

SECURITIES AND EXCHANGE COMMISSION

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Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to the Acquisition of the Boston Stock Exchange, Incorporated by The NASDAQ OMX Group, Inc.

May 1, 2008.

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 April 21, 2008, the Boston Stock Exchange, Incorporated (“Exchange” or “BSE”) 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 substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes: (i) To amend and restate its Certificate of Incorporation and its Constitution in their entirety to reflect the planned acquisition of the Exchange by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”); (ii) to redesignate its Constitution as the By-Laws of the Exchange (“By-Laws”); (iii) to amend the governance framework of Boston Options Exchange Regulation, LLC (“BOXR”) by adopting a written operating agreement and amending the BOXR by-laws (“BOXR By-Laws”); (iv) to obtain approval for a change of control of BSX Group, LLC (“BSX”) and make related amendments to the Third Amended and Restated Operating Agreement of BSX; (v) to adopt two related rules; and (vi) to obtain Commission approval for affiliation between the Exchange and certain broker-dealer subsidiaries of NASDAQ OMX. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.bostonstock.com>), at the Exchange, and at the Commission’s Public Reference Room. The text of Exhibit 5 of the proposed rule change is also available on the Commission’s Web site (<http://www.sec.gov/rules/sro.shtml>).

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

The Merger

On October 2, 2007, the Exchange announced that it had entered into an agreement with The Nasdaq Stock Market, Inc. (now NASDAQ OMX) pursuant to which NASDAQ OMX will acquire all of the outstanding membership interests in the Exchange and the Exchange will be merged with and into Yellow Merger Corporation, a Delaware corporation and wholly owned subsidiary of NASDAQ OMX, with the Exchange surviving the merger (“Merger”). As a result of the Merger, the Exchange will become a Delaware stock corporation, with 100% of its outstanding stock owned by NASDAQ OMX. Exchange Members will receive cash as consideration for their ownership interests, and therefore will not retain ownership interests in the Exchange or its affiliates. NASDAQ OMX will then operate the Exchange as a wholly owned subsidiary, with rules, membership rosters, and listings that are separate and distinct from the rules, membership rosters, and listings of The NASDAQ Stock Market LLC (“Nasdaq Exchange”). The Exchange will propose substantial amendments to its rules in a separate filing.

To reflect its changed status from an independent membership corporation to a wholly owned stock corporation, the Exchange proposes to amend and restate its Certificate of Incorporation and its Constitution in their entirety. The amended Constitution will be redesignated as the By-Laws of the Exchange. In addition, the Exchange proposes to adopt two new rules to reflect its status as a subsidiary of NASDAQ OMX, which is a public company.

The Exchange also proposes to amend the governance framework of BOXR by adopting a written operating agreement (the Amended and Restated Limited Liability Company Agreement of Boston Options Exchange Regulation, LLC (“BOXR LLC Agreement”)) and amending the BOXR By-Laws. BOXR is a wholly owned subsidiary of the Exchange that regulates the Boston Options Exchange (“BOX”), an electronic options market operated as a facility of the Exchange by Boston Options Exchange Group LLC (“BOX LLC”). BOX LLC was established in 2002 as a joint venture among the Exchange, Bourse de Montréal (“MX”), and several other investors. The Exchange has agreed to sell its equity interest in BOX LLC to MX, but the Exchange will continue to regulate BOX through BOXR for a period of time following the Merger. BOXR’s operations are governed by a Plan of Delegation of Functions and Authority by the Exchange to BOXR and by its by-laws, both of which are rules of the Exchange approved by the Commission. The BOXR LLC Agreement, and the BOXR By-Law amendments reflect changes that will be made to the governance and management of BOXR as it remains the designated entity that will regulate the BOX market until alternative arrangements acceptable to the Commission are made. The amendments to the BOXR By-Laws also make technical amendments to conform to the changes proposed to the Exchange Constitution.³

Finally, under Section 8.1 of the Third Amended and Restated Operating Agreement of BSX dated March 13, 2007 (“BSX Operating Agreement”), the Exchange must obtain Commission approval for certain transfers of ownership interests in BSX. In connection with the Merger, NASDAQ OMX will acquire direct interests in BSX, which, together with the Exchange’s interests, will result in BSX becoming a wholly owned subsidiary of NASDAQ OMX. Specifically, following the Merger, the Exchange will continue to own “Units” of ownership interest in BSX equivalent to 53.21% of the outstanding Units, while NASDAQ OMX will own the remaining 46.79%.

³ In a separate filing (SR-BSE-2008-27), the Exchange is proposing to amend the BOX LLC Operating Agreement and to adopt resolutions establishing an independent committee of the Exchange’s Board of Governors (to be redesignated as the Board of Directors) that will review BOX rule changes and certain other BOX-related regulatory matters. In addition, the Exchange has submitted a filing to amend the Exchange’s Certificate to allow for the distribution of the net proceeds from the Exchange’s intended sale of its equity interests in BOX (SR-BSE-2008-02).

Accordingly, the filing seeks approval for this transfer. The filing also proposes amendments to the BSX Operating Agreement to reflect BSX's acquisition.

Exchange Certificate of Incorporation

Article First and Second of the amended and restated Certificate (as proposed to be amended and restated, the "Restated Certificate") state the name and registered agent of the Exchange. Although NASDAQ OMX may propose to change the name of the Exchange in the future, at closing, the name of the Exchange will remain "Boston Stock Exchange, Incorporated."

Article Third of the Restated Certificate provides that the Exchange may engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware and any and all activities necessary or incidental to the foregoing. Without limiting these general powers, Article Third also specifically provides that the Exchange's activities shall include actions that support its regulatory responsibilities under the Act.⁴

Article Fourth of the Restated Certificate provides that the Exchange is authorized to issue 1,000 shares of common stock, par value \$0.01, all of which shall be held by NASDAQ OMX. The Restated Certificate further provides that NASDAQ OMX may not transfer or assign any shares of stock of the Exchange, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder.

Article Fifth pertains to the governing board of the Exchange, which is being designated as a Board of Directors ("Board"), rather than a Board of Governors. The total number of Directors constituting the entire Board will be fixed from time to time by the stockholders (*i.e.*, NASDAQ OMX), and

⁴ In a separate filing (SR-NASDAQ-2008-035), NASDAQ OMX is proposing to amend its by-laws to reflect the proposed acquisition of the Exchange. The proposed amendments include, among other protections, a stipulation that for so long as NASDAQ OMX shall control the Exchange, the board of directors, officers, employees and agents of NASDAQ OMX shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to its obligations to investors and the general public and shall not take any actions which would interfere with the effectuation of any decisions by the board of directors of the Exchange relating to its regulatory functions (including disciplinary matters) or the market structure which it regulates or which would interfere with the ability of the Exchange to carry out its responsibilities under the Act.

will be elected by the stockholders to hold office until their respective successors have been duly elected and qualified, subject, however, to prior death, resignation, retirement, disqualification, or removal from office. However, the exact composition of the Board is also subject to the requirements of the By-Laws relating to independence and fair representation of members, which are described in detail below.

Article Fifth also contains standard corporate provisions governing meetings of stockholders. Because NASDAQ OMX will be the sole stockholder, however, Article Seventh provides that any action required or permitted to be taken at an annual or special meeting of stockholders may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Thus, it is expected that most stockholder actions will be taken through written consent, rather than meetings.

Finally, Article Fifth provides that vacancies or newly created directorships resulting from an increase in the authorized number of Directors are filled as provided in the By-Laws (described below); that no decrease in the number of Directors shortens the term of an incumbent Director; and that Directors may be removed by the holders of a majority of the shares at the time entitled to vote at an election of Directors. However, the stockholders' removal authority is also limited by the By-Laws (as described below).

Article Sixth limits the liability of Directors to the Exchange in the manner permitted under Delaware law; and Article Eighth provides that the Board (in addition to the stockholders) may adopt, amend or repeal By-Laws. Article Ninth reserves the right to amend, alter, change, or repeal any provisions contained in the Restated Certificate;⁵ and Article Tenth provides that the Exchange has perpetual existence.

