather than in a Board of Directors.

- Section 2.8(e) is being amended to stipulate that the legend printed on certificates representing ownership interests in the Company must include language stating that the interests may not be sold, assigned or transferred unless such sale, assignment or transfer has been filed with and approved by the Commission under Section 19 of the Act²⁴ and the rules promulgated thereunder.
- Articles 3, 4, and 5 are being amended in their entirety to adopt language drawn from LLC Agreement of The NASDAQ Options Market LLC. The effect of the language is to place management authority directly in the Exchange. As a result, provisions relating to the current governance structure of the entity are being removed. Moreover, because BX Equities LLC will be operated directly by the Exchange, references to the BSE Facilities Services Agreement formerly in place between the Exchange and BSX Group LLC are being deleted. The new provisions include language stating that:
 - BX Equities LLC's purposes include (i) supporting the operation, regulation, and surveillance of a cash equities exchange, (ii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removing impediments to and perfecting the mechanisms of a free and open market and a national market system, and, in general, protecting investors and the public interest, (iii) supporting the various elements of the national market system pursuant to Section 11A of the

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15 U.S.C. 78s.

Act and the rules thereunder, (iv) fulfilling self-regulatory responsibilities, and (v) supporting such other initiatives as the Members may deem appropriate.

- BX Equities LLC and its Members shall comply with the federal securities laws and the rules and regulations thereunder; shall cooperate with the SEC and the Exchange pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with BX Equities LLC's ability: to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.
- All persons appointed as officers of the Company must also be officers of the Exchange. Each officer shall comply with the federal securities laws of the United States and the rules and regulations thereunder; shall cooperate with the SEC pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with the Company's ability: to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free

and open market and a national market system, and, in general, to protect investors and the public interest.

- Article 8 and Section 7.3 are being amended to stipulate that the Members may not transfer membership Units, and BX Equities LLC may not issue additional Units, without the approval of the SEC pursuant to Section 19 of the Act²⁵ and the rules promulgated thereunder. Because any transfer or dilution would require direct SEC approval, the more complex provisions of Article 8 relating to transfers, ownership concentration limits, and voting limits are being deleted as unnecessary.
- Article 11 is being amended to make provisions relating to dissolution of the Company more consistent with comparable provisions in the LLC Agreement of The NASDAQ Options Market LLC.
- Section 12.3 is being amended to make the fiscal year of the Company consistent with that of NASDAQ OMX.
- Article 14 and Sections 7.5, 18.1 and 18.10 (redesignated as Section 18.8) are being amended to remove references to “Related Agreements” that were formerly in place between the Exchange and BSX Group LLC but that are unnecessary due to the Exchange’s direct rights to manage the Company.
- Article 15 is being deleted as unnecessary in light of, and in some respects inconsistent with, the Exchange’s direct management authority.
- Most of Article 16 and all of Article 17 are being deleted, because specific restrictions on intellectual property and use of confidential information are unnecessary in the context of a closely held entity such as BX Equities LLC.

²⁵

15 U.S.C. 78s.

However, current Section 16.7 (redesignated as Article 16), which relates to confidential regulatory information, is being retained. Similarly, Section 18.8 is being deleted as unnecessary in the context of a closely held subsidiary.

- Sections 18.6 and 18.12 (redesignated as 18.10) are being amended to make changes to conform to changes made elsewhere in the Operating Agreement.
- Schedule 3 is being amended to eliminate representations and warranties and covenants that are unnecessary in light of BX Equities LLC's status as a closely held subsidiary, and to make conforming changes. In light of the proposal to operate the NASDAQ OMX BX Equities Market through BX Equities LLC, however, the provisions describing the Exchange's capital contribution to BX Equities LLC are substantively unchanged. Schedule 4, which described the BSE Facility Services Agreement, is being deleted, in light of the proposal to adopt a Delegation Agreement as described below.

Delegation Agreement

The Exchange intends to delegate to BX Equities LLC certain limited responsibilities and obligations solely with respect to the operation of a cash equities trading facility pursuant to a Delegation Agreement. The delegation is limited to the Exchange's cash equities market functions and does not include other functions not specifically mentioned in the limited delegation.

