SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71045; File No. SR–EDGX–2013–43]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC

December 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2013, EDGX Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On December 9, 2013, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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

The Exchange filed a proposed rule change (the ''Proposed Rule Change'') in connection with the proposed business combination (the ''Combination''), as described in more detail below, involving its indirect parent company, Direct Edge Holdings LLC (''DE Holdings''), and BATS Global Markets, Inc., the parent company of BATS Exchange, Inc. (''BATS'') and BATS Y-Exchange, Inc. (''BYX'') (collectively, ''BATS Exchanges''), each a national securities exchange registered with the Commission.

Upon completion of the Combination (the ''Closing''), DE Holdings and BATS Global Markets, Inc. each become intermediate holding companies, held under a single new holding company. The new holding company, currently named ''BATS Global Markets Holdings, Inc.,'' will at that time change its name to ''BATS Global Markets, Inc.'' In addition, the current parent company of the BATS Exchanges, BATS Global Markets, Inc., will at that time change its name to ''BATS Global Markets Holdings, Inc.''

For ease of reference, this Proposed Rule Change will refer to the current parent company of the BATS Exchanges as ''Current BGM'' when referring to the entity prior to the Closing, and as ''BGM Holdings'' when referring to that entity after the Closing. The entity that will become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as ''New BGM.''

To effectuate the Combination, the Exchange seeks to obtain the Commission's approval of (i) the proposed Resolutions of the DE Holdings Board of Managers regarding the Combination (the ''Resolutions'') making certain determinations regarding New BGM and the impact of the Combination on the Exchange; (ii) the proposed Amended and Restated Certificate of Incorporation of New BGM[3] (the ''New BGM Charter''); (iii) the proposed Amended and Restated Bylaws of New BGM (the ''New BGM Bylaws''); (iv) the replacement of the Fourth Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC[4] (''Fourth DE Holdings LLC Agreement'') in its entirety with the proposed Seventh Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC (the ''New DE Holdings LLC Agreement''); (v) the proposed amendments to the Direct Edge, Inc. (''DEI'') Certificate of Incorporation (the ''DEI Certificate of Incorporation''); (vi) the proposed amendments to the Bylaws of Direct Edge, Inc. (the ''DEI Bylaws''); (vii) the proposed amendments to the Certificate of Incorporation of the Exchange (the ''Exchange Certificate of Incorporation''); (viii) the proposed amendments to the Bylaws of the Exchange (the ''Exchange Bylaws''); (ix) the proposed amendments to Exchange Rule 2.3 to reflect the affiliation between the Exchange and two additional registered national securities exchanges; (x) the proposed amendments to Exchange Rule 2.10 to reflect the new affiliated entities of the Exchange; (xi) the proposed amendments to Exchange Rule 2.12 to reflect the affiliation between the Exchange and the routing broker for BATS and BYX; and (xii) the indirect acquisition by an affiliate of the Exchange of a Member[5] of the Exchange and the resulting affiliation between the Exchange and the Member of the Exchange, as required under Exchange Rule 2.10.

The text of the proposed rule change is available at the Exchange's Web site at *www.directedge.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

I. 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 parts of such statements.

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

1. Purpose

The Exchange submits this Proposed Rule Change to seek the Commission's approval of various changes to the organizational and governance documents of the Exchange and the Exchange's current and proposed future direct and indirect parent companies, changes to Exchange Rules,[6] and related actions that are necessary in connection

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The title of the New BGM Charter is the ''Amended and Restated Certificate of Incorporation of BATS Global Markets Holdings, Inc.'' The name, however, will change to BATS Global Markets Inc. at Closing. Therefore, to avoid confusion we will refer to it as the ''Amended and Restated Certificate of Incorporation of BATS Global Markets, Inc.''

[4] With their applications to register as national securities exchanges, the Exchange and EDGA Exchange, Inc. (''EDGA'') filed with, and received approval for, the DE Holdings' Fourth Amended and Restated Limited Liability Company Operating Agreement. *See* Securities Exchange Act Release No. 61698 (Mar. 12, 2010), 75 FR 13151 (Mar. 18, 2010). Since that time, DE Holdings amended the Agreement twice, creating the Fifth Amended and Restated Limited Liability Company Operating Agreement (''Fifth DE Holdings LLC Agreement'') and the Sixth Amended and Restated Limited Liability Company Operating Agreement (''Sixth DE Holdings LLC Agreement''). As required by Article 15, Section 15.2 of such Agreements, DE Holdings submitted its proposed amendments to the Boards of Directors of the Exchange and EDGA, which determined that the proposed amendments were not required to be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act and the rules promulgated thereunder. 15 U.S.C. 78s(b). DE Holdings currently operates pursuant to the Sixth DE Holdings LLC Agreement.

[5] The term ''Member'' is defined in Exchange Rule 1.5(n) as ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a 'member' of the Exchange as that term is defined in Section 3(a)(3) of the Act.'' To avoid confusion, the Exchange will refer to members of any other national securities exchanges, including members of EDGA or the BATS Exchanges as ''members,'' rather than as ''Members.''

[6] The term ''Exchange Rules'' refers to the rules of the Exchange.

with the Closing of the Combination, as described below.

Other than as described herein and set forth in the attached Exhibits 5A through 5K, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted, and will not make any changes to its regulated activities in connection with the Combination. Except as set forth in this Proposed Rule Change, the Exchange is not proposing any amendments to its trading and regulatory rules at this time. If the Exchange determines to make any such changes, it will seek the approval of the Commission to the extent required by the Act, the Commission's rules thereunder, and the Exchange Rules.

1. Current Corporate Structures

The Exchange and EDGA (collectively, the ''DE Exchanges'') are each Delaware corporations that are national securities exchanges registered [7] with the Commission pursuant to Section 6(a) of the Act.[8] Each DE Exchange is a direct, wholly owned subsidiary of DEI, a Delaware corporation. DEI is a direct, wholly owned subsidiary of DE Holdings, a Delaware limited liability company. In addition, DE Holdings owns 100 percent of the equity interest in Direct Edge ECN LLC d/b/a DE Route, a Delaware limited liability company and the routing broker-dealer for the DE Exchanges (''DE Route'').

As a limited liability company, ownership in DE Holdings is represented by units held by members of DE Holdings (''LLC Members'').[9] Certain of the DE Holdings LLC Members are Members or affiliates of Members of the Exchange. International Securities Exchange Holdings, Inc. (''ISE Holdings'') is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings. Other than ISE Holdings, the only firms beneficially owning ten percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and Knight Capital Holdings LLC, an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater but less than ten percent of DE Holdings. Five other firms each beneficially own less than five percent of DE Holdings.

BATS and BYX are each Delaware corporations that are national securities exchanges registered [10] with the Commission pursuant to Section 6(a) of the Act.[11] Each BATS Exchange is a direct, wholly owned subsidiary of Current BGM, a Delaware corporation. Current BGM also owns 100 percent of the equity interest in BATS Trading, Inc. (''BATS Trading''), a Delaware corporation that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each BATS Exchange.[12] In contemplation of the Combination, several new entities have been formed: New BGM, a Delaware corporation, is currently a wholly owned subsidiary of Current BGM, and is currently a shell company with no material assets or operations. New BGM, in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation (''Blue Merger Sub''), and Delta Merger Sub LLC, a Delaware limited liability company (''Delta Merger Sub''). Each of Blue Merger Sub and Delta Merger Sub is currently a shell company with no material assets or operations.

Current BGM is beneficially owned primarily by a consortium of several unaffiliated firms, including members or affiliates of members of the BATS Exchanges. No firm beneficially owns 20 percent or greater of Current BGM, and the only firms beneficially owning ten percent or greater of Current BGM are (i) GETCO Investments LLC, an affiliate of KCG Holdings, Inc., (ii) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (iii) Strategic Investments I, Inc., an affiliate of Morgan Stanley.[13] Seven other firms each beneficially own five percent or greater but less than ten percent of Current BGM, while seven other firms as well as various individuals each beneficially own less than five percent of Current BGM.

2. The Combination

On August 23, 2013, an Agreement and Plan of Merger (the ''Merger Agreement'') was entered into among Current BGM, New BGM, DE Holdings, Blue Merger Sub, Delta Merger Sub, and Cole, Schotz, Meisel, Forman & Leonard, P.A., solely in its capacity as representative of the LLC Members. Pursuant to and subject to the terms of the Merger Agreement, at the Closing, among other things:

(i) Blue Merger Sub will be merged with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM will be the surviving company (the ''BATS Merger'');

(ii) Delta Merger Sub will be merged with and into DE Holdings, whereupon the separate existence of Delta Merger Sub will cease and DE Holdings will be the surviving company (the ''Direct Edge Merger'');

(iii) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock and the right to receive from New BGM cash consideration, if any, payable pursuant to the Merger Agreement, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and

(iv) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or any LLC Member, each LLC Member's membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock and the right to receive from New BGM cash consideration, if any, payable pursuant

[7] Securities Exchange Act Release No. 61698 (Mar. 12, 2010), 75 FR 13151 (Mar. 18, 2010).

[8] 15 U.S.C. 78f(a).

[9] A ''Member'' is defined in Article I of the Sixth DE Holdings LLC Agreement as ''any Person (i) executing this Agreement as a member of the Company as of the Effective Date, (ii) admitted as a Member of the Company as of the Merger Date upon the effectiveness of the Merger pursuant to Sections 18–301(b)(3) and 18–101(7) of the Act, or (iii) hereafter admitted to the Company as an additional or substitute member of the Company as provided in this Agreement, each in its capacity as a member of the Company, and shall have the same meaning as the term ''member'' under the Act, but does not include any Person who has ceased to be a member of the Company.'' The definition of ''Member'' is the same in the Fourth DE Holdings LLC Agreement. To avoid confusion with the term ''Member'' as defined in Exchange Rule 1.5(n), the Exchange will refer to a ''Member'' of DE Holdings as an ''LLC Member'' in this rule filing.

[10] Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

[11] 15 U.S.C. 78f(a).

[12] Current BGM also directly owns Omicron Intermediate Holdings Corp., a Delaware corporation, directly and indirectly (through Omicron Intermediate Holdings Corp.) owns Omicron Holdings Corp., a Delaware corporation, and indirectly owns Omicron Acquisition Corp., a Delaware corporation, BATS Trading Limited, a limited company organized under the laws of England and Wales, and Chi-X Europe Limited, a limited company organized under the laws of England and Wales.

[13] For purposes of this Proposed Rule Change, references to the beneficial ownership of a ''firm'' refers to the aggregate beneficial ownership of the firm and its affiliated entities.

to the Merger Agreement, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

Upon the Closing, each of Current BGM and New BGM will amend and restate their respective certificates of incorporation to, among other things, change their names such that New BGM will be renamed ''BATS Global Markets, Inc.'' and Current BGM will be renamed ''BATS Global Markets Holdings, Inc.''

3. Post-Closing Corporate Structure

As a result of the Combination, New BGM will own (i) 100 percent of the equity interest in BGM Holdings (the entity previously referred to as ''Current BGM''), and (ii) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in each BATS Exchange and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route [14] and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in each DE Exchange. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

New BGM, as the new top-level holding company for the combined businesses, will have widely dispersed ownership, divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.[15]

4. Voting and Ownership Limitations of DE Holdings: Resolutions

The Sixth DE Holdings LLC Agreement [16] states that (i) no person, other than ISE Holdings, either alone or together with its Related Persons,[17] may own, directly or indirectly, of record or beneficially, Units [18] representing in the aggregate a Percentage Interest [19] of more than 40% in DE Holdings, and no person, either alone or together with its Related Persons, who is a Member, may own, directly or indirectly, of record of beneficially, Units representing in the aggregate a Percentage Interest of more than 20% (collectively, the ''DE Holdings Ownership Limitation''),[20] and (ii) subject to certain exceptions, no person, other than ISE Holdings, either alone or together with its Related Persons, may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, vote or cause the voting of Units representing a Percentage Interest of more than 20% in DE Holdings (the ''DE Holdings Voting Limitation'').[21]

However, the Sixth DE Holdings LLC Agreement provides that each of the DE

[14] As described above, the Combination will result in a change of ownership of both BATS Trading and DE Route, each of which is a member of the Financial Industry Regulatory Authority, Inc. (''FINRA''). The Exchange understands that, pursuant to NASD Rule 1017, each of BATS Trading and DE Route is seeking approval for this change of ownership from FINRA.

[15] ISE Holdings, which will beneficially own greater than five percent but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the proposed New BGM Charter and described below, shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. *See* New BGM Charter, Art. FOURTH, para. (b)(ii). Pursuant to the New BGM Charter and the Investor Rights Agreement expected to be entered into at Closing and attached as Exhibit A to the New BGM Bylaws (the ''Investor Rights Agreement''), ISE Holdings' shares of Class A Non-Voting Common Stock may convert to Voting Common Stock (i) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (ii) upon the termination of the Investor Rights Agreement; and (iii) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. *See* New BGM Charter, Art. FOURTH, para. (c); Investor Rights Agreement, Section 2.2(j).

[16] DE Holdings is currently operating pursuant to the Sixth DE Holdings LLC Agreement. As a result, the Resolutions discussed herein were adopted pursuant to the Sixth DE Holdings LLC Agreement. Therefore, the Sixth DE Holdings LLC Agreement, rather than the Fourth DE Holdings LLC Agreement, is the operative governing document for this Section 4 of the Proposed Rule Change, notwithstanding the fact that Exhibit 5D is marked to show changes from the Fourth DE Holdings LLC Agreement.

[17] A ''Related Person'' is defined in Article I of the Sixth DE Holdings LLC Agreement as the following: ''with respect to any Person: (A) any Affiliate of such Person; (B) any other Person with which such first Person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Units; (C) in the case of a Person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b–7 under the Exchange Act) or director of such Person and, in the case of a Person that is a partnership or limited liability company, any general partner, managing member or manager of such Person, as applicable; (D) in the case of any Exchange Member, any Person that is associated with the Exchange Member (as determined using the definition of 'person associated with a member' as defined under Section 3(a)(21) of the Exchange Act); (E) in the case of a Person that is a natural person and an Exchange Member, any broker or dealer that is also an Exchange Member with which such Person is associated; (F) in the case of a Person that is a natural person, any relative or spouse of such Person, or any relative of such spouse who has the same home as such Person or who is a director or officer of [DE Holdings] or any of its parents or subsidiaries; (G) in the case of a Person that is an executive officer (as defined under Rule 3b–7 under the Exchange Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (H) in the case of a Person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable.'' Pursuant to Article I of the Sixth DE Holdings LLC Agreement, ''Affiliate'' has the meaning set forth in Rule 12b–2 under the Act; ''Person'' is defined as any individual, partnership, joint stock company, corporation, entity, association, trust, limited liability company, joint venture, unincorporated organization, and any government, governmental department or agency or political subdivision of any government; and ''Exchange Member'' is defined as (i) any registered broker or dealer, as defined in Section 3(a)(48) of the Act, that is registered with the Commission under the Act and that has been admitted to membership in the national securities exchange operated by a Company-Related SRO, or (ii) any associated person of any registered broker or dealer (as determined using the definition of ''person associated with a member'' as defined under Section 3(a)(21) of the Act) that has been admitted to membership in the national securities exchange operated by a Company-Related SRO. A ''Company-Related SRO'' is defined in Article I as any Exchange Subsidiary of the DE Holdings that is registered with the Commission as a national securities exchange, as provided in Section 6 of the Act, and an ''Exchange Subsidiary'' is defined in Article I as the Exchange, EDGA, and any subsidiary of DE Holdings that is registered with the Commission as a national securities exchange. The Exchange notes that these definitions are substantively the same as the definitions contained in the Fourth DE Holdings LLC Agreement.

[18] Units are defined in Article I of the Sixth DE Holdings LLC Agreement as ''units of interest in the ownership and profits and losses of [DE Holdings] and such [LLC Member's] right to receive distributions in its capacity as a [LLC Member].'' This is the same definition of ''Units'' as set forth in the Fourth DE Holdings LLC Agreement.