By-Laws

The By-Laws reflect NASDAQ OMX's expectation that the Exchange will be operated with governance, regulatory, and market structures similar to those of the Nasdaq Exchange. Accordingly, the

⁵ All such changes must be filed with the Commission under Section 19(b) of the Act, 15 U.S.C. 78s(b), and become effective thereunder before being implemented.

Exchange proposes to adopt By-Laws that are similar in all material respects to the By-Laws of the Nasdaq Exchange. The most significant differences result from the fact that the Nasdaq Exchange is a limited liability company whereas the Exchange will be organized as a stock corporation.

Article I of the By-Laws contains key definitions used in the By-Laws. Article II provides for the registered office of the Exchange in Delaware and such other offices as it may establish. Article III contains standard corporate provisions governing meetings of stockholders, as well as a provision consistent with the Restated Certificate allowing stockholder action by written consent.

Article IV contains key provisions regarding the powers, composition, and selection of the Board. The property, business, and affairs of the Exchange will be managed under the direction of the Board. The exact number of Directors will be determined by the stockholders of the Exchange (*i.e.*, NASDAQ OMX), but shall in no event be less than ten Directors. No decrease in the number of Directors shall shorten the term of any incumbent Director.

As is the case with the Nasdaq Exchange, the Board composition will be required to reflect a balance among "Industry Directors," "Member Representative Directors," and "Non-Industry Directors," including "Public Directors." An Industry Director is a person with direct ties to the securities industry as a result of connections to a broker-dealer, the Exchange or its affiliates, the Financial Industry Regulatory Authority, Inc. ("FINRA"), or certain service providers to such entities.⁶ The By-Laws also permit up to

⁶ Specifically, Article I of the By-Laws defines an Industry Director as a person who: (i) Is or has served in the prior 3 years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Director or 20% or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20% or more of the professional revenues received by the

two officers of the Exchange, who would otherwise be considered Industry Directors, to be designated as "Staff Directors" and thereby be excluded from the definition of Industry Director. With the exception of the initial Member Representative Directors, Member Representative Directors are nominated by a Member Nominating Committee composed of registered representatives of Exchange Members, or are voted upon by Exchange Members.⁷ A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member. The process for election of Member Representative Directors is described in greater detail below. A Non-Industry Director is a Director (excluding Staff Directors) who is: (i) A Public Director; (ii) an officer or employee of an issuer of securities listed on the Exchange; or (iii) any other individual who would not be an Industry Director. A Public Director is a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA. With the exception of the initial Directors, Directors other than the Member Representative Directors are nominated by a Nominating Committee appointed by the Board and are then elected by NASDAQ OMX as the sole stockholder.

Section 4.3 of the By-Laws provides that the number of Non-Industry Directors, including at least three Public Directors and at least one Director representative of issuers and investors,⁸ must equal or exceed the sum of the number of Industry Directors and Member Representative Directors. At least 20% of the Directors must be Member Representative Directors. The By-Laws further stipulate that, as is currently the case, one Industry Director must be selected as a representative of a firm or organization that is registered with the Exchange for the purposes of participating in options trading on

Director or 20% or more of the gross revenues received by the Director's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange or any affiliate thereof or to FINRA or has had any such relationship or provided any such services at any time within the prior 3 years.

⁷ Article I defines a Member Representative Director as a Director who has been elected by the stockholders after having been nominated by the Member Nominating Committee or voted upon by Exchange Members pursuant to the By-Laws (or elected by the stockholders without such nomination or voting in the case of the initial Member Representative Directors elected pursuant to Section 4.3(b) of the By-Laws).

⁸ Section 6(b)(3) of the Act, 15 U.S.C. 78f(b)(3), requires that one or more directors shall be representative of issuers and investors and not be associated with a member of the Exchange, broker, or dealer.

BOX.⁹ A Director may not be subject to a statutory disqualification.¹⁰

The process for selecting Member Representative Directors is described in Section 4.4 and Section 4.14. Section 4.14 provides that the Board will appoint a Member Nominating Committee consisting of no fewer than three and no more than six members. All members of the Member Nominating Committee must be a current associated person of a current Exchange Member. The Board will appoint such individuals after appropriate consultation with representatives of Exchange Members. The Member Nominating Committee will then nominate a slate of candidates for Member Representative Director positions to be filled. Although the Member Nominating Committee would have authority to nominate a number of candidates in excess of the number of Board seats up for election, the Member Nominating Committee would likely nominate a number of candidates equal to the number of seats. The candidates nominated by the Member Nominating Committee will be stated on a formal "List of Candidates."

An Exchange Member may nominate an additional candidate for inclusion on the List of Candidates by submitting a timely and duly executed written petition to the Secretary of the Exchange. To be timely, an Exchange Member's notice must be delivered to the Secretary at the principal executive offices of the Exchange not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's "Voting Date"¹¹ (provided, however,

⁹ Section 6(b)(3) of the Act, 15 U.S.C. 78f(b)(3), requires that the rules of the Exchange assure a fair representation of its members in the selection of its directors and administration of its affairs. The Member Representative Directors and the BOX Participant Director satisfy this requirement because they are selected through processes that rely on nominations made by nominating committees composed of representatives of member firms, with an opportunity for nomination of alternate candidates by members. See Section 4.4 of the proposed By-Laws of the Exchange and Section 14 of the BOXR By-Laws.

¹⁰ Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39).

¹¹ The By-Laws define Voting Date as "a date selected by the Board for Exchange Members to vote with respect to Member Representative Directors in the event of a Contested Vote." As described below, the Board will select a Voting Date each year; however, a vote would be conducted on the Voting Date only in the event of a Contested Vote (*i.e.*, if there is more than one candidate for a Board seat).

In order to make the intent of this definition clearer, immediately following the closing of the Merger, the Exchange will propose to the newly constituted Board of the Exchange an amendment to the definition to read as follows: " 'Voting Date' means the date selected by the Board on an annual basis, on which Exchange Members may vote with

that in the event that the Voting Date is more than 30 days before or more than 70 days after such anniversary date, notice by the Exchange Member must be so delivered not earlier than the close of business on the 120th day prior to such Voting Date and not later than the close of business on the later of the 90th day prior to such Voting Date or the 10th day following the day on which public announcement of such Voting Date is first made by the Exchange).¹² The Exchange Member's notice must include: (i) As to the person whom the Exchange Member proposes for election as a Member Representative Director, all information relating to that person that is required to be disclosed in solicitations of proxies for election of Directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Act and the rules thereunder (and such person's written consent to be named in the List of Candidates and to serving as a Director if elected); (ii) a petition in support of the candidate duly executed by the authorized representatives of 10% or more of all Exchange Members; and (iii) the name and address of the Exchange Member making the proposal. The Exchange may require any proposed candidate to furnish such other information as it may reasonably require to determine the eligibility of such person to serve as a Member Representative Director.

After the Member Nominating Committee creates the List of Candidates, the Board will determine a Voting Date and a "Member Voting Record Date."¹³ Promptly after selection of the Voting Date, in a Notice to Exchange Members and in a prominent location on a publicly accessible Web site, the Exchange will announce the Voting Date and the List of Candidates, and describe the procedures for Exchange Members to propose candidates for election at the

respect to Member Representative Directors in the event of a Contested Vote." Following approval by the Board, the Exchange will file the amendment as a proposed rule change for approval by the Commission.

¹² Because the voting procedures contemplated by the By-Laws are new, the alternate time frames would apply in the case of the first annual meeting held under the By-Laws. Therefore, a nomination would be considered timely if delivered not earlier than the close of business on the 120th day prior to the first Voting Date and not later than the close of business on the later of the 90th day prior to the first Voting Date, or the 10th day following the day on which public announcement of such Voting Date is first made.