Specifically, the Exchange will delegate performance of the following functions to BX Equities LLC pursuant to the Delegation Agreement:

1. To operate the NASDAQ OMX BX Equities Market, including automated systems supporting it.

2. To provide and maintain a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions in cash equities.
3. To act as a Securities Information Processor for quotations and transaction information related to securities traded on the NASDAQ OMX BX Equities Market and any trading facilities operated by BX Equities LLC.
4. To administer the participation of the Exchange in the National Market System plans governing the quoting, trading, and regulation of cash equities and Commission regulations related thereto.
5. To collect, process, consolidate and provide to the Exchange accurate information requisite to operation of a surveillance audit trail for the quoting and trading of cash equities.
6. To establish and assess access fees, transaction fees, market data fees and other fees for the products and services offered by BX Equities LLC.
7. To develop, adopt and administer rules governing participation in the NASDAQ OMX BX Equities Market.
8. To refer to the Exchange any complaints of a regulatory nature involving potential rule violations by member organizations or employees.
9. To establish the annual budget for BX Equities LLC for approval by the Exchange.
10. To determine allocation of BX Equities LLC resources.
11. To manage external relations on matters related to trading on and the operation and functions of the NASDAQ OMX BX Equities Market with Congress, the Commission, state regulators, other SROs, business groups, and the public.

The Exchange will have ultimate responsibility for the operations, rules and regulations developed by the NASDAQ OMX BX Equities Market, as well as their enforcement. Actions taken pursuant to delegated authority will remain subject to review, approval or rejection by the board of directors of the Exchange in accordance with procedures established by that board of directors.

In addition, the Exchange will expressly retain the following authority and functions:

1. To exercise overall responsibility for ensuring that statutory and self-regulatory obligations and functions of the Exchange are fulfilled and to perform any duties and functions not delegated.
2. To delegate authority to BX Equities LLC to take actions on behalf of the Exchange.
3. To direct BX Equities LLC to take action necessary to effectuate the purposes and functions of the Exchange, consistent with the independence of the Exchange's regulatory functions, exchange rules, policies and procedures and the federal securities laws.

In addition, for so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, BX Equities LLC agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange or any delegated market responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange that shall come into the possession of BX Equities LLC shall: (a) not be made available to any person (other than as provided in the proviso at the end of this sentence) other than to those officers, employees and agents of the BX Equities LLC who have a reasonable need to know the

contents thereof; (b) be retained in confidence by BX Equities LLC and the officers, employees and agents of BX Equities LLC; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or the Exchange to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, employees or agents of BX Equities LLC to disclose such confidential information to the Commission or the Exchange.

2. BX Equities LLC's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by the Exchange.
3. BX Equities LLC's books and records shall be maintained within the United States.
4. The books, records, premises, officers, and employees of BX Equities LLC shall be deemed to be the books, records, premises, officers and employees of the Exchange for purposes of and subject to oversight pursuant to the Act.
5. BX Equities LLC shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Exchange pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, the Exchange pursuant to their regulatory authority.
6. BX Equities LLC and its officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of the Exchange

relating to their regulatory functions (including disciplinary matters) or that would interfere with the ability of the Exchange to carry out its responsibilities under the Act.

7. BX Equities LLC, its officers, and those of its employees whose principal place of business and residence is outside of the United States shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the Exchange or any delegated market responsibility (and shall be deemed to agree that BX Equities LLC may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and BX Equities LLC and each such officer or employee, in the case of any such officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

For so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, the Exchange agrees that it may not transfer or assign any of its ownership of BX Equities LLC. The Delegation Agreement may not be modified except pursuant to a written agreement among the Exchange and BX Equities LLC; provided that, prior to the effectiveness of any such amendment, such amendment shall be filed with, and approved by, the Commission under Section 19 of the Act and the rules promulgated thereunder.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁶ in general, and with Section 6(b)(1) and (b)(5) of the Act,²⁷ in particular, in that the proposal enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by Exchange Members and persons associated with Exchange Members with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or

²⁶ 15 U.S.C. 78f.

²⁷ 15 U.S.C. 78f(b)(1), (5).

within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BSE-2008-48 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BSE-2008-48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BSE-2008-48 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Florence E. Harmon
Acting Secretary

²⁸ 17 CFR 200.30-3(a)(12).