[19] ''Percentage Interest'' is defined to mean, with respect to an LLC Member, the ratio of the number of Units held by the Member to the total of all of the issued and outstanding Units, expressed as a percentage. For purposes of Article XII and any references to Article XII, Percentage Interest also includes Units owned, directly or indirectly, of record or beneficially, by a Person, either alone or together with its Related Persons. Sixth DE Holdings LLC Agreement, Art. I, Section 1.1. This definition of Percentage Interest is the same definition as set forth in the Fourth DE Holdings LLC Agreement.

[20] *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(a)(1) and 12.1(a)(2). The DE Holdings Ownership Limitation is the same as the comparable provisions set forth in the Fourth DE Holdings LLC Agreement. *See* Fourth DE Holdings LLC Agreement, Art. XII, Sections 12.1(a)(1) and 12.1(a)(2).

[21] *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(a)(3). The DE Holdings Ownership Limitation is substantively the same as the comparable provision set forth in the Fourth DE Holdings LLC Agreement. *See* Fourth DE Holdings LLC Agreement, Art. XII, Section 12.1(a)(3).

Holdings Ownership Limitation and the DE Holdings Voting Limitation may be waived (except with respect to Members and their Related Persons) pursuant to an amendment to the Sixth DE Holdings LLC Agreement and a resolution duly adopted by the Board of Managers of DE Holdings if, in connection with taking such action, the Board of Managers states in such resolution that it is its determination that the waiver:

- Will not impair the ability of either DE Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder;
- is otherwise in the best interests of DE Holdings, its LLC Members, and each DE Exchange;
- will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; [22]

Such an amendment shall not be effective until it is filed with and approved by the Commission.[23]

In granting such a waiver, the DE Holdings Board of Managers has the discretion to impose on the person and its Related Persons such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each DE Exchange.[24]

In addition, notwithstanding the above, the Sixth DE Holdings LLC Agreement provides [25] that in any case where a person, either alone or with its Related Persons, would own or vote more than the DE Holdings Ownership Limitation or DE Holdings Voting Limitation, respectively, upon consummation of any proposed Transfer [26] of Units, such a transaction will not become effective until the DE Holdings Board of Managers determines, by resolution, that such person and its Related Persons are not subject to any ''statutory disqualification,'' as defined in Section 3(a)(39) of the Act.[27]

As described above, upon Closing of the proposed Combination, New BGM will become the sole owner of DE Holdings. Additionally as discussed in more detail below, the Exchange is also seeking the Commission's approval for DE Holdings [sic] proposal to, contemporaneously with the Closing, replace the Sixth DE Holdings LLC Agreement with the New DE Holdings LLC Agreement. Unlike the Sixth DE Holdings LLC Agreement, the New DE Holdings LLC Agreement will not contain the DE Holdings Ownership Limitation or the DE Holdings Voting Limitation. While the DE Holdings Ownership Limitation and the DE Holdings Voting Limitation will not be contained in the New DE Holdings LLC Agreement, the New DE Holdings LLC Agreement specifies that DE Holdings' only LLC Member will be New BGM,[28] and the New BGM Charter will contain substantively identical ownership and voting limitation provisions, which will also become effective contemporaneously with the Closing.[29]

As a result, New BGM's acquisition of ownership and voting rights in DE Holdings upon Closing would not cause New BGM to contravene the DE Holdings Ownership Limitation or DE Holdings Voting Limitation, because the Sixth DE Holdings LLC Agreement will be contemporaneously amended to eliminate the DE Holdings Ownership Limitation and the DE Holdings Voting Limitation, and the New BGM Charter will be contemporaneously amended with respect to New BGM's stockholders.

Nevertheless, because the Combination will result in a change of ownership of DE Holdings (in that New BGM will become the sole owner of DE Holdings), the Exchange and the Board of Managers of DE Holdings each believe that it is appropriate for the Board of Managers of DE Holdings to adopt the Resolutions, attached as Exhibit 5A, making certain determinations with respect to New BGM and the Combination similar to those that would be necessary to waive the DE Holdings Ownership Limitation and DE Holdings Voting Limitation.[30]

Specifically, the Board of Managers of DE Holdings determined that:

- The acquisition of the proposed ownership by New BGM in DE Holdings will not impair the ability of the DE Exchanges to carry out their functions and responsibilities under the Act and the rules and regulations promulgated thereunder, is in the best interests of DE Holdings and its LLC Members and the DE Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- the acquisition or exercise of the proposed voting rights by New BGM in DE Holdings will not impair the ability of each DE Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of DE Holdings, its LLC Members and the DE Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- neither New BGM, nor any of its Related Persons, is subject to ''statutory disqualification'' within the meaning of Section 3(a)(39) of the Act; [31] and
- neither New BGM, nor any of its Related Persons (excluding BATS Trading, which is an Exchange Member) [32] is an Exchange Member.[33]

The Board of Managers of DE Holdings also has determined that it has given due regard to the preservation of the independence of the self-regulatory function of each DE Exchange and to its obligations to investors and the general public, and determined that the actions to be taken pursuant to the Resolutions do not interfere with the effectuation of decisions by the board of each DE Exchange relating to its regulatory functions (including disciplinary

[22] *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(b). Article XII, Section 12.1(b) of the Sixth DE Holdings LLC Agreement and of the Fourth DE Holdings LLC Agreement are substantively the same. *See* Fourth DE Holdings LLC Agreement, Art. XII, Section 12.1(b).

[23] *Id.*

[24] *Id.*

[25] *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(c). Section 12.1(c) are the same for both the Fourth and the Sixth DE Holdings LLC Agreements. *See* Fourth DE Holdings LLC Agreement, Art. XII, Section 12.1(c).

[26] ''Transfer'' is defined in the Sixth DE Holdings LLC Agreement, Article I, Section 1.1 to mean, (i) when used as a verb, to sell, transfer, assign, encumber or otherwise dispose of, directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and (ii) when used as a noun, a direct or indirect, voluntary or involuntary, sale, transfer, assignment, encumbrance or other disposition by operation of law or otherwise. The same definition of ''Transfer'' is set forth in Article I, Section 1.1 of the Fourth DE Holdings LLC Agreement.

[27] 15 U.S.C. 78c(a)(39).

[28] *See* New DE Holdings LLC Agreement, Art. II, Section 2.01.

[29] *See* New BGM Charter, Art. FIFTH, para. (b)(i).

[30] The waiver process for the DE Holdings Ownership Limitation and DE Holdings Voting Limitation is substantively the same in the Fourth DE Holdings LLC Agreement and in the Sixth DE Holdings LLC Agreement. *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(b) and Fourth DE Holdings LLC Agreement, Art. XII, Section 12.1(b).

[31] 15 U.S.C. 78c(a)(39).

[32] As noted above, BATS Trading is a routing broker-dealer and an Exchange Member that is affiliated with the BATS Exchanges, and a direct subsidiary of Current BGM. The same structure will continue to be in place following the Closing and BATS Trading will remain a direct subsidiary of BGM Holdings.

[33] In addition, the Resolutions contain a determination that the execution and delivery of the Merger Agreement by New BGM constituted notice of New BGM's intention to acquire ownership and voting rights in excess of the DE Holdings Ownership Limitation and DE Holdings Voting Limitation, respectively, in writing and not less than 45 days before the Closing. *See* Sixth DE Holdings LLC Agreement, Art. XII, Section 12.1(d), which is the same provision as set forth in Art. XII, Section 12.1(d) of the Fourth DE Holdings LLC Agreement.

matters) or would not otherwise interfere with each DE Exchange's ability to carry out its responsibilities under the Act.

The Exchange has reviewed such Resolutions and requests that the Commission approve such Resolutions. The Exchange believes that the Commission should approve the Resolutions, as the Combination will not impair the ability of either DE Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder. The DE Exchanges will continue to operate and regulate their markets and Members as they have done prior to the Combination. Thus, each DE Exchange will continue to enforce the Act, the Commission's rules thereunder, and each Exchange's own rules, in the manner it does today. Further, the Commission will continue to have plenary regulatory authority over the DE Exchanges, as is currently the case with these entities.

The Exchange also notes that the Resolutions reflect the determination by the DE Holdings Board of Managers that the Combination and New BGM's resulting ownership and voting rights in DE Holdings are otherwise in the best interests of DE Holdings, its LLC Members, and the DE Exchanges.

In addition, the Exchange notes that notwithstanding the Resolutions and the Combination, the DE Holdings Ownership Limitation and the DE Holdings Voting Limitation will remain in place with respect to potential future transactions involving the ultimate parent company of the DE Exchanges, New BGM. As described in more detail below, the Exchange is also proposing the adoption of the New BGM Charter and the New BGM Bylaws, which are modeled in large part on the Current BGM Charter and the Current BGM Bylaws (and include provisions substantially identical to the DE Holdings Ownership Limitation and the DE Holdings Voting Limitation), creating an ownership structure that will continue to provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities, and its directors, officers, employees and agents to the extent they are involved in the activities of the Exchange, and protect the independence of the Exchange's self-regulatory activities.

The Exchange therefore requests that the Commission approve the Resolutions, attached as Exhibit 5A.

5. Adoption of New BGM Charter and New BGM Bylaws

New BGM was incorporated on August 22, 2013, under the name BATS Global Markets Holdings, Inc., by filing a certificate of incorporation with the Secretary of State of Delaware. Upon incorporation, New BGM also adopted bylaws. New BGM is currently a shell company, with no material assets or operations. Therefore, neither its certificate of incorporation nor bylaws currently need or contain any provisions that would be appropriate for an entity that has direct or indirect ownership in a registered national securities exchange.

However, in connection with the Combination, upon Closing, New BGM will become (i) the indirect owner (through BGM Holdings) of each of the BATS Exchanges and BATS Trading, (ii) the indirect owner (through DE Holdings and DEI) of each of the DE Exchanges, and (iii) the indirect owner (through DE Holdings) of DE Route. As a result, the Exchange is proposing that in connection with New BGM's acquisition of indirect ownership in the Exchange, New BGM would amend and restate each of its certificate of incorporation and bylaws to adopt provisions designed to protect and maintain the integrity of the self-regulatory functions of the Exchange and to facilitate the ability of the Exchange and the Commission to carry out their regulatory and oversight obligations under the Act. Each of the New BGM Charter and the New BGM Bylaws is modeled on, and substantially similar to, the Current BGM Charter and Current BGM Bylaws, respectively, except with respect to the differences described below. The Exchange is filing with the Commission the New BGM Charter and New BGM Bylaws because, after the Combination, New BGM will be the ultimate parent company of the Exchange, and, as such, the New BGM Charter and New BGM Bylaws will be considered rules of the Exchange under Section 19(b)(1) of the Act.[34]

a. New BGM Charter

The New BGM Charter is proposed to be adopted as the Amended and Restated Certificate of Incorporation of BATS Global Markets Holdings, Inc. However, the New BGM Charter will effect an amendment to the name of the corporation upon Closing such that it will be renamed ''BATS Global Markets, Inc.'' [35] The change of name is intended to reflect the fact that New BGM is succeeding to the business of Current BGM in all respects, notwithstanding the technical change of corporate entity that will result from the structure of the Combination.

The New BGM Charter, which is attached as Exhibit 5B, is substantially similar to the Current BGM Charter, which the Commission has previously found to be consistent with the Act.[36] The Current BGM Charter provides that (i) no person, either alone or together with its Related Persons,[37] may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of its capital stock (the ''BGM Ownership Limitation'') and (ii) subject to certain exceptions, no person, either alone or together with its Related Persons, at any time may, directly, indirectly or pursuant to any of various

[34] 15 U.S.C. 78s(b)(1).

[35] *See* New BGM Charter, Art. FIRST.

[36] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

[37] The Current BGM Charter generally defines a ''Related Person'' as, with respect to any person, (i) any ''affiliate'' of such person (as defined in Rule 12b–2 under the Act), (ii) any other person with which such first person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of Current BGM (provided no person is deemed a Related Person pursuant to clause (ii) solely as a result of such person's being or becoming a party to the Investor Rights Agreement entered into by and among Current BGM and the stockholders named therein on January 1, 2008), (iii) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b–7 under the Act) or director of such person and, in the case of a person that is a partnership or limited liability company, any general partner, managing member or manager of such person, as applicable; (iv) in the case of any person that is a registered broker or dealer that has been admitted to membership in either of the BATS Exchanges (for purposes of this definition of ''Related Person,'' each such national securities exchange shall be referred to generally as an ''Exchange'' and any member of such Exchange, an ''Exchange Member''), any person that is associated with the Exchange Member (as determined using the definition of ''person associated with a member'' as defined under Section 3(a)(21) of the Act); (v) in the case of a person that is a natural person and Exchange Member, any broker or dealer that is also an Exchange Member with which such person is associated; (vi) in the case of a person that is a natural person, any relative or spouse of such person, or any relative of such spouse who has the same home as such person or who is a director or officer of Current BGM or any of its parents or subsidiaries; (vii) in the case of a person that is an executive office (as defined under Rule 3b–7 under the Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (viii) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. *See* Current BGM Charter, Art. FIFTH, para. (a)(ii).

arrangements, vote or cause the voting of shares representing more than 20 percent of the voting power of its then issued and outstanding capital stock (the ''BGM Voting Limitation'').[38] The New BGM Charter also will contain provisions imposing the BGM Ownership Limitation and the BGM Voting Limitation on any owners or prospective owners of New BGM.[39] In addition, similar to the Current BGM Charter, the New BGM Charter prohibits a member of any of New BGM's registered national securities exchange subsidiaries, either alone or together with such member's Related Persons,[40] from owning, directly or indirectly, of record or beneficially, more than 20 percent of shares of any class of capital stock of New BGM.[41] As in the Current BGM Charter, purported sales, transfers, assignments, pledges or ownership that would result in a violation of the BGM Ownership Limitation will not be recognized by New BGM to the extent of any ownership in excess of the limitation, and New BGM shall have the right to redeem the shares in excess of the applicable ownership limit for their fair market value. In addition, in contrast to the Current BGM Charter, the New BGM Charter would clarify that these same non-recognition and redemption rights apply in the case of a purported conversion of shares resulting in a violation of the BGM Ownership Limitation, as apply to purported sales, transfers, assignments, pledges or ownership that result in such a violation.[42] Similarly, as in the Current BGM Charter, purported voting or voting arrangements in violation of the BGM Voting Limitation will not be honored by New BGM to the extent of any voting in excess of the limitation.[43]

These provisions are designed to prevent any stockholder from exercising undue control over the operation of the BATS Exchanges or the DE Exchanges (together, the ''Exchange Subsidiaries''), each of which New BGM will indirectly own following the Combination, and to assure that each Exchange Subsidiary and the Commission are able to carry out their regulatory obligations under the Act.

Further, consistent with the Current BGM Charter, the New BGM Charter provides that, for so long as New BGM controls, directly or indirectly, a registered national securities exchange, before any amendment to the New BGM Charter may be effective, those changes must be submitted to the board of directors of each such exchange, and if the amendment is required to be filed with, or filed with and approved by, the Commission pursuant to Section 19(b) of the Act,[44] such change shall not be effective until filed with, or filed with and approved by, the Commission.[45] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Charter differ from those of the Current BGM Charter in certain limited respects:

• The total number of shares of common stock that New BGM will have authority to issue is 75,000,000, divided between 55,000,000 shares designated as Voting Common Stock, 10,000,000 shares designated as Class A Non-Voting Common Stock, and 10,000,000 shares designated as Class B Non-Voting Common Stock.[46] This represents an increase from the 25,000,000 shares that Current BGM is authorized to issue (divided between 24,500,000 shares designated as Voting Common Stock and 500,000 shares designated as Non-Voting Common Stock). The increase in authorized shares is due to the greater number of stockholders that New BGM will have following the Combination, as compared to Current BGM, as well as to provide an adequate number of authorized shares to allow for potential future issuances. The rights and preferences of the Class A Non-Voting Common Stock and Class B Non-Voting Common Stock are identical in all respects, except for conversion rights. Class A Non-Voting Common Stock converts into Voting Common Stock automatically upon transfer to a person other than a Related Person of such holder, upon termination of the Investor Rights Agreement, and may be converted into Voting Common Stock at any time at the option of the holder.[47] Class B Non-Voting Common Stock, however, may only be converted into Voting Common Stock following a ''Qualified Transfer.''[48] The term ''Qualified Transfer'' means a sale or other transfer of Class B Non-Voting Common Stock by a holder of such shares: (a) in a widely distributed public offering registered pursuant to the Securities Act of 1933;[49] (b) in a private sale or transfer in which the relevant transferee (together with its Affiliates, as defined below, and other transferees acting in concert with it) acquires no more than two percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3) and determined by giving effect to any such permitted conversion of transferred shares of Class B Non-Voting Common Stock upon such transfer pursuant to Article FOURTH of the New BGM Charter); (c) to a transferee that (together with its Affiliates and other transferees acting in concert with it) owns or controls more than 50 percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3)) of New BGM without regard to any transfer of shares from the transferring holder of shares of Class B Non-Voting Common Stock; or (d) to New BGM. As used above, the term ''Affiliate'' means, with respect to any person, any other person directly or indirectly controlling, controlled by or under common control with such person, and ''control'' (including, with correlative meanings, the terms ''controlled by'' and ''under common control with'') has the meaning set forth in 12 CFR 225.2(e)(1).[50] The Exchange understands that certain persons that will become stockholders

[38] *See* Current BGM Charter, Art. FIFTH, para. (b).