¹³ The By-Laws define "Member Voting Record Date" as a date selected by the Board for the purpose of determining the Exchange Members entitled to vote for Member Representative Directors on a Voting Date in the event of a Contested Vote.

next annual meeting. If, by the date on which an Exchange Member may no longer submit a timely nomination, there is only one candidate for each Member Representative Director seat, the Member Representative Directors would be elected by the stockholders directly from the List of Candidates nominated by the Member Nominating Committee. If, however, there is more than one candidate for a seat (*i.e.*, if there is a contested vote), a formal notice of the Voting Date and the List of Candidates will be sent by the Exchange at least 10 days but no more than 60 days prior to the Voting Date to the Exchange Members who were Exchange Members on the Member Voting Record Date, by any means, including electronic transmission, as determined by the Board or a committee thereof.

In the event of a Contested Vote, each Exchange Member will have the right to cast one vote for each Member Representative Director position to be filled;¹⁴ provided, however, that any such vote must be cast for a person on the List of Candidates. The votes may not be cumulated. The votes shall be cast by written ballot, electronic transmission or any other means as set forth in a notice to the Exchange Members sent by the Exchange prior to the Voting Date. Only votes received prior to 11:59 p.m. Eastern Time on the Voting Date shall be counted. The persons on the List of Candidates who receive the most votes shall be submitted to the stockholders for election, and the stockholders shall elect that candidate.

Notwithstanding the foregoing, the initial Board immediately following the Merger and the adoption of these By-Laws will be selected by NASDAQ OMX (as the sole stockholder) without use of the nomination or election processes required for subsequent elections. Specifically, the stockholders will hold a special meeting (or sign a consent in lieu thereof) for the purpose of electing the Board, which shall include individuals satisfying the classifications required by Section 4.3(a) of the By-Laws but which shall not have been nominated or voted upon in accordance with Section 4.4. The initial Member

Representative Directors will be officers, directors or employees of Exchange Members. The initial Board will consist of at least three Public Directors, one or two Staff Directors, at least two Member Representative Directors, an Industry Director representing "BOX Participants,"¹⁵ at least one Non-Industry Director representative of issuers and investors, and such additional Industry and Non-Industry Directors as NASDAQ OMX as the sole stockholder shall deem appropriate, consistent with the compositional requirements of the By-Laws. As soon as practicable thereafter, the Exchange shall hold its annual meeting for the purpose of electing Directors in accordance with the normal processes contemplated by the By-Laws.

Section 4.5 of the By-Laws provides that Directors may be removed from office by the stockholders, with the vacancy thus created also filled by the stockholders, but that the stockholders may remove a Member Representative Director only for cause, which shall include, without limitation, the failure of such Director to be free of a statutory disqualification. In addition, a Director is disqualified and his or her term of office terminates immediately upon a determination by the Board, by a majority vote of the remaining Directors: (a) that the Director no longer satisfies the classification for which the Director was elected; and (b) that the Director's continued service as such would violate the compositional requirements of the Board set forth in Section 4.3. Thus, for example, if a Public Director became employed by a broker-dealer and the Board thereby had an inadequate number of Public Directors, the Director would be disqualified and removed. If a Director is disqualified and removed, and the remaining term of office of such Director at the time of termination is not more than 6 months, a replacement for the Director is not required until the next annual meeting.

Section 4.7 of the By-Laws provides that if any Director position other than a Member Representative Director position becomes vacant, the Nominating Committee will nominate, and the Board will appoint by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director) for the directorship to fill the vacancy. Whenever a Member Representative Director position becomes vacant, the Member Nomination Committee will nominate,

and the Board will appoint by majority vote, a person to fill the vacancy, except that if the remaining term of office for the vacant Member Representative Director position is less than 6 months, no replacement is required.

Sections 4.8, 4.9, and 4.10 contain standard provisions for a Delaware corporation governing the quorum and voting requirements of the Board, the appropriateness of reliance by Directors upon the records, officers, and agents of the Exchange, and the rules governing conduct of meetings of the Board. Section 4.9 also recognizes the Exchange's status as a self-regulatory organization by providing that the Board, when evaluating any proposal, shall, to the fullest extent permitted by applicable law, take into account: (i) The potential impact thereof on the integrity, continuity and stability of the Exchange and the other operations of the Exchange, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (ii) whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

Section 4.12 provides that the Board may delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of the Exchange. However, no committee may have the power or authority of the Board in reference to: (i) Approving or adopting, or recommending to the stockholders, any action or matter (other than the election of Directors) expressly required by Delaware law to be submitted to stockholders for approval; or (ii) adopting, amending, or repealing any By-Law of the Exchange. The section also contains standard provisions for a Delaware corporation pertaining to the conduct and populating of Board committees.

Section 4.13 establishes several standing Board committees and delineates their general duties and compositional requirements:

- The Executive Committee may exercise all the powers and authority of the Board in the management of the business and affairs of the Exchange between meetings of the Board (subject to the limits described above). The number of Non-Industry Directors on

¹⁴ In order to limit the influence that a single affiliated group of members might exercise over the Exchange, immediately following the closing of the Merger, the Exchange will propose to the newly constituted Board of the Exchange an amendment to stipulate that no Member, either alone or together with its affiliates, may account for more than 20% of the votes cast for a candidate, and any votes cast by such Member, either alone or together with its affiliates, in excess of such 20% limitation shall be disregarded. Following approval by the Board, the Exchange will file the amendment as a proposed rule change for approval by the Commission.

¹⁵ "BOX Participant" means a firm or organization that is registered with the Exchange for the purposes of participating in options trading in the BOX market.

the Executive Committee must equal or exceed the number of Industry Directors on the Executive Committee. The percentage of Public Directors on the Executive Committee must be at least as great as the percentage of Public Directors on the whole Board, and the percentage of Member Representative Directors on the Executive Committee must be at least as great as the percentage of Member Representative Directors on the whole Board.

- The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of the Exchange, including recommendations for the Exchange's annual operating and capital budgets and proposed changes to the rates and fees charged by the Exchange.

- The Management Compensation Committee shall consider and recommend compensation policies, programs, and practices for employees of the Exchange. A majority of Management Compensation Committee members shall be Non-Industry Directors. The Chief Executive Officer of the Exchange shall be an ex-officio, non-voting member of the Management Compensation Committee.

- The Audit Committee shall consist of four or five Directors, none of whom shall be officers or employees of the Exchange. A majority of the Audit Committee members shall be Non-Industry Directors. The Audit Committee shall include two Public Directors. A Public Director shall serve as Chair of the Committee. The Audit Committee shall: (A) Provide oversight over the Exchange's financial reporting process and the financial information that is provided to the stockholders and others; (B) provide oversight over the systems of internal controls established by management and the Board and the Exchange's legal and compliance process; (C) select, evaluate and, where appropriate, replace the Exchange's independent auditors (or nominate the independent auditors to be proposed for ratification by the stockholders); and (D) direct and oversee all the activities of the Exchange's internal audit function, including but not limited to management's responsiveness to internal audit recommendations. The Audit Committee shall have exclusive authority to: (A) Hire or terminate the head of the Exchange's Internal Audit Department; (B) determine the compensation of the head of the Internal Audit Department; and (C) determine the budget for the Internal Audit Department. The Internal Audit Department and its head shall report directly to the Audit Committee. The Audit Committee may, in its discretion,

direct that the Internal Audit Department also report to senior management of the Exchange on matters the Audit Committee deems appropriate and may request that senior management of the Exchange perform such operational oversight as necessary and proper, consistent with preservation of the independence of the internal audit function. The Internal Audit Department and its head may also be employees of one or more affiliates of the Exchange (*i.e.*, NASDAQ OMX), and may serve in a similar capacity with respect to such affiliate(s).

- The Regulatory Oversight Committee shall: (i) Oversee the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities; (ii) assess the Exchange's regulatory performance; and (iii) assist the Board and other committees of the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions. In furtherance of its functions, the Regulatory Oversight Committee shall: (A) Review the Exchange's regulatory budget and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (B) meet regularly with the Exchange's Chief Regulatory Officer in executive session; and (C) be informed about the compensation and promotion or termination of the Chief Regulatory Officer and the reasons therefore. The Regulatory Oversight Committee shall consist of three members, each of whom shall be a Public Director and an "independent director" as defined in Rule 4200 of the Rules of the Nasdaq Stock Market.