[39] *See* New BGM Charter, Art. FIFTH, paras. (b)(i)(A) and (C).

[40] The New BGM Charter defines ''Related Persons'' consistent with the definition in the Current BGM Charter, except that (i) the definition of ''Exchange'' for purposes of such definition is expanded to refer to any national securities exchange that is a direct or indirect subsidiary of New BGM, and (ii) the reference to the ''Investor Rights Agreement'' has been revised to refer to the Investor Rights Agreement to be entered into upon Closing.

[41] *See* New BGM Charter, Art. FIFTH, para. (b)(i)(B).

[42] *See* New BGM Charter, Art. FIFTH, paras. (d)–(e).

[43] *See* New BGM Charter, Art. FIFTH, para. (d).

[44] 15 U.S.C. 78s(b).

[45] *See* New BGM Charter, Art. TWELFTH.

[46] *See* New BGM Charter, Art. FOURTH, para. (a).

[47] *See* New BGM Charter, Art. FOURTH, para. (c). In addition, Class A Non-Voting Common Stock held by ISE Holdings will convert automatically if ISE Holdings includes any such shares in any public offering of stock of New BGM.

[48] The Exchange notes that, notwithstanding the conversion features, neither Class A Non-Voting Common Stock nor Class B Non-Voting Common Stock may convert into Voting Common Stock if such a conversion would cause the stockholder to own, alone or with its Related Persons, directly or indirectly, of record or beneficially (i) more than 40% of any class of capital stock of New BGM in contravention of the BGM Ownership Limitation (unless a waiver is granted by the board of directors of New BGM and approved by the Commission), or (ii) in the case of an Exchange Member stockholder, more than 20% of any class of capital stock of New BGM. *See* New BGM Charter, Art. FIFTH, para. (b)(i)(A) and (B). In addition, to the extent that any Class A Non-Voting Common Stock or Class B Non-Voting Common Stock is converted into Voting Common Stock, the stockholder owning the converted Voting Common Stock would be subject to the BGM Voting Limitation and not permitted, either alone or together with its Related Persons, at any time, directly, indirectly or pursuant to any of various arrangements, to vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM (unless a waiver is granted by the board of directors of New BGM and approved by the Commission). *See* New BGM Charter, Art. FIFTH, para. (b)(i)(C).

[49] 15 U.S.C. 77a.

[50] *See* New BGM Charter, Art. FOURTH, para. (d)(i).

of New BGM as of the Closing may be, or may become, subject to restrictions under the Bank Holding Company Act of 1956 [51] on the extent to which they are permitted to own voting stock of New BGM or certain types of non-voting stock convertible into voting stock of New BGM. The Exchange understands that New BGM's Class B Non-Voting Common Stock is designed to permit a stockholder that may be subject to such restrictions to maintain an economic interest in New BGM, through ownership of Class B Non-Voting Common Stock, in excess of its voting interest and in compliance with such restrictions, for purposes of the Bank Holding Company Act of 1956.

• The term ''Exchange,'' as used in the New BGM Charter, is defined to refer to ''any national securities exchange registered under Section 6 of the Act with the [Commission] that is a direct or indirect subsidiary'' of New BGM.[52] The term ''Exchange'' is used throughout the New BGM Charter to refer to subsidiaries of New BGM that are registered as national securities exchanges. This definition differs from the definition contained in the Current BGM Charter, which defines ''Exchange'' by specific reference to the names of the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Charter has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.

• The New BGM Charter reflects certain non-substantive differences and typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

b. New BGM Bylaws

As with the New BGM Charter, the New BGM Bylaws, which are set forth in Exhibit 5C, contain provisions substantially similar to those of the Current BGM Bylaws, which the Commission has previously found to be consistent with the Act.[53] This includes provisions that are designed to maintain the independence of the self-regulatory functions of the Exchange Subsidiaries. Consistent with the Current BGM Bylaws, the New BGM Bylaws provide that New BGM and its officers, directors, employees and agents by virtue of their acceptance of such positions, shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each Exchange Subsidiary for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of the Exchange Subsidiary, and by virtue of their acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the United States federal courts, the Commission or the Exchange Subsidiary, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter of that suit, action or proceeding may not be enforced in or by such courts or agency.[54] In addition, for so long as New BGM controls, directly or indirectly, such Exchange Subsidiary, New BGM's books and records shall be subject at all times to inspection and copying by the Commission and each Exchange Subsidiary, provided that such books and records are related to the operation or administration of the Exchange Subsidiary.[55] In addition, to the extent they are related to the operation or administration of an Exchange Subsidiary, the books, records, premises, officers, directors, agents, and employees of New BGM shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange Subsidiary for the purposes of, and subject to oversight pursuant to, the Act.[56]

The New BGM Bylaws also provide that all books and records of an Exchange Subsidiary reflecting confidential information pertaining to the self-regulatory function of the Exchange Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM shall not be made available other than to those officers, directors, employees and agents of New BGM that have a reasonable need to know the contents thereof, and shall be retained in confidence by New BGM, the members of its board of directors, its officers, employees and agents, and not be used for any non-regulatory purposes.[57] The New BGM Bylaws, however, specify that the New BGM Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or an Exchange Subsidiary 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 New BGM to disclose such confidential information to the Commission or an Exchange Subsidiary.[58]

In addition, for so long as New BGM, directly or indirectly, controls an Exchange Subsidiary, the directors, officers, employees, and agents of New BGM are required to give due regard to the preservation of the independence of each Exchange Subsidiary's self-regulatory functions, and to its obligations to investors and the general public, and shall not take any actions which would interfere with the effectuation of decisions by the board of directors of such Exchange Subsidiary relating to its regulatory functions (including disciplinary matters) or which would interfere with such Exchange Subsidiary's ability to carry out its responsibilities under the Act.[59] Further, the New BGM Bylaws require that, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of the New BGM Bylaws may be effective, those changes must be submitted to the board of directors of each Exchange Subsidiary, and, if such amendment is required to be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act, and the rules promulgated thereunder by the Commission or otherwise, then the proposed changes to the New BGM Bylaws shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[60] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Bylaws differ from those of the Current BGM Bylaws in certain limited respects:

• The New BGM Bylaws provide for two separate corporate officer positions, one known as the Chief Executive

[51] 12 U.S.C. 1841 *et seq.*

[52] *See* New BGM Charter, Art. FIFTH, para. (a)(ii).

[53] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

[54] *See* New BGM Bylaws, Art. XIV, Section 14.05.

[55] *See* New BGM Bylaws, Art. XIV, Section 14.03.

[56] *Id.*

[57] *See* New BGM Bylaws, Art. XIV, Section 14.02.

[58] *See id.*

[59] *See* New BGM Bylaws, Art. XIV, Section 14.01.

[60] *See* New BGM Bylaws, Art. XII.

Officer and another known as the President. The Current BGM Bylaws, in contrast, provide for a combined position known as the President and Chief Executive Officer.[61] Under the New BGM Bylaws, the Chief Executive Officer will be the chief executive officer of New BGM and subject to the control of the board of directors of New BGM, has general supervision, direction and control of the business and affairs of New BGM,[62] while the President will be a senior executive officer with certain designated powers, among other things, to serve as the chief executive officer in the absence or disability of the Chief Executive Officer.[63] References to corporate officers throughout the New BGM Bylaws reflect this difference. The difference in corporate officer designations is intended to facilitate the anticipated executive leadership of New BGM following the Combination. It is anticipated that, following the Combination, the current President and Chief Executive Officer of Current BGM will become the Chief Executive Officer of New BGM, while the current Chief Executive Officer of DE Holdings will become the President of New BGM.

• The New BGM Bylaws provide for a board of directors consisting of 15 members, or such other number of members as the Board of Directors determines from time to time. The Current BGM Bylaws provide that the Board of Directors will consist of one or more members, as determined by resolution of the Board of Directors.[64] The size of the New BGM Board is proposed initially to be set at 15 in order to reflect the anticipated initial membership of the Board of Directors of New BGM. The Current BGM Board of Directors currently has 13 members. After the Closing, it is anticipated that the New BGM Board of Directors will consist of the same members as the Current BGM Board, except that the New BGM Board will be expanded by two members, to include representatives of two additional firms that are currently LLC Members of DE Holdings but will, by virtue of the Combination, become stockholders of New BGM.

• Article V, Section 5.02(a) of the Current BGM Bylaws sets forth the process for representatives of Current BGM to attend meetings of, and vote the shares of, any corporation, partnership or other entity (including each BATS Exchange) in which Current BGM may hold stock, partnership, or other equity interests. This provision parenthetically refers to the BATS Exchanges to reflect the fact that Current BGM is the direct owner of each of the BATS Exchanges. However, following the Combination, New BGM will instead be the direct owner of each of BGM Holdings and DE Holdings. The corresponding provision in the New BGM Bylaws therefore contains a similar parenthetical reference to its ownership of BGM Holdings and DE Holdings, rather than the BATS Exchanges.[65] In addition, the New BGM Bylaws include a reference to meetings of ''members'' of any ''limited liability company'' in which New BGM holds equity interests, which terms are not included in the corresponding provision in the Current BGM Bylaws.[66] This is intended to reflect the fact that New BGM will, following the Closing, be the sole member of DE Holdings, a limited liability company, while Current BGM does not hold equity in any limited liability companies.[67] In addition, the Current BGM Bylaws contain provisions that relate to Current BGM's voting of shares in the election of directors, and members of the Member Nominating Committees, of the BATS Exchanges.[68] These provisions will not be applicable to New BGM and are not included in the New BGM Bylaws, as the BATS Exchanges will be directly owned by BGM Holdings, rather than New BGM.[69]

• The term ''Exchange,'' as used in the New BGM Bylaws, is defined to refer to ''any national securities exchange registered with the [Commission] under Section 6 of the 1934 Act that is a direct or indirect subsidiary'' of New BGM.[70] The term ''Exchange'' is used throughout the New BGM Bylaws to refer to subsidiaries of New BGM that are registered as national securities exchanges. The Current BGM Bylaws either refer to each BATS Exchange by name or define ''Exchange'' by specific reference to the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Bylaws has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.

• The New BGM Bylaws reflect certain non-substantive updates to dates of agreements and cross-references, as well as typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

6. New DE Holdings LLC Agreement

After Closing, DE Holdings will continue to hold direct ownership of DEI and indirect ownership of the DE Exchanges, but it will no longer be the ultimate holding company of the corporate structure with a number of LLC Members. Instead, DE Holdings will be a wholly owned subsidiary of New BGM, and, as a result, New BGM will be the only LLC member of DE Holdings (the ''Sole LLC Member''). Accordingly, the Sixth DE Holdings LLC Agreement would no longer be appropriate.[71] Therefore, DE Holdings proposes to restate the Sixth DE Holdings LLC Agreement in its entirety and rename it as the Seventh Amended and Restated Limited Liability Company Operating Agreement.[72] The New DE Holdings LLC Agreement, which is set forth in Exhibit 5D, is drafted to reflect DE Holdings' new status as an intermediate holding company. As required by Article 15, Section 15.2 of

[61] *Compare* New BGM Bylaws, Art. IV, Section 4.01 and 4.02 *with* Current BGM Bylaws, Art. IV, Section 4.01 and 4.02(c) and (d).

[62] *See* New BGM Bylaws, Art. IV, Section 4.02(c).

[63] *See* New BGM Bylaws, Art. IV, Section 4.02(d).

[64] *Compare* New BGM Bylaws, Art. III, Section 3.01 *with* Current BGM Bylaws, Art. III, Section 3.01.

[65] *See* New BGM Bylaws, Art. V, Section 5.02(a).

[66] *Id.*

[67] *Compare* New BGM Bylaws, Art. V, Section 5.02 *with* Current BGM Bylaws, Art. V, Section 5.02(a).

[68] *See* Current BGM Bylaws, Art. V, Sections 5.02(b) and (c).

[69] The Exchange understands that substantially identical provisions are instead included in the BGM Holdings Bylaws.

[70] *See* New BGM Bylaws, Art. X, Section 10.02.

[71] As noted previously, DE Holdings currently operates pursuant to the Sixth DE Holdings LLC Agreement. The Fourth DE Holdings LLC Agreement was the last version filed with and approved by the Commission. The Exchange and EDGA Boards determined that a rule filing was unnecessary to reflect the changes made to the Fourth DE Holdings LLC Agreement and the Fifth DE Holdings LLC Agreement. Specifically, the Fourth DE Holdings LLC Agreement or Fifth DE Holdings LLC Agreement was amended to reflect that (i) DE Holdings could issue options to purchase equity interests in DE Holdings to officers and employees in conjunction with an approved equity plan; (ii) because the DE Exchanges became national securities exchanges, a facility of ISE Stock Exchange LLC (''ISE Exchange'') ceased operations; (iii) the Commission had approved DEI as a wholly-owned subsidiary of DE Holdings and direct parent company of the DE Exchanges; (iv) certain rights and obligations related to the transaction in which ISE Holdings became an LLC Member of DE Holdings expired on December 23, 2010; (v) service agreements with certain LLC Members had been updated, and (vi) that Units of DE Holdings were held by Knight Capital Holdings LLC and not Knight Trimark, Inc., and Citadel Securities LLC and not Citadel Derivatives Group LLC. Therefore, to ensure regulatory continuity, the Exchange will discuss the changes it proposes to make to the Fourth DE Holdings LLC Agreement, rather than the Sixth DE Holdings LLC Agreement, to create the New DE Holdings LLC Agreement. As necessary, the Exchange notes where the Fourth DE Holdings LLC Agreement and the Sixth LLC Agreement differ as a result of one or more of the above categories of changes.

[72] The Exchange is not proposing any changes to the Certificate of Formation of DE Holdings.

the Sixth DE Holdings LLC Agreement, DE Holdings submitted its proposed amendments to the Sixth DE Holdings LLC Agreement to the Board of Directors of the Exchange.[73] The Board of Directors of the Exchange determined that the proposed amendments were required to be filed with and approved by the Commission pursuant to Section 19 of the Act and the rules promulgated thereunder.[74] Therefore, the Exchange requests the Commission's approval of the New DE Holdings LLC Agreement pursuant to this Proposed Rule Change. The Exchange believes that the proposed changes to the Sixth DE Holdings LLC Agreement are consistent with the requirements of the Act.

Following the Closing, DE Holdings will continue to be the sole stockholder of DEI, which, in turn, holds 100% of the equity of the DE Exchanges. Although DE Holdings will not carry out any regulatory functions, the Exchange notes that its activities with respect to the operation of the DE Exchanges must be consistent with, and must not interfere with, the self-regulatory obligations of each DE Exchange.[75] The New DE Holdings LLC Agreement therefore continues to include the provisions in the Fourth DE Holdings LLC Agreement that are designed to maintain the independence of the Exchange's self-regulatory functions, enable the Exchange to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b)[76] and 19(g)[77] of the Act, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act. Specifically, the New DE Holdings LLC Agreement would contain the following provisions which are substantially similar to the comparable provisions in the Fourth DE Holdings LLC Agreement.