Section 4.14 and Articles VI and VII govern the appointment by the Board of certain standing committees, not composed of Directors, to be appointed to administer various provisions of the rules that the Exchange expects to propose with respect to governance, listing, equity trading, and member discipline:

- The Member Nominating Committee will nominate candidates for each Member Representative Director position on the Board, and will also nominate candidates for appointment by the Board for positions on certain standing committees with positions reserved for Member Representatives. The Member Nominating Committee shall consist of no fewer than three and no more than six members. All members of the Member Nominating Committee shall be a current associated person of a current Exchange Member. The Board will appoint such individuals after appropriate consultation with representatives of Exchange Members.

- The Nominating Committee will nominate candidates for all other vacant or new Director positions on the Board, and candidates for all other vacant or new positions on certain standing committees. In nominating an Industry Director who is representative of BOX Participants, the Nominating Committee shall adopt the recommendation of the Nominating Committee of the Exchange's subsidiary, BOXR, and the stockholders of the Exchange (*i.e.*, NASDAQ OMX) shall elect the candidate.¹⁶ The Nominating Committee shall consist of no fewer than six and no more than nine members. The number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members on the Nominating Committee. If the Nominating Committee consists of six members, at least two shall be Public members. If the Nominating Committee consists of seven or more members, at least three shall be Public members. No officer or employee of the Exchange shall serve as a member of the Nominating Committee in any voting or non-voting capacity. No more than three of the Nominating Committee members and no more than two of the Industry members shall be current Directors. A Nominating Committee member may not simultaneously serve on the Nominating Committee and the Board, unless such

¹⁶ As noted above in footnote 8, the BOX Participant Director, together with the Member Representative Directors, allow the Exchange to fulfill the requirement of Section 6(b)(3) of the Act, 15 U.S.C. 78f(b)(3) that the rules of the Exchange assure a fair representation of its members in the selection of its directors and administration of its affairs. Article II, Section 4 of the Exchange's Constitution currently requires that the Exchange's Board of Governors select and appoint as governor a candidate put forth by the BOXR Nominating Committee for the position on the Board of Governors reserved for a representative of BOX Participants. It is the intent of the Exchange that a person nominated by the BOXR Nominating Committee for this position will, consistent with the current requirement in the Exchange's Constitution, continue to be automatically nominated and elected through the Exchange's Board selection process, unless such nominee is not eligible for service under Section 4.3 of the By-Laws (*i.e.*, because the nominee is subject to a statutory disqualification). The Exchange believes that this intent is reflected in the text of the Restated Certificate and By-Laws as approved by the Exchange's members, but could be reflected with greater clarity through further limited amendments to the text of the By-Laws. Accordingly, immediately following the closing of the Merger, the Exchange will propose to the newly constituted Board of the Exchange an amendment to the By-Laws to make it clear that the person nominated by the BOXR Nominating Committee shall also be nominated by the Exchange Nominating Committee and elected by the stockholders, unless such nominee is not eligible for service under Section 4.3; and the Exchange shall file the amendment as a proposed rule change for approval by the Commission.

member is in his or her final year of service on the Board, and following that year, that member may not stand for election to the Board until such time as he or she is no longer a member of the Nominating Committee.

- The composition and duties of the Exchange Listing and Hearings Review Council are described in Articles VI. Under the rules to be proposed with respect to listings on the Exchange, the Exchange Listing and Hearing Review Council will review appeals from decisions to deny issuers listings on the Exchange, and will also consider and make recommendations to the Board on policy and rule changes relating to issuer listings. The Exchange Listing and Hearing Review Council will consist of no fewer than eight and no more than eighteen members, of which not more than 50% may be engaged in market-making activity or employed by an Exchange Member whose revenues from market-making activity exceed 10% of its total revenues. The Exchange Listing and Hearing Review Council will include at least five Non-Industry members (including at least two Public members), and a number of Member Representative members that is equal to at least 20% of the total number of members of the Exchange Listing and Hearing Review Council. A quorum of the Exchange Listing and Hearing Review Council will consist of a majority of its members, including one Non-Industry member and one Member Representative member.

- The composition and duties of the Exchange Review Council are described in Article VII. Under the disciplinary and membership rules to be proposed for the Exchange, the Exchange Review Council may be authorized to act with respect to an appeal or review of a disciplinary proceeding, a statutory disqualification proceeding, or a membership proceeding; a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; the exercise of exemptive authority; and such other proceedings or actions as may be authorized by the Exchange Rules.¹⁷ The Exchange Review Council also may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and associated persons and enforcement policies, including policies with respect to fines and other

sanctions. The Exchange Review Council shall consist of no fewer than eight and no more than twelve members. The Exchange Review Council shall include a number of Member Representative members that is equal to at least 20% of the total number of members of the Exchange Review Council. The number of Non-Industry members, including at least three Public members, shall equal or exceed the sum of the number of Industry members and Member Representative members. A quorum of the Exchange Review Council will consist of a majority of its members, including not less than 50% of its Non-Industry members and one Member Representative member.

- The Quality of Markets Committee will: (A) Provide advice and guidance to the Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the Exchange from the perspective of investors, both individual and institutional, retail firms, market making firms, companies listed on the Exchange, and other market participants; and (B) advise the Board with respect to national market system plans and linkages between the facilities of the Exchange and other markets. The Quality of Markets Committee shall include broad representation of participants in the Exchange, including investors, market makers, integrated retail firms, and order entry firms. The Quality of Markets Committee shall include a number of Member Representatives that is equal to at least 20% of the total number of members of the Quality of Markets Committee. The number of Non-Industry members of the Quality of Markets Committee shall equal or exceed the sum of the number of Industry members and Member Representative members. A quorum of the Quality of Markets Committee will consist of a majority of its members, and at least 50% of its Non-Industry members must either be present or must waive attendance after receiving an agenda of the meeting.

- The Market Operations Review Committee will administer certain rules planned for the Exchange, notably appeals from decisions to cancel or modify clearly erroneous trades on the Exchange. The Market Operation Review Committee must include a number of Member Representatives that is equal to at least 20% of the total number of members of the Market Operations Review Committee. No more than 50% of the members of the Market Operations Review Committee shall be engaged in market making activity or employed by an Exchange Member firm

whose revenues from market making activity exceed 10% of its total revenues.

- The Arbitration and Mediation Committee will: (i) Advise the Board on the development and maintenance of an equitable and efficient system of dispute resolution that will equally serve the needs of public investors and Exchange Members; (ii) shall monitor rules and procedures governing the conduct of dispute resolution; and (iii) shall have such other powers and authority as are necessary to effectuate the purposes of the Exchange Rules. The Arbitration and Mediation Committee must consist of no fewer than three and no more than ten members, and shall have at least 50% Non-Industry members. As is the case with the Nasdaq Exchange, the Arbitration Committee may be populated with members of FINRA's Arbitration and Mediation Committee, assuming the Exchange receives regulatory services from FINRA.¹⁸ A quorum of the Arbitration and Mediation Committee will consist of a majority of its members, and at least 50% of its Non-Industry members must either be present or must waive attendance after receiving an agenda of the meeting.

- The Market Regulation Committee will: (i) Advise the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices; (ii) advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Exchange Member's conduct and trading activities in the Exchange; (iii) provide a pool of attorney panelists for hearing panels under the Exchange Rules; (iv) participate in the training of hearing panelists on issues relating to quotations, executions, trade reporting, and trading practices; and (v) review and recommend to the Exchange Review Council changes to the Exchange's guidelines for sanctions to be imposed on members for violations of Exchange Rules. The Market Regulation Committee shall not have any involvement in deciding whether or not to institute disciplinary proceedings. The Market Regulation Committee shall have at least 50% Non-Industry members. As is the case with the Nasdaq Exchange, the Market Regulation Committee may be

¹⁷ As provided in the current rules relating to BOX, certain disciplinary matters pertaining to BOX Participants may be subject to review by the BOXR Board of Directors and the Exchange Board. The Exchange Review Council is not expected to have a role in BOX matters.

¹⁸ "The Board shall appoint an Arbitration and Mediation Committee, or shall cause the Corporation to enter into an agreement with a self-regulatory organization that provides regulatory services pursuant to which such self-regulatory organization shall appoint an Arbitration and Mediation Committee on the Corporation's behalf." Section 4.14(e) of the Restated Certificate.

populated with members of FINRA's Market Regulation Committee, assuming the Exchange receives regulatory services from FINRA.¹⁹ A quorum of the Market Regulation Committee will consist of a majority of its members, and at least 50% of its Non-Industry members must either be present or must waive attendance after receiving an agenda of the meeting.

Sections 4.15, 4.16, and 4.17 contain standard provisions for a Delaware corporation requiring: (i) Recusal by Directors and committee members subject to conflicts of interest; (ii) providing for the enforceability of contracts in which a Director has an interest if appropriately approved or ratified by disinterested Directors or by stockholders, or if fair to the Exchange; (iii) allowing for compensation of Board members; and (iv) allowing for Board action by unanimous written consent.

Article V governs the appointment by the Board of the Exchange's officers, agents, and employees, and specifically provides for the appointment of a Chair of the Board,²⁰ a Chief Executive Officer, a President, Vice Presidents, a Chief Regulatory Officer, a Secretary, an Assistant Secretary, a Treasurer, and an Assistant Treasurer.

The Chief Regulatory Officer shall have general supervision of the regulatory operations of the Exchange, including responsibility for overseeing the Exchange's surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party. The Chief Regulatory Officer shall meet with the Regulatory Oversight Committee of the Exchange in executive session at regularly scheduled meetings of such committee, and at any time upon request of the Chief Regulatory Officer or any member of the Regulatory Oversight Committee. The Chief Regulatory Officer may also serve as the General Counsel of the Exchange.

Article VIII provides for indemnification by the Exchange of Directors, officers, employees and agents in a manner consistent with that

¹⁹ The Board shall appoint a Market Regulation Committee, or shall cause the Corporation to enter into an agreement with a self-regulatory organization that provides regulatory services pursuant to which such self-regulatory organization shall appoint a Market Regulation Committee on the Corporation's behalf.

²⁰ The designation by the By-Laws of the Chair of the Board as an officer of the Corporation within the meaning of the By-Laws reflects standard corporate practice for a Delaware corporation and would not cause an independent Director chosen who is selected as the Chair to cease to be an independent Director.

of most Delaware stock corporations, and allows for the purchase of director and officer liability insurance. Article IX contains standard corporate provisions relating to the Exchange's capital stock, including provisions relating to stock certificates, the Exchange's stock ledger, and transfers of stock. However, like the Restated Certificate, the By-Laws also contain a stipulation that all shares of Common Stock are held by NASDAQ OMX, which may not transfer or assign any shares of stock of the Exchange, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder. The Article also contains a stipulation that dividends may not be paid to the stockholders (*i.e.*, to NASDAQ OMX) using "Regulatory Funds," which are defined as fees, fines, or penalties derived from the regulatory operations of the Exchange. The definition further provides, however, that the term shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange.

Article X contains miscellaneous standard corporate provisions relating to the corporate seal, the fiscal year of the Exchange, waiver of notice of meetings, and the Exchange's contracting authority. Article XI authorizes amendments to the By-Laws by either the stockholders or the vote of a majority of the whole Board,²¹ as well as the adoption of emergency by-laws by the Board. Article XII contains specific authorization for the Board to adopt rules needed to effect the Exchange's obligations as a self-regulatory organization, to establish disciplinary procedures and impose sanctions on members, to establish standards for membership, and to impose dues, fees, assessments, and other charges. Finally, Section 12.5 authorizes the Board, or such person or persons as may be designated by the Board, in the event of an emergency or extraordinary market conditions, to take any action regarding: (a) The trading in or operation of the Exchange or any other organized securities markets that may be operated by the Exchange, the operation of any automated system owned or operated by the Exchange, and the participation in

²¹ All such changes must be filed with the Commission under Section 19(b) of the Act, 15 U.S.C. 78s(b), and become effective thereunder before being implemented.

any such system or any or all persons or the trading therein of any or all securities; and (b) the operation of any or all offices or systems of Exchange Members, if, in the opinion of the Board or the person or persons hereby designated, such action is necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace or the system.

BOXR LLC Agreement

Upon the creation of BOXR, the Exchange filed a Certificate of Formation with the State of Delaware.²² The purpose of the creation of BOXR was specifically for supporting the operation, regulation, and surveillance of the BOX facility. In connection with that, the Exchange drafted and filed with the Commission the BOXR By-Laws, which filing was approved on January 13, 2004,²³ and incorporated into the BOX Rules. However, no written LLC operating agreement was created for the entity. Accordingly, since the time of formation, BOXR has operated under an unwritten operating agreement, with its written By-Laws standing in place for, and reflecting, the intention of the agreement of BOXR. The Exchange therefore proposes to adopt the BOXR LLC Agreement, which includes all standard provisions typically found in a State of Delaware Limited Liability Company operating agreement. These provisions include a statement, found in Section 22 of the agreement, that the BOXR LLC Agreement may not be deemed to provide rights to any persons other than those named specifically in the agreement. The provision stipulates, however, that such rights include the rights of BOX Participants in the selection of directors of BOXR in the manner currently provided by the BOXR By-Laws. In addition, Section 20 of the BOXR LLC Agreement will provide that a transfer or assignment of the Exchange's limited liability company interests in BOXR must be filed with and approved by the Commission under Section 19 of the Act. The BOXR LLC Agreement also expands the recognized officers of BOXR to include its Chief Legal Officer and includes Schedules that list the directors and officers of BOXR as of April 15, 2008.

BOXR By-Laws

The BOXR By-Laws are being amended for consistency with other

²² The Certificate of Formation was filed on March 25, 2002.

²³ See Securities Exchange Act Release No. 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR-BSE-2003-04).

changes being made in the governance of the Exchange. Specifically, the proposed changes: (i) Replace references to the Constitution of the Exchange with references to the By-Laws and references to the Board of Governors with references to the Board of Directors; (ii) add appropriate references to the BOXR LLC Agreement; (iii) amend the definition of "Public Director" to exclude persons having a material business relationship with affiliates of the Exchange, BOX, or BOXR; and (iv) make several clarifying and corrective edits. In addition, Section 14 is being amended to state that the BOX Participant nominee selected by BOX Participants for service on the Exchange Board is recommended for service on such Board, but is not directly elected, to reflect the fact that BOX Participants are not stockholders of the Exchange. Section 14 is also amended to provide that a disciplinary decision of a BOXR Hearing Committee or panel with respect to any BOX Participant that is an affiliate of NASDAQ OMX within the meaning of proposed Chapter XXXIX, Section 2 of the rules of the Exchange (as described below) may not be appealed to or reviewed by the BOXR Board of Directors or the Exchange Board of Directors, but rather shall constitute final disciplinary action of the Exchange for purposes of Commission Rule 19d-1(c)(1) and may be appealed to the Commission. Together with the new rules described below, the limitation is intended to guard against any possibility that the Exchange may exercise, or forebear to exercise, regulatory authority with respect to an affiliated member in a manner that is influenced by commercial considerations.²⁴ Finally, the Exchange is proposing to replace the indemnification provisions of Section 24 with a cross-reference to updated indemnification provisions being adopted in the BOXR LLC Agreement.