The New DE Holdings LLC Agreement, like the Fourth DE Holdings LLC Agreement, would require that, for so long as DE Holdings, directly or indirectly, controls an Exchange Subsidiary,[78] DE Holdings' LLC Member, officers, employees and agents give due regard to the preservation of the independence of the self-regulatory function of such Exchange Subsidiary, as well as to its obligations to investors and the general public, and not take any actions that would interfere with the effectuation of any decisions by a board of directors of an Exchange Subsidiary relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of such Exchange Subsidiary to carry out its responsibilities under the Act.[79] The New DE Holdings LLC Agreement, like the Fourth DE Holdings LLC Agreement, would require that DE Holdings comply with the U.S. federal securities laws and rules and regulations thereunder and cooperate with the Commission and each Exchange Subsidiary, as applicable, pursuant to and to the extent of their respective regulatory authority.[80] Pursuant to the New DE Holdings LLC Agreement, DE Holdings' officers, employees and agents, by virtue of their acceptance of such positions, shall be deemed to agree (x) to comply with the U.S. federal securities laws and the rules and regulations thereunder; and (y) to cooperate with the Commission and each Exchange Subsidiary in respect of the Commission's oversight responsibilities regarding the Exchange Subsidiaries and the self-regulatory functions and responsibilities of the Exchange Subsidiaries, and DE Holdings will take reasonable steps to cause its officers, employees and agents to so cooperate.[81]

Furthermore, to the fullest extent permitted by law, DE Holdings and its officers, employees and agents, by virtue of their acceptance of such position, shall be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each Exchange Subsidiary, as applicable, for purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder arising out of, or relating to, the activities of an Exchange Subsidiary.[82] By virtue of their acceptance of any such position, DE Holdings and its officers, employees and agents also will be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the U.S. federal courts, the Commission and the Exchange Subsidiaries that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter of that suit, action or proceeding may not be enforced in or by such courts or agency.[83]

The New DE Holdings LLC Agreement, like the Fourth DE Holdings LLC Agreement, also would contain a number of provisions designed to ensure that the Exchange has sufficient access to the books and records of DE Holdings. Pursuant to the New DE Holdings LLC Agreement, to the extent they are related to the operation or administration of the Exchange Subsidiary, the books, records, premises, officers, agents, and employees of DE Holdings are deemed to be the books, records, premises, officers, agents and employees of such Exchange Subsidiary for purposes of, and subject to oversight pursuant to, the Act.[84] In addition, for as long as DE Holdings controls, directly or indirectly, an Exchange Subsidiary, DE Holdings' books and records shall be subject at all times to inspection and copying by the Commission and the applicable Exchange Subsidiary, provided that such books and records are related to the operation or administration of an Exchange Subsidiary.[85]

The New DE Holdings LLC Agreement, similar to the Fourth DE Holdings LLC Agreement, also would provide that, to the fullest extent permitted by applicable law, all books and records of an Exchange Subsidiary reflecting confidential information

[73] DE Holdings also submitted its proposed amendments to the Sixth DE Holdings LLC Agreement to the EDGA Board of Directors. As discussed in EDGA's companion rule filing, the EDGA Board of Directors also determined that the proposed amendments were required to be filed with and approved by the Commission pursuant to Section 19 of the Act and the rules promulgated thereunder. *See* SR–EDGA–2013–34.

[74] 15 U.S.C. 78s(b).

[75] The Exchange notes that the proposed Combination will not affect the explicit agreement between the Exchange and DE Holdings which requires DE Holdings to provide adequate funding for the Exchange's operations, including the regulation of the Exchange. *See* Securities Exchange Act Release No. 61698 (Mar. 12, 2010), 75 FR 13151 (Mar. 18, 2010).

[76] 15 U.S.C. 78f(b).

[77] 15 U.S.C. 78s(g).

[78] For the purposes of the New DE Holdings LLC Agreement, the term ''Exchange Subsidiary'' is defined to include the Exchange and EDGA. Section 3.04(b) of the New DE Holdings LLC Agreement.

[79] *Compare* Fourth DE Holdings LLC Agreement, Art. XIV, Section 14.1 *with* New DE Holdings LLC Agreement, Art. X, Section 10.01(a). These two provisions are substantively identical. Obsolete references to the ISE Exchange and to International Securities Exchange, LLC (''ISE LLC'') have been deleted from the version set forth in the Fourth DE Holdings LLC Agreement.

[80] *Compare* Fourth DE Holdings LLC Agreement, Art. XIV, Section 14.2 *with* New DE Holdings LLC Agreement, Art. X, Section 10.02(a).

[81] *Id.*

[82] *Compare* Fourth DE Holdings LLC Agreement, Art. XIV, Section 14.3 *with* New DE Holdings LLC Agreement, Art. X, Section 10.03(a).

[83] *Id.*

[84] *Compare* Fourth DE Holdings LLC Agreement, Art. XI, Section 11.2(b) *with* New DE Holdings LLC Agreement, Art. XI, Section 11.02(b). These two provisions are the same except obsolete references to the ISE Exchange and to ISE LLC have been deleted from the version set forth in the Fourth DE Holdings LLC Agreement. References to managers and directors have also been deleted because DE Holdings will be managed by its Sole LLC Member, new BGM, and will not be managed by managers or directors.

[85] *Id.*

pertaining to the self-regulatory function of an Exchange Subsidiary (including disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of DE Holdings, and the information contained in those books and records shall (i) be retained in confidence by DE Holdings, its Sole LLC Member, and its officers, employees and agents, and (ii) not be used for any non-regulatory purposes.[86] The New DE Holdings LLC Agreement provides, however, that the foregoing shall not be interpreted so as to limit or impede the rights of the Commission or an Exchange Subsidiary to access and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder, or limit or impede the ability of the Sole LLC Member, or any of DE Holdings' officers, directors, employees or agents to disclose such information to the Commission or an Exchange Subsidiary.[87]

Furthermore, the New DE Holdings LLC Agreement would require that DE Holdings take reasonable steps necessary to cause its current officers, employees and agents and prospective officers, employees and agents, prior to the commencement of such Person's employment, appointment or other service, to consent in writing to the applicability of Section 11.02, and Article X, of the New DE Holdings LLC Agreement with respect to activities related to an Exchange Subsidiary.[88]

In addition, the New DE Holdings LLC Agreement would provide that, for so long as DE Holdings, directly or indirectly, controls an Exchange Subsidiary, before any amendment to or repeal of any provision of the New DE Holdings LLC Agreement shall be effective, those changes must be submitted to the board of directors of each Exchange Subsidiary, and if the same must be filed with or filed with and approved by the SEC before the changes may be effective, under Section 19 of the Act and the rules and regulations promulgated thereunder by the SEC or otherwise,[89] then the proposed changes to the New DE Holdings LLC Agreement shall not be effective until filed with or filed with and approved by the Commission, as the case may be.[90]

The Exchange also proposes that certain provisions of the Fourth DE Holdings LLC Agreement be deleted in their entirety or revised and simplified to reflect the transfer of ownership of DE Holdings to New BGM from the existing LLC Members. First, in light of the change in ownership, the Exchange proposes to eliminate the DE Holdings Ownership and Voting Limitations set forth in the Fourth DE Holdings LLC Agreement and replace them with a provision that identifies New BGM as the Sole LLC Member.[91] The identification of the Sole LLC Member of DE Holdings is designed to assure that any change to the indirect ownership or control of the DE Exchanges occurs through a change in the ownership or control of New BGM, or in accordance with the rule filing process described above. If the change of control occurs through a change in the ownership or control of New BGM, any purported change of such ownership or control would need to comply with the New BGM Charter and New BGM Bylaws, including the BGM Ownership Limitation and the BGM Voting Limitation (or a Commission-approved waiver therefrom).

In addition, the Exchange proposes to delete various other provisions that are applicable to a limited liability company with multiple LLC Members, but not to one with a Sole LLC Member. The more significant changes include the following:[92]

- The Exchange proposes that DE Holdings delete Article IV of the Fourth DE Holdings LLC Agreement regarding equity interests of DE Holdings. Article IV, among other things, provides that equity interests in DE Holdings are represented by Units,[93] authorizes DE Holdings to issue certificates evidencing the Units, and requires the maintenance of books for the purpose of registering the Transfer of Units. In contrast, Section 4.01 of the New DE Holdings LLC Agreement, which describes the capital structure of DE Holdings, states that the capital structure of DE Holdings consists of one class of common interests. All such common interests are identical with each other in every respect, and the LLC Member owns all of the common interests issued and outstanding.
- The Exchange proposes that DE Holdings delete Article V of the Fourth DE Holdings LLC Agreement regarding the capital contributions of the LLC Members, and replace it with Section 4.02 of the New DE Holdings LLC Agreement. Article V of the Fourth DE Holdings LLC Agreement describes each LLC Member's capital contribution, including its valuation,[94] and the terms of any additional capital contributions required of LLC Members.[95] In contrast, Section 4.02 of the New DE Holdings LLC Agreement states that a capital contributions account shall be maintained for the LLC Member, to which contributions shall be credited and against which distributions of capital contributions shall be charged. From time to time, the LLC Member may determine that DE Holdings requires capital and may make capital contributions in an amount determined by the LLC Member, and such contributions shall be credited to the LLC Member's capital contributions account.
- The Exchange proposes to delete Article VI of the Fourth DE Holdings LLC Agreement, which describes (i) the rights of LLC Members in the event of a Transfer[96] of Units, including the right of first refusal, drag-along rights and pre-emptive rights,[97] (ii) the general restrictions on Transfers of Units and the admission of new LLC Members; and (iii) the requirement for the Board to keep a list of LLC Members and the

[86] *Compare* Fourth DE Holdings LLC Agreement, Art. XI, Section 11.2(a) *with* New DE Holdings LLC Agreement, Art. XI, Section 11.02(a).

[87] *Id.*

[88] *Compare* Fourth DE Holdings LLC Agreement, Art. XIV, Section 14.4 *with* New DE Holdings LLC Agreement, Art. X, Section 10.04.

[89] 15 U.S.C. 78s.

[90] *Compare* Fourth DE Holdings LLC Agreement, Art. XV, Section 15.2(b) *with* New DE Holdings LLC Agreement, Art. XII, Section 12.02(b). These two provisions are the same except obsolete references to the ISE Exchange and to ISE LLC have been deleted from the version set forth in the Fourth DE Holdings LLC Agreement. In addition, this provision has been revised to reflect changes in the amendment process, as described above, and to reflect additional non-material changes.

[91] *See* New DE Holdings LLC Agreement, Art. II, Section 2.01.

[92] The Exchange also proposes a variety of other changes, including, but not limited to, (1) replacing the existing Recitals with a description of the Combination; (2) deleting Article I, which includes the Definitions section, because the definitions are generally applicable to deleted provisions; and (3) deleting Sections 7.17 (Tax Matters Partner), 7.18 (Restrictions on Foreign Operations) and 7.19 (Conversion to Corporation; Registration Rights; Initial Public Offering); 10.7 (Other Activities of Members); and 10.8 (Use of Trade Name and Trademarks), among others.

[93] ''Units'' are defined as the units of interest in the ownership and profits and losses of DE Holdings and such LLC Member's right to receive distributions in its capacity as a LLC Member. *See* Fourth DE Holdings LLC Agreement, Art. I, Section 1.1.

[94] *See* Fourth DE Holdings LLC Agreement, Art. V, Section 5.1.

[95] *See* Fourth DE Holdings LLC Agreement, Art. V, Section 5.2.

[96] A ''Transfer'' means (i) when used as a verb, to sell, transfer, assign, encumber or otherwise dispose of, directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and (ii) when used as a noun, a direct or indirect, voluntary or involuntary, sale, transfer, assignment, encumbrance or other disposition by operation of law or otherwise. *See* Fourth DE Holdings LLC Agreement, Art. I, Section 1.1.

[97] *See* Fourth DE Holdings LLC Agreement, Art. VI, Sections 6.2, 6.3 and 6.4, respectively.

number of Units and Percentage Interest of each LLC Member. In contrast, Article VII of the New DE Holdings LLC Agreement states that the Sole LLC Member may not sell, assign, transfer, convey, gift, exchange or otherwise dispose of any or all of its common interests except pursuant to an amendment to the New DE Holdings LLC Agreement, which shall not be effective until filed with and approved by the Commission under Section 19 of the Act and the rules and regulations promulgated thereunder by the Commission or otherwise, as the case may be. After such amendment is effective and, upon receipt by DE Holdings of a written agreement executed by the person or entity to whom such common interests are to be transferred agreeing to be bound by the terms of the New DE Holdings LLC Agreement, such person shall be admitted as an LLC Member of DE Holdings. In addition, Section 2.05 of the New DE Holdings LLC Agreement states that new LLC Members of DE Holdings shall be admitted only upon the approval of the Sole LLC Member and pursuant to an amendment to the New DE Holdings LLC Agreement, which shall not be effective until filed with and approved by the Commission under Section 19 of the Act and the rules and regulations promulgated thereunder by the SEC or otherwise.[98]

• The Exchange proposes that DE Holdings delete Sections 7.1, 7.2, 7.3(c), 7.3(e), 7.4–7.9, and 7.14–7.19 of the Fourth DE Holdings LLC Agreement regarding the governance of DE Holdings.[99] Section 7.1 and 7.2(a) provide for the governance of DE Holdings by a Board of Managers, which is populated by representatives of various LLC Members. Section 7.2(b) permits the Board to designate committees subject to certain requirements, including the representation of certain significant LLC Members on the committee. Section 7.3(c) addresses matters related to Owner Directors of the Exchange and EDGA. As discussed below in Section 8 of this Proposed Rule Change, the Exchange proposes to eliminate the category of Owner Directors from the Board of the Exchange and of EDGA, thereby making this provision unnecessary. Section 7.3(e) addresses meetings of equity holders of subsidiaries that are not exchanges. Sections 7.4 and 7.5 set forth requirements for board and committee meetings, and Section 7.6 permits the election of a Chairman of the Board. Section 7.7 sets forth the circumstances under which certain actions require supermajority board approval, majority board approval and/or the approval of a majority of all or a subset of LLC Members. Under the New DE Holdings LLC Agreement, DE Holdings will be managed by New BGM, as the Sole LLC Member, rather than a board.[100] Section 7.8 prohibits LLC Members from entering into voting trusts. Section 7.9 describes how Managers are agents of DE Holdings. Because DE Holdings will not have a Board of Managers or multiple LLC Members after Closing, these provisions would no longer be relevant.[101] The Exchange also proposes to delete Sections 7.14 through 7.19, which address, respectively, the powers of members, non-solicitation and confidentiality, reliance by third parties, the tax matters partner, restrictions on foreign operations, and the conversion to a corporation, registration rights and an initial public offering.

• The Exchange proposes to replace Article VIII of the Fourth DE Holdings LLC Agreement regarding distributions with the more simplified version as set forth in Article V, Section 5.02 of the New DE Holdings LLC Agreement. For example, Article VIII of the Fourth DE Holdings LLC Agreement addresses tax distributions to LLC Members and explains how withholdings on behalf of LLC Members are treated as distributions. Article V, Section 5.02 of the New Holdings LLC Agreement does not address these issues.

• The Exchange proposes to replace Article IX of the Fourth DE Holdings LLC Agreement with the more simplified version in Article V, Section 5.01 of the New DE Holdings LLC Agreement. Article IX of the Fourth DE Holdings LLC Agreement provides, among other things, for the calculation and allocation of profits and losses among LLC Members in order to determine distributions to LLC Members. In contrast, Article V, Section 5.01 does not address such issues because all allocations of profits and losses are made to the Sole LLC Member.

7. Amendments to DEI Certificate of Incorporation and DEI Bylaws

After Closing, DEI will continue to be a wholly owned subsidiary of DE Holdings and will continue to hold direct ownership of the DE Exchanges. DEI, however, will have a new ultimate parent company, New BGM. Therefore, the Exchange proposes that DEI make minor revisions to its Certificate of Incorporation and Bylaws to reflect certain aspects of the Combination.