Change of Control of BSX

BSX was formed in 2004 as a joint venture between the Exchange and several investors to operate an electronic trading facility ("Boston Equities Exchange" or "BeX") for trading cash equities. BeX ended its operations in September 2007. In connection with the Merger, NASDAQ OMX is purchasing all of the outstanding limited liability company interests in BSX held by investors other

than the Exchange. By virtue of this purchase, NASDAQ OMX will directly own 46.79% of these interests, and will indirectly, through the Exchange, own the remainder of the outstanding interests in BSX. Section 8.1 of the BSX Operating Agreement provides that the Exchange must obtain Commission approval for certain transfers of ownership interests in BSX.

Accordingly, the Exchange, through this filing, seeks Commission approval for the transfer of ownership interests to NASDAQ OMX contemplated by the Merger. Following such transfer, the Exchange and NASDAQ OMX will be the sole members of BSX, and the admission of additional or substitute members would require approval by the Commission pursuant to a filing under Section 19 of the Act. In addition, the Exchange is also proposing amendments to the BSX Operating Agreement to reflect its status as a wholly owned subsidiary of NASDAQ OMX, and to remove references to BeX. Notably, the Exchange is proposing to make the following amendments:

- Section 4.1 is amended to provide that a five-member Board of Directors will be selected by BSE.
- Section 4.4 is amended to replace a provision requiring a super-majority of director votes in favor of BSX taking certain significant actions, such as entry into a new line of business or replacing BSE as BSX's regulatory service provider, with more general authority of BSE to veto or mandate actions as dictated by regulatory requirements.
- Article VII and Sections 8.2 and 8.3 are amended to remove provisions that allow members to exercise rights of first refusal in the event that one member proposes to transfer its ownership interests in BSX to another member or BSX proposes to issue additional units of ownership.
- Section 8.4(f) (redesignated as 8.2(f)) is amended to clarify terms used to describe certain ownership interests in a Member of BSX.
- Various amendments are being made to delete references to BeX.
- Sections 8.5 and 8.6 (redesignated as Sections 8.3 and 8.4), which restricted ownership and voting of ownership interests in BSX above the 20% level by a BeX participant or its affiliates, are being retained but amended. The amendments replace "BeX Participant" with "BSE member" to apply more broadly to any person that is a member of the Exchange. However, the amendments also provide that the restrictions of these provisions shall not be construed to limit the ownership of membership interests by NASDAQ OMX or BSE. This proviso is

necessary because, as discussed in greater detail below, the Nasdaq Exchange owns two broker-dealers, the ownership of which has been previously approved by the Commission. These broker-dealers are, and will continue to be, members of the Exchange.

- Article 9, which governs distributions to Members, is being amended to adopt a restriction on distributions of Regulatory Funds comparable to the restriction proposed for inclusion in the Exchange's By-Laws.

- Article 13, which governs disputes among members via arbitration, is being deleted to reflect the BSX's wholly owned status.

- Section 16.2, which governs the confidentiality obligations of Members, is being amended: (i) To clarify that Members may use confidential information pursuant to the Act and the rules and regulations thereunder; (ii) to stipulate that directors, officers, and employees receiving confidential information must themselves be under confidentiality obligations; and (iii) to require Members to conduct their business activities so as to limit the applicability of legal disclosure obligations that may supersede the confidentiality requirements of the BSX Operating Agreement.

- New Section 16.7 is being added to provide that to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange or the Exchange's equity business (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of BSX shall: (a) Not be made available to any person (other than as provided in the proviso of this sentence) other than to those officers, directors, employees and agents of BSX who have a reasonable need to know the contents thereof; (b) be retained in confidence by BSX and its officers, directors, employees and agents; 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, directors, employees or agents of BSX to disclose such confidential information to the Commission or the Exchange.

- Amending Section 18.6 to clarify that the jurisdiction of the U.S. federal courts, the Commission, and the

²⁴ Prior to resuming trading of equities securities, the Exchange will propose new rules that will include a comparable restriction on review of disciplinary decisions affecting an affiliated member trading equities through the Exchange.

Exchange over BSX, its Members, and the officers, directors, agents, and employees of the Company and its Members is exclusive (subject, however, to Delaware jurisdiction over matters relating to the organization or internal affairs of BSX), adding conforming references with respect to the provision's waiver of claims as to lack of personal jurisdiction, and providing for the waiver of any foreign secrecy or blocking statutes or regulations to the fullest extent permitted by law.

Prior to resuming trading of cash equities, the Exchange will file amended rules with the Commission that would replace the current BeX rules, as well as certain other rules of the Exchange. At this time, the Exchange expects to operate its cash equities market through the BSX entity. However, the Exchange will not resume cash equities trading until the new rule set is approved. If necessary to accurately reflect BSX's operations and to impose any additional regulatory safeguards deemed necessary by the Exchange or the Commission, the new rule set will include further amendments to the BSX Operating Agreement. In addition, the Exchange will provide the Commission with the opportunity to review, and if necessary, approve, any agreements between BSX and the Exchange or any third party to support BSX's operations of a facility of the Exchange, such as an amended BSE Facility Services Agreement. References to superseded agreements that formerly supported BeX, such as agreements with Lava Trading, Inc., and Atos Euronext S.A., are being deleted from the BSX Operating Agreement, as are other provisions that were applicable to BSX's initial formation and operation.

New Rules

The Exchange proposes to adopt two new rules that will reflect its status as a wholly owned subsidiary of NASDAQ OMX upon the effectiveness of the Merger. The purpose of the rules is to guard against any possibility that the Exchange may exercise, or forebear to exercise, regulatory authority with respect to an affiliated member in a manner that is influenced by commercial considerations, to provide an opportunity for Commission review of certain proposed affiliations, and to ensure that certain affiliated members do not receive advantaged access to information in comparison with unaffiliated members. The Exchange believes that the proposed rules will provide added assurance of regulatory integrity without subjecting the Exchange and its affiliates to unwarranted restrictions on their commercial activities.

First, Chapter XXXIX, Section 1 will limit ownership of NASDAQ OMX's voting securities by members of the Exchange and their associated persons (*i.e.*, their registered representatives). The rule is comparable to Rule 2130 of the Nasdaq Exchange, and provides that no member or associated person of a member shall be the beneficial owner of greater than 20% of the then-outstanding voting securities of NASDAQ OMX. "Beneficial ownership" is defined with reference to NASDAQ OMX's Certificate of Incorporation, which in turn provides that a person shall be deemed the "beneficial owner" of, shall be deemed to have "beneficial ownership" of, and shall be deemed to "beneficially own" any securities: (i) Which such person or any of such person's affiliates is deemed to beneficially own, directly or indirectly, within the meaning of Rule 13d-3 under the Act * * *;²⁵ (ii) subject to certain narrow exceptions described in the certificate of incorporation, which such person or any of such person's affiliates has the right to acquire or to vote pursuant to any agreement, arrangement, or understanding; or (iii) subject to certain narrow exceptions described in the certificate of incorporation, which are beneficially owned, directly or indirectly, by any other person and with respect to which such person or any of such person's affiliates has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of such securities.

Second, Chapter XXXIX, Section 2 regulates affiliation between the Exchange and its affiliates, on the one hand, and Exchange members, on the other hand, in a manner comparable to Rule 2140 of the Nasdaq Exchange. In general, the proposed rule provides that the Exchange must file a proposed rule change with the Commission before the Exchange or an entity with which it is affiliated acquires or maintains an ownership interest in, or engages in a business venture with, an Exchange member or an affiliate of an Exchange member.²⁶ The rule defines "affiliate" with reference to Rule 12b-2 under the Act,²⁷ which provides that if one person controls, is controlled by, or is under

²⁵ Rule 13d-3 under the Act, 17 CFR 240.13d-3, in turn provides that a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares voting power or investment power.

²⁶ As used in the rule, the term "affiliate" includes natural persons, but the term "entity," when used to describe an affiliate, excludes natural persons.

²⁷ 17 CFR 240.12b-2.

common control another person, the persons are affiliates.

The proposed rule would make it clear that in a case where the Exchange or an affiliate of the Exchange proposes an acquisition of, or a merger or business venture with an Exchange member, a Commission filing will be required. In order to make it clear that the obligation to avoid affiliations that have not been filed is imposed by the rule both on the Exchange and its members, moreover, the rule provides that an Exchange member shall not be or become an affiliate of the Exchange, or an affiliate of any entity affiliated with the Exchange, without a Commission filing.

The term "business venture," as used in the rule, is defined as an arrangement under which the Exchange or an entity with which it is affiliated, on the one hand, and an Exchange member or affiliate thereof, on the other hand, engage in joint activities with an expectation of shared profit and a risk of shared loss from common entrepreneurial efforts. Thus, the term does not include, and the proposed rule does not regulate, contracts with members or their affiliates to provide goods, products, or services for consideration, including, but not limited to, asset or stock purchase agreements that do not result in ongoing ties with a member or its affiliates,²⁸ credit or debt facilities, licenses of intellectual property, contracts for investment banking, financial advisory, or consulting services,²⁹ or the provision of transaction services or data to a broker-dealer member or products or services to a listed company that is or that owns a member broker-dealer.

The rule limits possible expansive interpretations of the term "affiliate" by stipulating that one entity is not deemed to be an affiliate of another entity solely by virtue of having a common director. For example, if one of the member representative directors of the Exchange is also a director of an Exchange member, that member would not be deemed to be an affiliate of the

²⁸ For example, in the case of an acquisition of a non-member subsidiary of a member in a transaction that did not result in an ongoing affiliation with the member, the transaction would not be regulated by the rule.

²⁹ In some cases, such contracts may involve sharing of confidential information with a member in circumstances where a member acts as a fiduciary for BSE or one of its affiliates. The member would be required to take measures to prevent such information from being misused, and a failure to do so would constitute a violation of BSE rules, including, depending on the circumstances, Chapter II, Sections 14, 25, and 36, and Chapter XXXVII, Section 11. Amended rules to be proposed by BSE to govern equity trading in the future will maintain comparable prohibitions.

Exchange solely because of the common director. In addition, the rule should not be construed to regulate in any manner the selection of directors or standing committee members of the Exchange, NASDAQ OMX, the Nasdaq Exchange, or their affiliates, provided such selections are conducted in accordance with applicable provisions of governing corporate documents.

In circumstances where a Commission filing is required, the rule may, in appropriate cases, permit a filing to be submitted on an immediately effective basis under Section 19(b)(3)(A) of the Act³⁰ and Rule 19b-4(f) thereunder.³¹ For example, in cases where a proposed affiliation or business venture would not result in the establishment of a "facility" of the Exchange within the meaning of Section 3 of the Act,³² a filing to establish rules to govern the operation of the affiliate or business venture would not be required or appropriate. Rather, in such circumstances, the Exchange would expect to engage in informal consultation with the Division of Trading and Markets and/or members of the Commission, and would then submit a filing to amend the rule itself, to establish that the affiliation or business venture could exist as an exception to the rule. Depending on the circumstances, such a filing might be submitted on an immediately effective basis.

There are also several important exceptions to the general filing requirement of the rule. First, the rule would not require a filing for transactions that result in an Exchange member acquiring or holding an interest in NASDAQ OMX that is consistent with Chapter XXXIX, Section 1 (discussed above). Second, no filing is required for the Exchange or an entity affiliated with the Exchange acquiring or maintaining an ownership interest in, or engaging in a business venture with, an affiliate of an Exchange member if there are information barriers between the member and the Exchange and its facilities, such that the member: (i) Will not be provided an informational advantage concerning the operation of the Exchange and its facilities, and will not be provided changes or improvements to the trading system that are not available to the industry generally or other Exchange members; (ii) will not have knowledge in advance of other members of proposed changes, modifications, or improvements to the operations or trading systems of the

Exchange and its facilities, including advance knowledge of Exchange filings pursuant to Section 19(b) of the Act; (iii) will be notified of any proposed changes, modifications, or improvements to the operations or trading systems of the Exchange and its facilities in the same manner as other Exchange members are notified; and (iv) will not share employees, office space, or databases with the Exchange or its facilities, NASDAQ OMX, or any entity that is controlled by NASDAQ OMX.³³ The Exchange's Regulatory Oversight Committee must certify, on an annual basis, to the Director of the Division of Trading and Markets, that the Exchange has taken all reasonable steps to implement the foregoing requirements with respect to any affiliate to which they apply and is in compliance therewith.

This exception is aimed at circumstances in which the Exchange or an affiliated entity acquires, or enters into a business venture with, an affiliate of an Exchange member, and the Exchange erects information barriers between the member and the Exchange and its facilities. Thus, the Exchange ensures that the member does not receive any advantage as a result of its affiliation.

In connection with the adoption of this rule, it is also necessary for the Exchange to seek Commission approval under the rule for the affiliation that will result by virtue of the Merger between the Exchange and the two broker-dealer subsidiaries of the Nasdaq Exchange: Nasdaq Execution Services, LLC ("NES") and NASDAQ Options Services, LLC ("NOS"). The acquisition of the entities that are now NES and NOS by The Nasdaq Stock Market, Inc. (now NASDAQ OMX) was approved by the Commission in 2004 and 2005.³⁴ The rules under which NES currently routes orders to other market centers were approved by the Commission in

³³ BSE will not construe these limitations to bar an employee of an affiliated member from serving on a BSE advisory committee, since: (i) Such committee members will be required to sign confidentiality agreements with regard to information received through committee service, and (ii) the committee member employed by the affiliate would receive information provided through committee service at the same time as other committee members.

³⁴ See Order Granting Application for a Temporary Conditional Exemption Pursuant To Section 36(a) of the Exchange Act by the National Association of Securities Dealers, Inc. Relating to the Acquisition of an ECN by The Nasdaq Stock Market, Inc., Securities Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004); Order Approving a Proposed Rule Change To Establish Rules Governing the Operation of the INET System, Securities Exchange Act Release No. 52902 (December 7, 2005), 70 FR 73810 (December 13, 2005) (SR-NASD-2005-128).

2006 and subsequently amended on several occasions.³⁵ Notably, Nasdaq Exchange Rule 4758(b) establishes the parameters for operation of NES as follows: (1) All routing of equities by the Nasdaq Exchange is performed by NES, which, in turn, routes orders to other market centers as directed by the Nasdaq Exchange; (2) NES will not engage in any business other than: (a) As an outbound router for the Nasdaq Exchange and (b) any other activities it may engage in as approved by the Commission; (3) NES will operate as a facility, as defined in Section 3(a)(2) of the Act, of the Nasdaq Exchange; (4) for purposes of Commission Rule 17d-1, the designated examining authority of NES will be a self-regulatory organization unaffiliated with the Nasdaq Exchange or any of its affiliates; (5) the Nasdaq Exchange shall be responsible for filing with the Commission rule changes related to the operation of, and fees for services provided by, NES, and NES shall be subject to exchange non-discrimination requirements; (6) the books, records, premises, officers, agents, directors and employees of NES, as a facility of the Nasdaq Exchange, shall be deemed to be the books, records, premises, officers, agents, directors and employees of the Nasdaq Exchange for purposes of, and subject to oversight pursuant to, the Act, and the books and records of NES, as a facility of the Nasdaq Exchange, shall be subject at all times to inspection and copying by the Commission; and (7) use of NES is optional.

Currently, routing by NES on behalf of the Nasdaq Exchange takes two forms: (i) Orders that access any liquidity on the Nasdaq Exchange book that has a price equal to or superior to the prices available on other "automated market centers" and thereafter route to seek the best available price, and (ii) routing of "directed orders" to automated market centers other than the Nasdaq Exchange on an "immediate-or-cancel" basis. Such directed orders may be designated as "intermarket sweep orders," which may be executed by the receiving venue based on the representation of the market participant that it has routed to

³⁵ See Securities Exchange Act Release No. 56867 (November 29, 2007), 72 FR 69263 (December 7, 2007) (SR-NASDAQ-2007-065); Securities Exchange Act Release No. 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078); Securities Exchange Act Release No. 55335 (February 23, 2007), 72 FR 9369 (March 1, 2007) (SR-NASDAQ-2007-005); Securities Exchange Act Release No. 54613 (October 17, 2006), 71 FR 62325 (October 24, 2006) (SR-NASDAQ-2006-043); Securities Exchange Act Release No. 54271 (August 3, 2006), 71 FR 45876 (August 10, 2006) (SR-NASDAQ-2006-027); and Securities Exchange Act Release No. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001).