As required by Article EIGHTH, Paragraph 3 of the current DEI Certificate of Incorporation and Article VI, Section 6.4 of the current DEI Bylaws, DEI submitted its proposed amendments to the DEI Certificate of Incorporation and DEI Bylaws to the Board of Directors of the Exchange. The Board of Directors of the Exchange determined that the proposed amendments were required to be filed with and approved by the Commission pursuant to Section 19 of the Act and the rules promulgated thereunder.[102] Therefore, the Exchange requests the Commission's approval of the proposed amendments to the DEI Certificate of Incorporation and DEI Bylaws pursuant to this Proposed Rule Change. The Exchange believes that the proposed changes to the DEI Certificate of Incorporation and DEI Bylaws are consistent with the requirements of the Act.

a. DEI Certificate of Incorporation

In connection with the Combination, the Exchange proposes that DEI amend and restate its Certificate of Incorporation. The DEI Certificate of Incorporation, as revised, is set forth in Exhibit 5E. DEI proposes to make the following amendments to its Certificate of Incorporation:

• Deleting as outdated Article FIFTH regarding the name and address of the sole incorporator.

• Deleting paragraphs 1 and 2 of Article SIXTH (renumbered Article FIFTH). Paragraph 1 of Article SIXTH states that the business and affairs of DEI shall be managed by or under the direction of the board of directors of DEI (''DEI board of directors''), provided that any action that specifically requires the approval of the Board of Managers and/or LLC Members of DE Holdings pursuant to Section 7.7 of the Fourth DE Holdings LLC Agreement, by and among the LLC Members of DE Holdings, as such agreement may be amended from time to time, shall require the approval of the stockholders of DEI. Paragraph 2 of Article SIXTH generally states that,

[98] Article VI of the Fourth DE Holdings LLC Agreement was amended to delete obsolete provisions, including provisions related to ISE Holdings and for dated actions for which the date had passed.

[99] Provisions comparable to the remaining provisions of Article 7 of the Fourth DE Holdings LLC Agreement have been incorporated into the New DE Holdings LLC Agreement.

[100] *See* New DE Holdings LLC Agreement, Art. III, Section 3.01.

[101] Article VII of the Fourth DE Holdings LLC Agreement was amended to reflect the various categories of changes described above in paragraph (ii) through (vi) in footnote 71.

[102] 15 U.S.C. 78s.

notwithstanding paragraph 1 of Article SIXTH, nothing in Section 7.7 of the Fourth DE Holdings LLC Agreement shall be applicable where the application of such provision(s) would interfere with the effectuation of any decisions by the DEI board of directors relating to regulatory functions of each Exchange Subsidiary (including disciplinary matters) or the structure of the market that each Exchange Subsidiary [103] regulates, or would interfere with the ability of each Exchange Subsidiary to carry out its responsibilities under the Act or to oversee the structure of the market that each Exchange Subsidiary regulates, in each case as determined by the DEI board of directors, which functions or responsibilities shall include the ability of the Exchange Subsidiary as a self-regulatory organization to prevent fraudulent and manipulative acts and practices; 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; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest. Both paragraph 1 and 2 of Article SIXTH address the application of Section 7.7 of the Fourth DE Holdings LLC Agreement to the actions of DEI. As discussed above in Section 6 of this Proposed Rule Change, the Exchange proposes to delete Section 7.7 of the Fourth DE Holdings LLC Agreement because it describes certain circumstances that require the majority or supermajority vote of the DE Holdings Board of Managers or the LLC Members. However, such majority and supermajority voting requirements are unnecessary when, upon Closing, there will be only one LLC Member of DE Holdings and when DE Holdings will no longer have a Board of Managers. Therefore, paragraphs 1 and 2 of Article SIXTH would no longer be necessary.

• Moving the current definition of ''Exchange Subsidiary'' from current Article SIXTH to Article SEVENTH (renumbered Article SIXTH). Currently, the definition of ''Exchange Subsidiary'' is set forth in Article SIXTH. However, with the deletion of paragraphs 1 and 2 of Article SIXTH, the definition of ''Exchange Subsidiary'' also would be deleted. As a result, the Exchange proposes to move the definition to Article SEVENTH (renumbered as Article SIXTH).

• Changing the reference to ''DE Holdings'' in paragraph 4 of Article EIGHTH (renumbered as Article SEVENTH) from the abbreviated ''DE Holdings'' to ''Direct Edge Holdings LLC.'' Currently, Direct Edge Holdings LLC is defined as ''DE Holdings'' in paragraph 1 of Article SIXTH. However, with the deletion of paragraph 1, the definition of the abbreviated name also would be deleted. Therefore, it is necessary to use the full name, rather than the abbreviated version.

• Paragraph 3 of the Article SEVENTH, as re-numbered from Article EIGHTH, is proposed to be amended to make minor revisions to it so that it would read as follows: ''For so long as the Corporation shall control, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of this Certificate of Incorporation shall be effective, those changes shall be submitted to the board of directors of each Exchange Subsidiary and if the same must be filed with, or filed with and approved by, the Securities and Exchange Commission (the ''SEC'') before the changes may be effective under Section 19 of the Exchange Act and the rules promulgated thereunder by the SEC or otherwise, then the proposed changes to this Certificate of Incorporation of this Corporation shall not be effective until filed with, or filed with and approved by, the SEC, as the case may be.'' [104]

• Making corresponding administrative changes to the DEI Certificate of Incorporation, including revising numbering and certain cross-references to reflect the above changes. The Exchanges notes that it is not deleting Article EIGHTH, paragraph 4 (to be renumbered Article SEVENTH, paragraph 4), which identifies DE Holdings as the sole stockholder of DEI.

b. Amended and Restated Bylaws of DEI

In connection with the Combination, the Exchange proposes that DEI amend its Bylaws and adopt the amended Bylaws as its Amended and Restated Bylaws. The DEI Bylaws, as revised, are set forth in Exhibit 5F. The Exchange proposes that DEI make the following amendments to its Bylaws:

• Deleting the following phrase from Section 2.15(b): ''and other than 'Owner Directors' [105] as defined in the governance documents of EDGA and EDGX, as applicable.'' Section 2.15(b) states, among other things, that, at any meeting of the equity holders of an Exchange Subsidiary [106] held for the purpose of electing directors (other than the chief executive officer of the Exchange or EDGA, as applicable and other than Owner Directors), DEI shall cause all outstanding equity of such Exchange Subsidiary to be voted in favor of the election of certain directors. As discussed below in Section 8 of this Proposed Rule Change in more detail, the Exchange proposes to eliminate the category of Owner Directors from the Board of the Exchange. Therefore, the provisions in the DEI Bylaws related to such Owner Directors are no longer applicable.

• Deleting Section 2.15(c) in its entirety. Section 2.15(c) states that DEI shall take all actions in its capacity as a stockholder of the Exchange and EDGA, as applicable, to vote or consent with respect to matters concerning an Owner Director according to the written instructions of the relevant LLC Member of DE Holdings that is entitled to nominate such Owner Director. Section 2.15(c) further states that, without limiting the generality of the foregoing, at any meeting of the stockholders of the Exchange or EDGA held for the purpose of electing or removing and/or replacing Owner Directors of such Exchange Subsidiary, or in the event written consents are solicited or otherwise sought from the stockholders of the Exchange or EDGA with respect thereto, DEI shall cause all outstanding shares of such Exchange Subsidiary owned by DEI and entitled to vote to be voted, or, in the event written consents are solicited or otherwise sought from the equity holders of an Exchange Subsidiary, shall cause to be validly

[103] For purposes of the DEI Certificate of Incorporation, ''Exchange Subsidiary'' means any subsidiary of DEI that is registered with the Commission as a national securities exchange, as provided in Section 6 of the Act. Article SIXTH, para. 2 of the current DEI Certificate of Incorporation.

[104] *See* Amendment No. 1 to the Form 19b–4 filed by the Exchange.

[105] ''Owner Directors'' are defined in the current Exchange Bylaws as a Director nominated by a Designating Owner pursuant to Article III, Section 4(g) of the Exchange Bylaws and elected by the stockholders of the Exchange. Exchange Bylaws, Art. I, Paragraph (w). Correspondingly, a ''Designating Owner'' means an LLC Member of DE Holdings that holds (together with its Affiliates) at least 15% Percentage Interest (as defined in the Fourth DE Holdings LLC Agreement) in DE Holdings. A ''Percentage Interest'' is defined in the Article I of the Fourth DE Holdings LLC Agreement as, with respect to an LLC Member, the ratio of the number of Units held by the LLC Member to the total of all of the issued and outstanding Units, expressed as a percentage. For purposes of Article XII and any references to Article XII in the Fourth DE Holdings LLC Agreement, Percentage Interest also includes Units owned, directly or indirectly, of record or beneficially, by a Person, either alone or together with its Related Persons.

[106] An ''Exchange Subsidiary'' is defined in Section 2.15(b) of the DEI Bylaws as the Exchange, EDGA or any other subsidiary of DEI that is registered with the Commission as a national securities exchange, as provided in Section 6 of the Act.

executed only such written consents, (i) electing each Owner Director nominated by the Designating Owner or (ii) removing and/or replacing each Owner Director who had been nominated by the Designating Owner in accordance with the governance documents of such Exchange Subsidiary. Section 2.15(c) also states that DEI shall not vote or execute a consent to effectuate the matters in clauses (i) or (ii) unless and until the Designating Owner has provided written notice to DEI of such Designating Owner's designation of an individual to serve as an Owner Director, to be removed as an Owner Director or to replace another individual as an Owner Director, as applicable. Because the Exchange proposes to eliminate the category of Owner Directors from the Board of the Exchange, Section 2.15(c) would no longer be applicable.[107]

• Eliminating Section 2.15(e) regarding the election, removal or replacement of directors designated by LLC Members of DE Holdings for any non-exchange subsidiaries of DEI entitled to make such designation under the governing documents of such subsidiary. Specifically, Section 2.15(e) states that, at any meeting of the equity holders of a subsidiary, other than an Exchange Subsidiary, held for the purpose of electing or removing and/or replacing any director designated by any DE Holdings LLC Member who is entitled to designate or remove one or more directors of such subsidiary in accordance with the governance documents of such subsidiary, or, in the event written consents are solicited or otherwise sought from the equity holders of such subsidiary, DEI shall cause all outstanding equity of such subsidiary owned by DEI and entitled to vote to be voted, or in the event written consents are solicited or otherwise sought from the equity holders of such subsidiary, shall cause to be validly executed only such written consents, (i) electing each director nominated by such DE Holdings LLC Member or (ii) removing and/or replacing such director who had been nominated by such DE Holdings LLC Member in accordance with the governance documents of such subsidiary. This provision is unnecessary going forward because, after Closing, there will be no non-exchange subsidiary of DEI.

• Changing the term ''Exchange Member Nominating Committee'' to ''Member Nominating Committee'' in Section 2.15(b). As discussed in more detail below in Section 8 of this Proposed Rule Change, the Exchange proposes to change the name of the ''Exchange Member Nominating Committee'' to ''Member Nominating Committee'' to conform the term with the bylaws of the BATS Exchanges.[108] Therefore, this change is intended to conform the name of this committee with the name as set forth in the revised version of the Exchange Bylaws.

• Changing the term ''Exchange Member Director'' to ''Member Representative Director'' in Section 2.15(d) (to be renumbered Section 2.15(c)). As discussed in more detail below in Section 8 of this Proposed Rule Change, the Exchange proposes to change the name of the ''Exchange Member Director'' to ''Member Representative Director'' to conform the term with the bylaws of the BATS Exchanges.[109] Therefore, this change is intended to conform the name of this director with the name as set forth in the revised version of the Exchange Bylaws.

• Deleting Section 4.6(b) of the DEI Bylaws, which states that DEI shall not make a dividend payment to any stockholder of DEI if, and to the extent, such dividend payment would violate the General Corporation Law of the State of Delaware or other applicable law, or would come from any Regulatory Funds. ''Regulatory Funds'' is defined as ''any fees, fines or penalties derived from the regulatory operations of an Exchange Subsidiary (as defined herein), provided that Regulatory Funds shall not include revenues derived from listing fees, market data revenue, transaction revenues or any other aspect of the commercial operations of such Exchange Subsidiary, even if a portion of such revenues are used to pay costs associated with the regulatory operations of such Exchange Subsidiary.'' [110] The Exchange Bylaws and the bylaws of EDGA each prohibit the Exchange and EDGA, respectively, from distributing any such funds to its stockholder, instead requiring that such funds only be applied to fund the legal and regulatory operations of the respective exchange or pay restitution and disgorgement of funds intended for customers.[111] As a result, DEI will not be permitted to come into possession of regulatory funds, as they will remain at the respective exchange and used only for permitted purposes. The Exchange therefore believes that a provision in the DEI Bylaws relating to the handling by DEI of such funds is unnecessary and potentially confusing.[112]

• Revising Section 5.8(a) to state that, to the fullest extent permitted by law, all books and records of an Exchange Subsidiary reflecting confidential information pertaining to the self-regulatory function of such Exchange Subsidiary (including disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of DEI, and the information contained in those books and records, ''shall not be made available to any persons (other than as provided in the next sentence) other than to those officers, directors, employees and agents of the Corporation that have a reasonable need to know the contents thereof.'' The Commission has previously approved such language.[113]

• Making minor revisions to the language in Section 6.4 to be fully consistent with the proposed language in Article XII of the New BGM Bylaws and in Section 12.02(b) of the New DE Holdings LLC Agreement. Revised Section 6.4 would read as follows: ''For so long as the Corporation shall control, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of these Bylaws shall be effective, those changes shall be submitted to the board of directors of each Exchange Subsidiary and if the same must be filed with or filed with and approved by the SEC before the changes may be effective, under Section 19 of the Exchange Act and the rules and regulations promulgated thereunder by the SEC or otherwise, then the proposed changes to these Bylaws shall not be effective until filed with or filed with and approved by the SEC, as the case may be.'' The Commission has previously approved this provision as proposed.[114]

[107] With the elimination of paragraph (c) of Section 2.15, the Exchange also proposes to renumber the current paragraph (d) of Section 2.15 as paragraph (c).

[108] *Compare* Art. I, para. (q) of the Current Exchange Bylaws *with* Art. I, para. (r) of the revised Exchange Bylaws.

[109] *Compare* Art. I, para. (p) of the Current Exchange Bylaws *with* Art., I, para. (s) of the revised Exchange Bylaws.

[110] DEI Bylaws, Section 4.6(b).

[111] *See* Exchange Bylaws, Art. X, Section 4; and EDGA Bylaws, Art. X, Section 4.

[112] The Exchange understands that the proposed BGM Holdings Bylaws do not contain a provision relating to BGM Holdings' handling of funds derived from the regulatory operations of its exchange subsidiaries, such as regulatory fees, fines and penalties. *See* SR–BATS–2013–059 and SR–BYX–2013–039. Similarly, the Exchange does not propose to add such a provision to the New DE Holdings LLC Agreement.

[113] *See, e.g.,* Securities Exchange Act Release No. 66171 (Jan. 17, 2013), 77 FR 3297 (Jan. 23, 2012).

[114] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

• Replacing the term ''Company'' with ''Corporation'' in Section 7.5 to make the terminology referring to DEI consistent throughout the Bylaws.

• Making non-substantive changes to correct typographical errors, such as deletions to unnecessary spaces.