³⁰ 15 U.S.C. 78s(b)(3)(A).

³¹ 17 CFR 240.19b-4(f).

³² 15 U.S.C. 78c.

all superior protected quotations, or not so designated, in which case the orders will execute only if their execution would not result in a trade-through.

NOS serves as the outbound router for the Nasdaq Options Market ("NOM"), which commenced operations on March 31, 2008. Under NOM Rule Chapter VI, Section 11: (1) NOM will route orders in options via NOS, which serves as the sole "Routing Facility" of NOM; (2) the sole function of the Routing Facility will be to route orders in options listed and open for trading on NOM to away markets pursuant to NOM rules, solely on behalf of NOM; (3) NOS is a member of an unaffiliated self-regulatory organization which is the designated examining authority for the broker-dealer; (4) the Routing Facility is subject to regulation as a facility of the Nasdaq Exchange, including the requirement to file proposed rule changes under Section 19 of the Act; (5) NOM shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Nasdaq Exchange and its facilities (including the Routing Facility), and any other entity; and (6) the books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of the Nasdaq Exchange, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Nasdaq Exchange for purposes of and subject to oversight pursuant to the Act, and the books and records of the Routing Facility, as a facility of the Exchange, shall be subject at all times to inspection and copying by the Nasdaq Exchange and the Commission.³⁶

Unlike NES, NOS does not have a "directed order" for options that are trading on NOM; rather, all routable orders for options that are trading on NOM check the NOM book prior to routing. However, NOS also routes orders in options that are not trading on NOM. When routing orders in options that are not listed and open for trading on NOM, NOS will not be regulated as a facility of the Nasdaq Exchange but rather as a broker-dealer regulated by its designated examining authority. However, as provided by Chapter IV, Section 5 of the NOM Rules, all orders routed by NOS under these circumstances will be routed to away markets that are at the best price, and solely on an immediate-or-cancel basis.

³⁶ See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and -080) ("NOM Approval Order").

Although not explicitly stated in Chapter VI, Section 11, NOS, like NES, will be subject to exchange non-discrimination requirements, and the use of NOS will be optional.³⁷ In addition, NOS will not engage in any business other than the activities approved by the Commission in the NOM Approval Order and such other activities as may be approved by the Commission at a later date.

In order to further restrict the interaction between the Exchange and NES and NOS, the Nasdaq Exchange has agreed that it will, prior to the closing of the Merger, amend its rules to change the routing practices of NES and NOS. With respect to NES, directed orders will not be eligible for routing to Exchange facilities (including a planned Exchange facility for trading equities). With respect to NOS, when routing orders in options that are not listed and open for trading on NOM, NOS will not route to Exchange facilities (including BOX). Routing of orders that check the Nasdaq Exchange and NOM books prior to routing to the Exchange will continue.

The Exchange notes that at a later date, an equity trading system operated by the Exchange may opt to use NES to route on behalf of the Exchange. Similarly, if the Exchange operates an options trading system other than BOX following a future termination of relations between the Exchange and BOX, the Exchange may opt to use NOS to perform routing.³⁸ Such future uses of NES or NOS would be reflected in filings to establish the terms and conditions of such routing, but would not allow for routing of directed orders to the Nasdaq Exchange, NOM, or any other affiliated exchange or trading facility thereof.

In light of the foregoing facts and circumstances, and in accordance with proposed Exchange Rule Chapter XXXIX, Section 2(a)(2), the Exchange proposes that NES and NOS be permitted to become affiliates of the Exchange subject to the following:

- *With respect to NES:* NES remains a facility of the Nasdaq Exchange; use of NES's routing function by Nasdaq Exchange members continues to be optional; and NES does not provide routing of directed orders to the Exchange or any trading facilities thereof, unless such orders first attempt

³⁷ Consistent with this restriction, Chapter VI, Section 11 currently states that NOM participants can designate orders as either available for routing or not available for routing.

³⁸ In this regard, it should be noted that both the New York Stock Exchange LLC and NYSE Arca, Inc. ("NYSE Arca") use NYSE Arca's broker-dealer subsidiary to perform routing.

to access any liquidity on the Nasdaq Exchange book.

- *With respect to NOS:* NOS remains a facility of the Nasdaq Exchange; use of NOS's Routing Facility function by Nasdaq Exchange members continues to be optional; and NOS does not provide routing of orders in options that are not listed and open for trading on NOM to the Exchange or any trading facilities thereof.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,³⁹ in general, and with Sections 6(b)(1), (b)(3) and (b)(5) of the Act,⁴⁰ 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; is designed to assure a fair representation of Exchange Members in the selection of Directors; 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.

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 within such longer period (i) as the Commission may designate up to

³⁹ 15 U.S.C. 78f.

⁴⁰ 15 U.S.C. 78f(b)(1), (3) and (5).

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 such 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-2008-23 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-BSE-2008-23. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2008-23 and should be submitted on or before May 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57762; File No. SR-BSE-2008-25]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change Relating to Proposal to Transfer Boston Stock Exchange, Inc.'s Ownership Interest in Boston Options Exchange Group, LLC

May 1, 2008.

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 April 23, 2008, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the BSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to transfer its 21.87% ownership interest in the Boston Options Exchange Group, LLC ("BOX"), the operator of its Boston Options Exchange facility ("BOX Market")³ to MX US 2, Inc. ("MX US"), a wholly-owned U.S. subsidiary of the Montréal Exchange Inc. ("MX"), such that, following the transfer, the Exchange's aggregate Percentage Interest will be 0% and MX US's Percentage Interest will increase to 53.24%.⁴ The Exchange will remain the Regulatory

⁴¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78c(a)(2).

⁴ MX US currently has a 31.37% ownership interest in BOX. The BSE notes that in SR-BSE-2008-06, MX US's ownership interest in BOX was rounded up to 31.4%. See Securities Exchange Act Release No. 57260 (February 1, 2008), 73 FR 7617 (February 8, 2008) (SR-BSE-2008-06).

Authority⁵ for the BOX Market and is submitting the proposed rule change to the Commission to approve the transfer of interests to MX US and to amend the Fifth Amended and Restated Operating Agreement (the "5th BOX LLC Agreement") of BOX accordingly (such agreement, as amended, the "6th BOX LLC Agreement").⁶ The Exchange is requesting confidential treatment of the sections of the 6th BOX LLC Agreement, which contain confidential business information and do not relate to the control and governance of BOX.

The text of the proposed rule change is available at the BSE, the Commission's Public Reference Room, and <http://www.bostonstock.com>. The text of Exhibits 3A and 3B of the proposed rule change are also available on the Exchange's Web site and on the Commission's Web site (<http://www.sec.gov/rules/sro/bse.shtml>).

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 BSE 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 BSE 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 13, 2004, the Commission approved four BSE proposals that together established the BOX Market as a facility of the Exchange.⁷ This

⁵ The "Regulatory Authority" is defined as the BSE as the non-equity, non-Member authority of BOX and, together with and pursuant to delegated authority from BSE, the Boston Options Exchange Regulation LLC ("BOXR"), as approved by the SEC. See Section 1.1, 6th BOX LLC Agreement.

⁶ Capitalized terms not otherwise defined herein shall have the meanings set forth in the 6th BOX LLC Agreement.

⁷ See Securities Exchange Act Release Nos. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (SR-BSE-2003-17) (establishing a fee schedule for the proposed BOX Market); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR-BSE-2003-04) (creating BOXR to which the BSE would delegate its self-regulatory functions with respect to the BOX Market); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15) (approving trading rules for the BOX Market); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR-BSE-2003-19) (approving certain regulatory provisions of the operating agreement of BOX).