8. Amendments to Exchange Certificate of Incorporation and Exchange Bylaws

In connection with the Combination, the Exchange proposes to make various revisions to its Certificate of Incorporation and Bylaws. Upon Closing, the Exchange's corporate family will include four separate exchanges, the two DE Exchanges and the two BATS Exchanges. Accordingly, the Exchange believes that it is important for each of the four exchanges to have a consistent, uniform approach to corporate governance. Therefore, to simplify and unify the governance and corporate practices of these four exchanges, the Exchange proposes to revise its Certificate of Incorporation and Bylaws to conform them with the certificates of incorporation and bylaws of the BATS Exchanges. In addition, the Exchange proposes several amendments to the Exchange Bylaws that reflect changes that the BATS Exchanges propose to make to their bylaws as a result of the Combination.[115] These additional changes to the Exchange Bylaws would reconcile and conform the Exchange Bylaws and the bylaws of the BATS Exchanges going forward. The Exchange believes that the proposed changes to the Exchange Certificate of Incorporation and Exchange Bylaws are consistent with the requirements of the Act. Finally, in proposing these revisions to the Exchange Certificate of Incorporation and the Exchange Bylaws, the Exchange emphasizes that it believes that the Proposed Rule Change is not inconsistent with the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Order, entered by the Commission on October 13, 2011.[116] Set forth below are the proposed changes to the Exchange Certificate of Incorporation and Exchange Bylaws.[117]

a. Exchange Certificate of Incorporation

The Exchange proposes to amend and restate its Certificate of Incorporation and rename it the Restated Certificate of Incorporation of the Exchange. The revised Exchange Certificate of Incorporation, which is set forth in Exhibit 5G, is modeled on, and substantially similar to, the current certificates of incorporation of the BATS Exchanges. The Commission has previously found the certificates of incorporation of the BATS Exchanges to be consistent with the Act.[118] Therefore, by making the Exchange Certificate consistent with the certificates of incorporation of the BATS Exchanges, the Exchange believes that, like the BATS Exchanges, the Exchange will continue to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange Rules, as required by Section 6(b)(1) of the Act.[119]

Specifically, to conform the Exchange Certificate of Incorporation with those of the BATS Exchanges, the Exchange proposes to make the following amendments:

• Delete as outdated Article FIFTH setting forth the name and mailing address of the sole incorporator.

• Delete Article SIXTH, which includes paragraphs one through five, in its entirety. Paragraph 1 provides that the business and affairs of the Exchange shall be managed by or under the direction of the Board; provided, that, any action that specifically requires the approval of the Board of Managers and/or LLC Members of DE Holdings pursuant to Section 7.7 of the Third Amended and Restated Limited Liability Company Operating Agreement of DE Holdings, dated as of December 23, 2008, by and among the LLC Members of DE Holdings, as such agreement may be amended from time to time, shall require the approval of the stockholders of the Exchange.[120] Paragraph 2 states that the election of directors need not be by written ballot. Paragraph 3 states that the Board of Directors of the Exchange is expressly authorized to adopt, amend, alter or repeal the Exchange Bylaws. Paragraph 4 states that the Bylaws may also be amended, altered or repealed, or new bylaws may be adopted, by action taken by the stockholders of the Exchange. Paragraph 5 states that any Director may be removed with or without cause by a majority vote of the stockholders.[121] The Exchange proposes to delete this Article SIXTH because the certificates of incorporation of the BATS Exchanges do not contain these provisions, and the Exchange intends to conform the Exchange Certificate of Incorporation with the certificates of incorporation of the BATS Exchanges.

• Delete Article SEVENTH, which addresses liability of Directors to the Exchange or its stockholders for monetary damages for any breach of fiduciary duty. Specifically, Article SEVENTH states that, except to the extent that the General Corporation Law of Delaware prohibits the elimination or limitation of liability of directors for breaches of fiduciary duty, no director of the Exchange shall be personally liable to the Exchange or its stockholders for monetary damages for any breach of fiduciary duty as a director, notwithstanding any provision of law imposing such liability. No amendment to or repeal of Article SEVENTH shall apply to or have any effect on the liability or alleged liability of any director of the Exchange for or with respect to any acts or omissions of such director occurring prior to such amendment. The Exchange proposes to delete this Article SEVENTH because the certificates of incorporation of the BATS Exchanges do not contain this provision. The deletion of this provision would not be expected to materially

[115] The BATS Exchanges describe these proposed revisions in the BATS Exchanges' companion rule filings related to the Combination. *See* SR–BATS–2013–059 and SR–BYX–2013–039.

[116] *See* Securities Exchange Act Release No. 65556 (Oct. 13, 2011).

[117] In addition to the substantive changes discussed below, the revised Certificate of Incorporation and Bylaws of the Exchange also reflect certain non-substantive differences, including, but not limited to, various conforming changes to terminology, renumbering and typographical changes.

[118] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

[119] 15 U.S.C. 78f(b)(1).

[120] The Exchange also notes that paragraph 1 of Article SIXTH would be obsolete after the Closing. As discussed above in Section 7 of this Proposed Rule Change, Section 7.7 of the Fourth DE Holdings LLC Agreement sets forth the circumstances under which certain actions require supermajority board approval, majority board approval and/or the approval of a majority of all or a subset of LLC Members. Under the New DE Holdings LLC Agreement, DE Holdings will be managed by New BGM, as the Sole LLC Member, rather than a board. Because DE Holdings will only have one LLC Member after Closing, the provisions regarding majority and supermajority approval would be unnecessary. Accordingly, the Exchange proposes that DE Holdings delete Section 7.7 of the Fourth DE Holdings LLC Agreement. Correspondingly, the Exchange proposes to delete paragraph 1 of Article SIXTH as it would refer to provisions that no longer exists in the New DE Holdings LLC Agreement.

[121] The Exchange also notes that Article III, Section 4, Article IX, Section 1, and Article III, Section 7 of the Exchange Bylaws address the election of Directors, the amendment, alteration and repeal of the Exchange Bylaws and the removal of Directors, respectively. Therefore, the Exchange believes that the proposed deletions from Article SIXTH of the Exchange Certificate do not leave these areas unaddressed. Moreover, as discussed in Section 8(b) of this Proposed Rule Change, these provisions of the Exchange Bylaws also will be consistent with the bylaws of the BATS Exchanges.

affect the Exchange as it removes a provision limiting the personal liability of its Directors.

• Delete Article EIGHTH, which provides that the Exchange reserves the right to amend, alter, change or repeal any provision contained in the Exchange Certificate of Incorporation, in the manner now or hereafter prescribed by statute and the Exchange Certificate of Incorporation, and all rights conferred upon stockholders in the Exchange Certificate of Incorporation are granted subject to this reservation. The Exchange proposes to delete Article EIGHTH because the certificates of incorporation of the BATS Exchanges do not contain this provision.[122]

b. Exchange Bylaws

In connection with the Combination, the Exchange proposes to amend and restate its Second Amended and Restated Bylaws to adopt the amended Exchange Bylaws as its Third Amended and Restated Bylaws. The new Exchange Bylaws, which are set forth in Exhibit 5H, are modeled on, and substantially similar to, the current bylaws of the BATS Exchanges, as proposed to reflect the Combination. The Commission has previously found the current bylaws of the BATS Exchanges to be consistent with the Act.[123] Section (i) of this Section 8(b) summarizes the changes that the Exchange proposes to make to the Exchange Bylaws to conform them with the current bylaws of the BATS Exchanges. In addition, in Section (ii) of this Section 8(b) of this Proposed Rule Change, the Exchange summarizes its proposed amendments to the Exchange Bylaws that reflect changes that the BATS Exchanges propose to make to their bylaws as a result of the Combination. The Exchange believes that, with these proposed changes, the Exchange will continue to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange Rules, as required by Section 6(b)(1) of the Act.[124]

(i) Changes To Conform to Existing Bylaws of BATS Exchanges

(I) Board of Directors

Article III of the Exchange Bylaws describes the powers, composition and selection of Directors. The Exchange proposes to amend various provisions in this Article to conform them to the bylaws of the BATS Exchanges.

First, the Exchange proposes to amend the size and composition of the Board, as set forth in Article III, Section 2. Currently, Section 2(a) states that, subject to Article III, Section 2(b), 4(g) and 6(a), the Board will consist of nineteen Directors, a majority of which must be Independent Directors.[125] In addition, the Board must be comprised initially of the following: the Chief Executive Officer, four Owner Directors,[126] 10 Independent Directors and four Exchange Member Directors.[127] The Owner Directors are subject to increase pursuant to Article III, Section 2(b) and 4(g), and Independent Directors and Exchange Member Directors are subject to increase pursuant to Article III, Section 2(b). Each Director will serve until his or her term expires as provided in Article III, Section 3. Furthermore, Section 2(b) states that the Board may, by resolution, add or remove Director positions to the Board, provided that (i) the number of Director positions will not be fewer than seven nor more than 25; (ii) no removal of a Director position will have the effect of shortening the term of an incumbent Director and (iii) the Board at all times will include a directorship for the Chief Executive Officer, a majority of Independent Directors, at least twenty percent Exchange Member Directors, and a number of Owner Director positions that equals the number of Owner Directors that the Designating Owners are entitle to nominate and that the stockholders of the Exchange have elected.

The Exchange proposes to revise these provisions to state that the Board would consist of four or more Directors, with the number thereof to be determined from time to time by the resolution of the Board, subject to the compositional requirements of the Board set forth in Article III, Section 2(b) of the revised Exchange Bylaws. At all times, the Board would consist of the Chief Executive Officer and sufficient numbers of Non-Industry[128] (including Independent,[129]) Industry[130] and Member Representative Directors,[131] as those terms are defined in BATS Exchanges' current bylaws, to satisfy the following composition requirements: (i) the number of Non-Industry Directors, including at least one Independent Director, shall equal or exceed the sum of the number of Industry Directors and Member Representative Directors elected pursuant to Article III, Section 4; and (ii) the number of Member Representative Directors shall be at least twenty percent of the Board.

With the introduction of the terms Industry and Non-Industry Directors to the Exchange Bylaws, the Exchange proposes to add definitions of these terms to Article I. Specifically, an Industry Director would be defined in Article I(o) as a

> Director who (i) is or has served in the prior three 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 ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent 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 percent or more of the professional revenues received by the Director or 20 percent 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 percent 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 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the

[122] The Exchange also notes that the deletion of this provision does not change the manner in which provisions in the Exchange Certificate may be amended, altered, changed or repealed, as Article EIGHTH merely refers back to statutory rights in that regard and does not further elaborate on the means for amending the Exchange Certificate.

[123] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010); Securities Exchange Act Release No. 69884 (Jun. 27, 2013), 78 FR 40255 (Jul. 3, 2013).

[124] 15 U.S.C. 78f(b)(1).

[125] The term ''Independent Director'' is defined in Article I, paragraph (t) of the current Exchange Bylaws.

[126] The term ''Owner Director'' is defined in Article I, paragraph (w) of the current Exchange Bylaws.

[127] The term ''Exchange Member Director'' is defined in Article I, paragraph (p) of the current Exchange Bylaws.

[128] *See* Art. I(v) of the revised Exchange Bylaws. Because the Exchange proposes to introduce the new Non-Industry Director classification, the Exchange proposes to require that the Secretary collect information as is reasonably necessary to serve as a basis for determining the nominee's classification as a Non-Industry Director. *See* Art. III, Section 2(c) of the revised Exchange Bylaws.

[129] *See* Art. I(m) of the revised Exchange Bylaws.

[130] *See* Art. I(o) of the revised Exchange Bylaws.

[131] *See* Art. I(s) of the revised Exchange Bylaws.

Company or any affiliate thereof or has had any such relationship or provided any such services at any time within the prior three years.

Correspondingly, the term ''Non-Industry Director'' would be defined in Article I(v) as a Director who is (i) an Independent Director; or (ii) any other individual who would not be an Industry Director.

With the proposed change in composition of the Board, the Exchange will now use the term ''Non-Industry Directors,'' as opposed to just ''Independent Directors.'' These two terms are comparable, although not identical. Article I(t) of the current Exchange Bylaws generally defines the term ''Independent Director'' as a Director who has no material relationship with the Exchange, an Affiliate [132] of the Exchange, a Member of the Exchange or an Affiliate of a Member of the Exchange, provided that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DEI, DE Holdings or EDGA. In contrast, a Non-Industry Director is defined as an Independent Director or any other Director that does not satisfy one of the specific scenarios in the definition of Industry Director. Therefore, the Non-Industry Director may be somewhat broader than the definition of an Independent Director because it may include an individual with a material relationship with the Exchange, its Affiliate, or a Member of the Exchange or its Affiliate, provided that it does not satisfy the definition of an Industry Director.

In addition, the Exchange proposes to eliminate the category of Owner Directors from its Board. An Owner Director is currently defined in Article I(w) as ''a Director nominated by a Designating Owner pursuant to Article III, Section 4(g) and elected by the stockholders of the Company.'' A ''Designating Owner,'' in turn, is defined in Article I(i) as ''a member of Direct Edge Holdings that holds (together with its Affiliates) at least a 15% Percentage Interest [133] (as defined in the [the Fourth DE Holdings LLC Agreement]) in Direct Edge Holdings.'' DE Holdings will only have one LLC Member after the Combination. Accordingly, the Exchange proposes to delete the definitions of ''Owner Director'' and ''Designating Owner'' from Article I, as well as all references to and provisions related to Owner Directors throughout the Bylaws.[134]

Furthermore, the Exchange proposes to replace the term ''Exchange Member Director'' with the term ''Member Representative Director,'' and replace the existing definition of ''Exchange Member Director'' with the definition of ''Member Representative Director,'' as set forth in the bylaws of the BATS Exchanges. Although worded differently, the definitions of ''Exchange Member Director'' and ''Member Representative Director'' are substantively similar. Specifically, an Exchange Member Director is currently defined as an officer, director, employee or agent of an Exchange Member, other than an Owner Exchange Member, who is elected as a Director in accordance with the Bylaws. The Exchange proposes to define ''Member Representative Director'' as ''a Director who has been appointed as such to the initial Board of Directors pursuant to Article III, Section 4(g) of these Bylaws, or elected by stockholders after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to these Bylaws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director must be an officer, director, employee or agent of an Exchange Member that is not a Stockholder Exchange Member.'' [135]

Second, the Exchange proposes to amend the manner in which the Board is divided into classes. Specifically, Section 3(b) currently states that ''The Board shall be divided into three (3) classes.'' The Exchange proposes to provide additional clarity, by revising this provision to states that ''Each of the Non-Industry and Industry Directors (excluding the Chief Executive Officer, but including Member Representative Directors) shall be divided into three (3) classes.'' In addition, the Exchange proposes to clarify in Section 3(b) that Directors—other than the Chief Executive Officer—will serve staggered three year terms.

Third, the Exchange proposes to amend Section 5 of Article III regarding the Chairman of the Board to state that the Chief Executive Officer shall be the Chairman of the Board. Currently, the Chief Executive Officer may be, but is not required to be, the Chairman of the Board.

Fourth, the Exchange proposes to revise the process for filling Board vacancies as set forth in Section 6 of Article III. Currently, under Sections 6(a) and (b), a majority of Directors then in office, though less than a quorum or a sole remaining Director, are required to elect the new Director that has been nominated by the Nominating and Governance Committee. The Exchange proposes to amend this provision to require the stockholder to elect the nominee. In addition, Section 6(b), which addresses vacancies for Member Representative Directors, would be revised to permit the Member Nominating Committee to recommend an individual or list of individuals to the stockholders from which the stockholders shall elect the new Director, rather than nominating a person for the vacancies. In addition, the Exchange proposes to delete the provisos in Section 6(a) and (b) that state that any vacancy resulting from the removal from office by a vote of the stockholders for cause may be filled by a vote of the stockholders at the same meeting at which such removal occurs. Without these two provisos, the Director vacancies must be filled in accordance with the procedures set forth in Section 6(a) and (b). That is, the Nominating Committee must nominate, and the stockholders must elect, a person satisfying the classification (Industry, Non-Industry, or Independent Director), if applicable, for the directorship to fill such vacancy until the expiration of the remaining term or to fill such newly-created Director position until the expiration of such position's designated term. The revised Exchange Bylaws would not specifically address whether or not the removal and new election may occur in the same meeting. The Exchange believes that, with these proposed changes, the Exchange will continue to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange Rules, as required by Section 6(b)(1) of the Act.[136]

Fifth, the Exchange Bylaws currently state in Section 2(d) of Article III that a Director will no longer qualify to be a Director upon a determination by the Board (i) that the Director no longer satisfies the classification for which the

[132] The term ''Affiliate'' is defined in Article I(b) of the current Exchange Bylaws.

[133] *See* Fourth DE Holdings LLC Agreement, Art. I.

[134] The following provisions in the current Exchange Bylaws related to Owner Directors will be deleted: Article III, Sections 2(a) and (b), 4(a), 4(g), 6(a), 6(c) and 7(a); Article VI, Section 2; and Article IX, Section 1.

[135] The Exchange also proposes to replace the term ''Owner Exchange Member'' with the new term ''Stockholder Exchange Member'' in Article I. The definitions of these two terms are identical.

[136] 15 U.S.C. 78f(b)(1).

Director was elected; and (ii) that the Director's continued service would violate the compositional requirements of the Board set forth in Article III, Section 2(b). The Exchange proposes to move this provision to new Section 7(b) and to revise the language to clarify that, under these two scenarios, the Director will be removed immediately upon determination of the Board by a majority vote of the remaining Directors.

Sixth, the Exchange proposes to amend Section 7(b) (to be renumbered Section 7(c)) to permit a Director to resign upon notice of resignation to the Chairman, the President or Secretary, rather than the Chairman, Chief Executive Officer or Secretary, as the Proposed Rule Change would require that the Chairman and Chief Executive Officer be the same person.

Seventh, the Exchange proposes to amend Section 10(a) of Article III regarding special meetings to permit the President to call a special meeting. Under the current Bylaws, the Chairman and Chief Executive Officer are authorized to do so. However, with the revisions pursuant to this Proposed Rule Change, the Chairman and Chief Executive Officer will be the same person. To continue to ensure that at least two different persons may call a special meeting, the Exchange proposes to permit the President in addition to the Chairman to call such meetings. The Commission has previously found this consistent with the Act as it is part of the current bylaws of the BATS Exchanges. Furthermore, the Exchange proposes to add language to paragraph (b) of Section 10 to describe the process for providing notice of special meetings to each Director. Specifically, Section 10 would state that notice of any special meeting shall be given to each Director at his or her business address or such other address as he or she may have advised the Secretary to use for such purpose. If delivered, notice shall be deemed to be given when delivered to such address or to the Director to be notified. If mailed, such notice shall be deemed to be given five business days after deposit in the United States mail, postage prepaid, of a letter addressed to the appropriate location. Notice may also be given by telephone, electronic transmission or other means not specified in this section, and in each such case shall be deemed to be given when actually received by the Director to be notified.

Eighth, current Section 12 of Article III defines a quorum for the transaction of business as a majority of the number of Directors then in office, but in no event less than ⅓ of the total number of Directors. The Exchange proposes to eliminate from the quorum calculation the minimum requirement of ⅓ of the total number of Directors.

Ninth, the Exchange also proposes to add to Article III a new Section 13, entitled ''Presumption of Assent.'' It would state that a Director of the Exchange who is present at a duly convened meeting of the Board or of a committee of the Board at which action on any corporate matter is taken shall be conclusively presumed to have assented to the action taken unless his or her dissent or election to abstain shall be entered in the minutes of the meeting or unless he or she shall file his or her written dissent or election to abstain to such action with the person acting as the secretary of the meeting before the adjournment of the meeting or shall forward such dissent or election to abstain by registered or certified mail to the Secretary of the Exchange immediately after the adjournment of the meeting. Such right to dissent or abstain shall apply to a Director who voted in favor of such action.

Tenth, the Exchange proposes to add to Article III a new Section 17,[137] which would state that the Board shall have the power to interpret the Exchange Bylaws and any interpretation made by it shall be final and conclusive.

Finally, the Exchange proposes several amendments to current Section 16, entitled Conflicts of Interest; Contracts and Transactions Involving Directors, and to renumber it as Section 18. Section 16(a) currently states that, to the fullest extent permitted by law, a Director or a member of any committee may not participate in consideration or decision of any matter relating to a particular Member or Person if such Director or committee member has a material interest in, or a professional, business or personal relationship with, that Member or other Person, or if such participation shall create an appearance of impropriety. The Exchange proposes to add to this provision the statement that ''[i]n any such case, the Director or committee member shall recuse himself or herself or shall be disqualified. If a member of the Board or any committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Board or applicable committee.'' In addition, the Exchange proposes to delete the following statement from this paragraph: ''Exchange Member Directors shall not be deemed to be personally interested in the determination of matters that may affect the Exchange Members as a whole or certain groups of Exchange Members, and Exchange Member Directors shall not be prohibited from participating in such determinations in the normal course of conducting the Exchange's business.''

In addition, paragraph (b) of this Section addresses Exchange contracts and transactions involving Directors and officers. Specifically, this paragraph currently states that:

> No contract or transaction between the [Exchange] and one or more of its Directors or officers, or between the [Exchange] and any other corporation, partnership, association, or other organization in which one or more of its Directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board or committee which authorizes the contracts or transaction, or solely because any such Director's or officer's votes are counted for such purpose, if (i) the material facts pertaining to such Director's or officer's relationship or interest and as to the contract or transactions are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Directors, even though the disinterested Directors be less than a quorum; (ii) the material facts as to the Director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (iii) the contract or transaction is fair as to the [Exchange] as of the time it is authorized, approved or ratified, by the Board, a committee or the stockholders.

The Exchange proposes to delete the phrase ''or solely because the director or officer is present at or participates in the meeting of the Board or committee which authorizes the contracts or transaction, or solely because any such Director's or officer's votes are counted for such purpose,'' as well as clause (iii). In addition, the Exchange proposes to amend clause (ii) to state ''the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of disinterested Directors, even though the disinterested Directors be less than a quorum.'' With these changes, paragraph (b) will be consistent with the bylaws of the BATS Exchanges.

The changes to these provisions of the Exchange Bylaws relating to the Board of Directors will permit the Exchange to continue to be so organized and have

[137] As a result, the Exchange is proposing corresponding amendments to renumber current Section 16 as Section 18, as described below.

the capacity to be able to carry out the purpose of the Act and to comply and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange Rules, as required by Section 6(b)(1) of the Act.[138]

(II) Stockholders

The Exchange proposes several minor changes to Article IV of the Exchange Bylaws, which describes matters related to the stockholders of the Exchange.

- The Exchange proposes to amend Section 2 to permit the Chairman, Board or the President to call a special meeting of the stockholders, rather than the Chairman, Board or Chief Executive Officer.
- The Exchange proposes to amend Section 3 to require the list of the stockholders to be open to examination by any stockholder at a place within the city where the meeting is to be held, or at the place where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held, rather than at the principal place of business of the Exchange.
- The Exchange proposes to add Section 7, which states that the stockholder may not transfer or assign, in whole or in part, its ownership interest(s) in the Exchange.

(III) Committees of the Board

The Exchange proposes the following amendments to Article V of the Exchange Bylaws, which sets forth various requirements regarding committees of the Board.

- Section 1 would no longer require the formation of an Executive Committee, although such a Committee would be permissible.
- The Exchange proposes to eliminate the requirement that Board committees other than those listed in this section be formed ''for a specific and limited purpose'' as set forth in Section 1.
- The Exchange proposes to amend the process for the appointment and removal of committee members, as well as the committee composition, as set forth in Section 2(a). The existing Bylaws require the Board, after consultation with the Chairman, to appoint committee members, and the Board to remove committee members. The Exchange proposes to require the Chairman, with the approval of the Board, to appoint committee members, and to permit the Chairman, with the approval of the Board, to remove committee members.[139] Correspondingly, the Chairman, rather than the Board, would be responsible for determining whether committees meet the applicable compositional requirements. In addition, under Article V, Section 2(a) of the current Exchange Bylaws, each committee must be comprised of at least three members of the Board, with a majority of Independent Directors (although Article V, Section 5(a) and (c) of the current Exchange Bylaws additionally require that the Regulatory Oversight Committee and Compensation Committee consist solely of Independent Directors). The Exchange proposes to require that each committee be comprised of at least three people and may include persons who are not members of the Board. Other proposed provisions of Article V would provide additional requirements for the composition of the various committees. For example, proposed Article V, Section 6(a) would require each voting member of the Compensation Committee to be a Non-Industry Director, and proposed Article V, Section 6(c) would require that each member of the Regulatory Oversight Committee be a Non-Industry Director. Furthermore, the revised Bylaws would clarify that committee members who are not also Board members shall only participate in committee actions to the extent permitted by law. Finally, the Exchange proposes to eliminate the statement that ''[t]he Board, after consultation with the Chairman, may designate one or more Directors as alternate members of any committee who may replace any absent or disqualified member at any meeting of the committee. Except as otherwise set forth in these Bylaws, the Board, after consultation with the Chairman, may have non-voting observers attend committee meetings.''
- The Exchange proposes to add as new Section 2(b) a requirement that, upon request of the Secretary, each prospective committee member who is not a Director provide the Secretary such information as is reasonably necessary to serve as a basis for determining the prospective member's classification as an Industry, Non-Industry or Independent member. In addition, the Secretary would be required to certify to the Board each prospective committee member's classification. Such committee members must update the information submitted under new Section 2(b) at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such information.[140]
- With the introduction of the terms ''Industry member'', ''Non-Industry member'', ''Independent member'' and ''Member Representative member'' with respect to committees, the Exchange proposes to add definitions of each of these terms to Article I. Specifically, the Exchange proposes to define an Independent member as ''a member of any committee who has no material relationship with the Company or any affiliate of the Company, or any Exchange Member or any affiliate of any such Exchange Member, other than as a committee member. The term Independent member may, but is not required to, refer to an Independent Director who serves on a committee.'' In addition, the Exchange proposes to define an Industry member in Article I(p) as ''a member of any committee or hearing panel who (i) is or has served in the prior three 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 ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent 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 percent or more of the professional revenues received by the Director or 20 percent 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 percent 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 percent or more of the professional

[138] 15 U.S.C. 78f(b)(1).

[139] Note that the Exchange also proposes to revise Section 2(a) of the Exchange Bylaws to state that the Chairman, with the approval of the Board, shall appoint the chair of each committee. This change is discussed below in Section 8(b)(ii), as a new change to the Exchange Bylaws as well as to the bylaws of the BATS Exchanges.

[140] Note that comparable language to this provision is currently set forth in Article VI, Section 3. The Exchange proposes to delete the language in Article VI and move it to this Article.

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

• In addition, the Exchange proposes to add the following definition of Non-Industry member as Article I(w): ''a member of any committee who is (i) an Independent member; or (ii) any other individual who would not be an Industry member.'' Finally, the Exchange proposes to define a ''Member Representative member'' in Article I(t) as ''a member of any committee or hearing panel who is an officer, director, employee or agent of an Exchange Member that is not a Stockholder Exchange Member.''

• The Exchange proposes to revise current Article V, Section 2(c) (renumbered as Section 2(d)) to state that the Chairman, with approval of the Board, instead of the Board, after consultation with the Chairman, will fill committee vacancies.

• The Exchange proposes to add as Article V, Section 3 a provision stating that, to the extent provided in the resolution of the Board of Directors of the Exchange, any committee that consists solely of one or more Directors shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Exchange.

• The Exchange proposes to amend the provisions regarding the appointment, composition and responsibilities of the Compensation Committee in Section 5(a) (to be renumbered as Section 6(a)). Specifically, the Chairman, with the approval of the Board, would appoint a Compensation Committee, rather than the Board, after consultation with the Chairman. In addition, each member of the Compensation Committee would be a Non-Industry Director, rather than an Independent Director. Moreover, the Exchange would eliminate (1) the requirement that the committee have three members; (2) the requirement that the Compensation Committee assist the Board in fulfilling its responsibilities to ensure the structures of compensation systems of the Exchange do not interfere with the Exchange's ability to fulfill its responsibilities as an SRO; and (3) the statement that the Board, after consultation with the Chairman, may designate non-voting observers who shall be permitted to attend and participate in committee meetings.

• The Exchange proposes to amend the provisions regarding the appointment, composition and responsibilities of the Audit Committee in Section 5(b) (to be renumbered as Section 6(b)). Specifically, the Chairman, with the approval of the Board, would appoint the Audit Committee, rather than the Board, after consultation with the Chairman. In addition, a majority of the members of the Audit Committee would be Non-Industry Directors, rather than Independent Directors. A Non-Industry Director, rather than an Independent Director, would serve as the Chairman of the Audit Committee. Moreover, the Exchange proposes to eliminate the following Audit Committee responsibilities: (1) Assist the Board in fulfilling its responsibilities to oversee the financial soundness and compliance resources and the effectiveness of financial and compliance control processes related to the operation of the Exchange; (2) take appropriate actions to oversee overall corporate policy for quality activities and reporting of a SRO, sound business risk management practices and ethical behavior; (3) provide oversight over the technology and information integrity established by management and the Board; (4) selecting and replacing and determining the compensation of the head of the Internal Audit Department (or if such position is outsourced, of the third party service provider) in consultation with management; and (5) overseeing enterprise risk and technology operations, including security and business continuity measures. The Exchange also proposes to add the parenthetical ''(or nominate the independent auditors to be proposed for ratification by stockholders)'' to the function of selecting, evaluating, and where appropriate, replacing the Company's independent auditor. The Exchange also would clarify that the Audit Committee had ''exclusive'' authority to perform certain functions, including hiring the Exchange's Internal Audit Department, determining the compensation of the head of the Internal Audit Department and determining the budget for the Internal Audit Department. Finally, the Exchange would eliminate the statement in this Section that nothing in this Section shall prohibit or be deemed to be in conflict with the ability of the Exchange to retain a third party to perform all or a portion of its audit function, provided that the Exchange shall supervise and have primary responsibility for any action undertaken by a third party auditor retained to perform such audit functions.

• The Exchange proposes to amend the provisions regarding the appointment and composition of the Regulatory Oversight Committee in Section 5(c) (to be renumbered as Section 6(c)). Specifically, the Chairman, with the approval of the Board, would appoint the Regulatory Oversight Committee, rather than the Board, after consultation with the Chairman. In addition, each member of the Regulatory Oversight Committee would be a Non-Industry Director, rather than an Independent Director.

• The Exchange proposes to amend the provisions regarding the appointment and composition of the Appeals Committee in Section 5(d) (to be renumbered as Section 6(d)). Specifically, the Chairman, with the approval of the Board, would appoint the Appeals Committee, rather than the Board, after consultation with the Chairman. In addition, the Appeals Committee would no longer consist of two Independent Directors and one Exchange Member Director. Instead, the Appeals Committee would consist of one Independent Director, one Industry Director, and one Member Representative Director. If the Independent Director recuses himself or herself from an appeal, due to a conflict of interest or otherwise, such Independent Director may be replaced by a Non-Industry Director for purposes of the applicable appeal if there is no other Independent Director able to serve as a replacement.

• The Exchange proposes to amend Section 5(e) (to be renumbered as Section 6(e)) regarding the Executive Committee in two ways. Specifically, the Chairman, with the approval of the Board, would appoint the Executive Committee, rather than the Board, after consultation with the Chairman. In addition, the Exchange would add the requirement that the number of Non-Industry Directors on the Executive Committee equal or exceed the number of Industry Directors on the Executive Committee.

• The Exchange proposes to add Section 6(f), stating that the Chairman, with the approval of the Board, may appoint a Finance Committee. If appointed, the Finance Committee will 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.

The changes to these provisions of the Exchange Bylaws relating to committees of the Board will permit the Exchange

to continue to be so organized and have the capacity to be able to carry out the purpose of the Act and to comply and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Exchange Rules, as required by Section 6(b)(1) of the Act.[141]

(IV) Nominating Committees

The Exchange also proposes to amend Article VI regarding the Nominating Committees of the Exchange.[142] To conform the requirements regarding the Exchange's Nominating and Governance Committee with that of the BATS Exchanges, the Exchange proposes to rename the Nominating and Governance Committee the ''Nominating Committee.'' [143] In addition, the Exchange would change the composition of this Committee from a committee of three Independent Directors, to a committee in which the number of Non-Industry members equals or exceeds the number of Industry members. The Exchange also proposes to streamline the responsibilities of this Committee by eliminating the following responsibilities from the Committee's purview: (1) Developing and recommending governance policies to the Board; (2) nominating chairpersons to serve on committees of the Board; (3) overseeing an annual self-evaluation of the independent Directors and Board committees; (4) overseeing the implementation and effectiveness of the Bylaws, committee charters, policies and other governance documents as needed; (5) reviewing and recommending best practices in corporate governance; and (6) overseeing an orientation for new Directors. Finally, the Exchange proposes to add to Section 2 that a Nominating Committee member may simultaneously serve on the Nominating Committee and the Board, unless the Nominating Committee is nominating Director candidates for the Director's class. Notwithstanding the prior sentence, a Director may serve on the Nominating Committee in his or her final year of service on the Board. 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 Exchange also proposes to amend the description of the Exchange Member Nominating Committee, as set forth in Section 3 of Article VI. First, the Exchange proposes to change the name of the ''Exchange Member Nominating Committee'' to ''Member Nominating Committee.'' [144] Second, the Member Nominating Committee will continue to nominate candidates for Exchange Member Directors (to be renamed the ''Member Representative Director'') position on the Board that is to be elected by Exchange Member or stockholders, but will no longer be tasked with the obligation to nominate candidates for ''all other vacant or new Exchange Member Director positions on the Board.'' Third, the Exchange would amend the description of the composition of this Committee by changing the committee member qualification requirement from ''an Exchange Member Director, except that such committee member is not required to be a Director'' to ''a Member Representative member.'' Fourth, the Exchange proposes to delete the provisions regarding the process for confirming whether a prospective committee member satisfies such member's classification requirements, and move such provisions to Article V, Section 2(b).

(V) Officers, Agents and Employees

The Exchange proposes the following amendments to Article VII of the Exchange Bylaws, which sets forth various requirements regarding the officers, agents and employees of the Exchange.

- The Exchange proposes to revise Section 1 to require that the Exchange have a President, Secretary and Treasurer in addition to the currently required Chief Executive Officer and Chief Regulatory Officer. In addition, the Exchange proposes to prohibit the same person from holding the offices of both the President and the Secretary. Currently, this prohibition applies to the offices of the Chief Executive Officer and the Secretary.
- The Exchange proposes to amend Section 3(a) of Article VII to permit an officer to provide his or her resignation to the President in addition to the Chairman, Chief Executive Officer or the Secretary. The Exchange also proposes the corresponding amendment to Section 3(a) to provide that an officer could no longer provide such resignation to a designee of the Board, if no such officers are then appointed. In addition, the Exchange proposes to add Section 3(c), which would state that vacancies in any office of the Exchange may be filled for the unexpired term by the Board.
- The Exchange proposes to amend Section 4 of Article VII regarding officer compensation to reflect the proposed change to Article V, Section 6(c) of the Exchange Bylaws regarding the compensation of the Chief Regulatory Officer. Specifically, the Exchange proposes to add the phrase ''Except as otherwise provided in Article V, Section 6(c) of these Bylaws,'' to the statement that the salaries of all other officers and agents of the Company shall be fixed by the Chief Executive Officer, in consultation with the Compensation Committee.
- The Exchange proposes to amend Section 6 of Article VII regarding the Chief Executive Officer to state that the Chief Executive Officer shall be the Chairman of the Board and ''shall preside at all meetings of the Board at which the Chief Executive Officer is present; provided, however, that he or she shall not participate in executive sessions'' of the Board.
- Section 7 of Article VII (to be renumbered Section 9) regarding the Chief Regulatory Officer would be revised to require the Chief Regulatory Officer to be an officer of the Exchange with the position of Executive Vice President or Senior Vice President.
- Section 8 of Article VII (to be renumbered Section 10) regarding the Secretary would be revised to state that the President, in addition to the Board and Chief Executive Officer, may assign duties to the Secretary. The President's ability to do so comports with the responsibilities as set forth in new proposed Section 7, as discussed below.
- The Exchange proposes to add new Sections 7, 8, 11, 12 and 13 to Article VII of the Exchange Bylaws describing the responsibilities of the President, Vice President, Assistant Secretary, Treasurer and Assistant Treasurer, respectively. Specifically, Section 7 would state the following: ''The President shall, in the absence of the Chairman and Chief Executive Officer, preside at all meetings of the Board at which the President is present. The

[141] 15 U.S.C. 78f(b)(1).

[142] To conform the terms of Section 1 of Article VI with the bylaws of the BATS Exchanges, the Exchange also proposes to add the following: ''the stockholder shall appoint the initial Nominating Committee and Member Nominating Committee consistent with the compositional requirements of Article VI. In each subsequent year, each of the Nominating Committee and Member Nominating Committee shall nominate candidates to serve on the succeeding year's Nominating Committee and member Nominating Committee, as applicable, such candidates to be voted on by stockholders at the annual meeting of stockholders.''

[143] The Exchange proposes to make this change to the definition of ''Nominating and Governance Committee'' in Article I(v) (to be renumbered Article I(u)) and throughout the Bylaws).

[144] The Exchange proposes to make this change to the definition of ''Exchange Member Nominating Committee'' in Article I(q) (to be renumbered Article I(r)) as well as throughout the Bylaws where the term ''Exchange Member Nominating Committee'' is used.

President shall have general supervision over the operations of the Company. The President shall have all powers and duties usually incident to the office of the President, except as specifically limited by a resolution of the Board. The President shall exercise such other powers and perform such other duties as may be assigned to the President from time to time by the Board.''

• In addition, Section 8 of Article VII regarding Vice Presidents would read as follows:

The Board shall appoint one or more Vice Presidents. In the absence or disability of the President or if the office of President becomes vacant, the Vice Presidents in the order determined by the Board, or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board at any time to extend or restrict such powers and duties or to assign them to others. Any Vice President may have such additional designations in such Vice President's title as the Board may determine. The Vice Presidents shall generally assist the President in such manner as the President shall direct. Each Vice President shall exercise such other powers and perform such other duties as may be assigned to such Vice President from time to time by the Board, the Chief Executive Officer or the President. The term ''Vice President'' used in this Section shall include the positions of Executive Vice President, Senior Vice President, and Vice President.

• Furthermore, new Section 11 of Article VII would describe the responsibilities of an Assistant Secretary as follows: ''In the absence of the Secretary or in the event of the Secretary's inability or refusal to act, any Assistant Secretary, approved by the Board, shall exercise all powers and perform all duties of the Secretary. An Assistant Secretary shall also exercise such other powers and perform such other duties as may be assigned to such Assistant Secretary from time to time by the Board or the Secretary.''

• In addition, Section 12 of Article VII, regarding Treasurers, would state:

The Treasurer shall have general supervision over the care and custody of the funds and over the receipts and disbursements of the Company and shall cause the funds of the Company to be deposited in the name of the Company in such banks or other depositories as the Board may designate. The Treasurer shall have supervision over the care and safekeeping of the securities of the Company. The Treasurer shall have all powers and duties usually incident to the office of Treasurer except as specifically limited by a resolution of the Board. The Treasurer shall exercise such other powers and perform such other duties as may be assigned to the Treasurer from time to time by the Board, the Chief Executive Officer or the President.

Finally, new Section 13 of Article VII would describe the role of the Assistant Treasurer. Specifically, it would state that ''In the absence of the Treasurer or in the event of the Treasurer's inability or refusal to act, any Assistant Treasurer, approved by the Board, shall exercise all powers and perform all duties of the Treasurer. An Assistant Treasurer shall also exercise such other powers and perform such other duties as may be assigned to such Assistant Treasurer from time to time by the Board or the Treasurer.''

(VI) Indemnification

The Exchange also proposes to make certain amendments to the indemnification provisions set forth in Section 1 of Article VIII of the Exchange Bylaws, including the following:

• The Exchange proposes to revise paragraph (a) (to be renumbered (b)). First, this paragraph would state that the Exchange shall advance to any person who was or is a party or is threatened to be made a party to any threatened, pending or completed proceeding of any kind by reason of the fact that he is or was a Director or executive officer of the Exchange or is or was serving at the request of the Exchange as a Director or executive officer of another entity, prior to the final disposition of such proceeding, all expenses incurred by such person in such proceeding upon receipt of such person's undertaking to repay amounts if it should be determined ultimately that such person is not entitled to be indemnified. The Exchange would add a second paragraph to this renumbered paragraph (b) stating that in general no advance shall be made by the Exchange to an executive officer of the Exchange (except by reason of the fact that such executive officer is or was a Director of the Exchange in which event this paragraph shall not apply) in any proceeding of any kind if a determination is reasonably and promptly made (i) by the Board of Directors by a majority vote of a quorum of directors who were not parties to the proceeding, or (ii) if such quorum is not obtainable, or, even if obtainable, a quorum of disinterested Directors so directs, by independent legal counsel in a written opinion, that the facts demonstrate clearly and convincingly that such person acted in bad faith or in a manner that such person did not believe to be in or not opposed to the best interests of the Exchange.

• The Exchange proposes to delete paragraph (c) and replace it in its entirety. Paragraph (c) currently states that, if a claim for indemnification (following the final disposition of such proceeding) or advancement of expenses under Article VIII is not paid in full within thirty days after a written claim by the applicable person has been received by the Exchange, such person may file suit to recover the unpaid amount and, if successful shall be entitled to be paid the expense of prosecuting such claim to the fullest extent permitted by law. In any such action the Exchange shall have the burden of proving that such person is not entitled to the indemnification or advancement of expenses under applicable law. The revised paragraph (c) would state that any right to indemnification or advances granted by Article VIII is enforceable by or on behalf of the person holding such right if (i) the claim for indemnification or advances is denied, in whole or in part, or (ii) no disposition of such claim is made within ninety (90) days of request therefor. The claimant, if successful in whole or in part, shall also be entitled to be paid expenses relating to prosecuting his claim.

• The Exchange proposes to revise paragraph (f) (to be renumbered paragraph (e)) to clarify that the rights conferred on any person by Article VIII continue as to a person who has ceased to be a Director or executive officer of the Exchange.

• The Exchange proposes to amend paragraph (k) (to be renumbered paragraph (i)) by adding two new paragraphs. The first new paragraph states that the term ''proceeding'' shall be broadly construed. The second new paragraph provides that references to a ''director,'' ''officer,'' ''employee,'' or ''agent'' of the Exchange shall include, without limitation, situations where such person is serving at the request of the Exchange as a director, officer, employee, trustee or agent of another entity.

• The Exchange also proposes to make certain additional amendments to Article VIII of the Exchange Bylaws that are not material and will not impair the ability of (1) the Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder or (2) the Commission to enforce the Act and the rules and regulations thereunder.

(VII) Miscellaneous Provisions

The Exchange proposes to make the following amendments to Article XI of the Exchange Bylaws:

• Revising the language of the following sentence in Section 3 of Article XI: ''All books and records of the [Exchange] reflecting confidential information pertaining to the self-regulatory function of the [Exchange]

(including disciplinary matters, trading data, trading practices, and audit information) and the information contained in those books and records shall be retained in confidence by the [Exchange] and the Directors, officers, employees, hearing officers, other agents and advisors of the [Exchange], shall not be used by the [Exchange] for any non-regulatory purposes and shall not be made available to any Person (including any [Member]), other than to personnel of the Commission, and those Directors, officers, employees, hearing officers, other agents and advisors of the [Exchange] to the extent necessary or appropriate to discharge properly the self-regulatory responsibilities of the [Exchange].'' Specifically, the Exchange proposes to (i) delete the phrase ''and the information contained in those books and records''; (ii) replace the phrase ''the Directors, officers, employees, hearing officers, other agents and advisors'' of the Exchange with the more general term ''personnel''; (iii) add the following to the list of persons who may receive confidential information to the extent necessary or appropriate to properly discharge the self-regulatory responsibilities of the Exchange: members of committees of the Board, members of the Board, hearing officers and other agents of the Exchange.

• Amending Section 6(a) of Article XI (Execution of Instruments, Contracts, etc.) to eliminate the statement that the Chief Executive Officer, the Chief Regulatory Officer, the Secretary or such other officer or officers or person or persons as the Chief Executive Officer, the Chief Regulatory Officer, or the Secretary may from time to time designate may sign checks, drafts, bills of exchange, notes or other obligations or orders for the payment of money, and to eliminate the defined term ''Authorized Officers.'' Correspondingly, any ''officer, employee or agent,'' instead of an Authorized Officer, would be authorized, in the name of and on behalf of the Exchange, to enter into or execute and deliver deeds, bonds, mortgages, contracts and other obligations or instruments, and such authority may be general or confined to specific instances.

• Amending Section 6(b) of Article XI to permit any officer of the Exchange, or, to the extent designated for such purposes from time to time by the Board, an employee or agent of the Exchange, rather than an Authorized Officer, to execute all applications, written instruments and papers required by any department of the United States government or by any state, county, municipal or other governmental authority in the name of the Exchange. Such designation may contain the power to substitute, in the discretion of the person named, one or more persons.

• Deleting Section 8 of Article XI regarding how notices contemplated by the Exchange Bylaws may be given.[145]

• Deleting Section 10 of Article XI regarding stock certificates and uncertificated shares.

(VIII) Additional Amendments

In addition to the definitional changes discussed above, the Exchange proposes to make the following changes to Article I of the Exchange Bylaws regarding definitions.[146]

• Amend the definition of ''Act'' by deleting the parenthetical ''and in effect from time to time and any successor statute'' to conform to the BATS Exchanges' definition.

• Replace the Exchange's current definition of ''Affiliate'' with the BATS Exchanges' definition. The Exchange currently defines an ''Affiliate'' as ''with respect to any Person, any other person directly or indirectly through one or more intermediaries Controlling, Controlled by, or under direct or indirect common Control with, such Person. 'Affiliated' shall have the correlative meaning.'' Correspondingly, the Exchange currently defines ''Control'' to mean ''the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities or general partnership or managing member interests, by contract or otherwise. 'Controlling' and 'Controlled' shall have correlative meanings.'' The Exchange would eliminate both of these definitions, and adopt the following definition of ''affiliate'': ''a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.''

• Amend the definition of ''Board'' to include ''Board of Directors'' as a defined term.

• Delete the definition of ''Business Day,'' and add the definition of ''day''. ''Day'' would be defined as a ''calendar day.''

• Define a ''broker'' as having the same meaning as in Section 3(a)(4) of the Act.

• Delete the definition of ''Chairman'' as it is defined in Article III, Section 5 of the Bylaws.

• Delete the definition of ''Control.''

• Define a ''dealer'' as having the same meaning as in Section 3(a)(5) of the Act.[147]

• Delete the definition of ''DGCL'' as the term will not be used in the revised Exchange Bylaws.

• Delete the definitions of ''Direct Edge Holdings,'' ''Direct Edge'' and ''Holdings Operating Agreement.''

• Revise the definition of an ''Exchange Member'' to replace the reference to a broker or dealer that has been admitted to membership in the ''Exchange'' with the more general phrase ''national securities exchange operated by the [Exchange].''

• Replace the term ''Exchange Member Representative'' with the term ''Executive Representative.'' In addition, the Exchange proposes to clarify within the definition the means by which the Executive Representative may give notice to the Secretary. Specifically, the amendment would provide that notice may be given ''via electronic process or such other process as the [Exchange] may prescribe.''

• Revise the proviso in the definition of ''Independent Director,'' which currently states that ''an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of the Company, Direct Edge, Direct Edge Holdings or EDGA Exchange, Inc.'' The Exchange proposes to replace the phrase ''Direct Edge, Direct Edge Holdings or EDGA Exchange, Inc.'' with the phrase ''or its stockholder.''

• Replace the current definition of ''List of Candidates'' with the version of the definition employed by the BATS Exchanges. Specifically, the Exchange proposes to delete its existing definition, which states that the List of Candidates ''shall have the meaning set forth in Article III, Section 4(e).'' In its place, the Exchange would define a List of Candidates as ''the list of nominees for Member Representative Director positions as nominated by the Member Nominating Committee and amended by petitions filed by Exchange Members. The List of Candidates is submitted to Exchange Members for the final selection of nominees to be elected by stockholders to serve as Member Representative Directors.''

• Revise the definition of ''Person.'' The Exchange currently defines a ''Person'' as ''any individual, partnership, joint stock company, corporation, entity, association, trust, limited liability company, joint venture, unincorporated organization, and any government, governmental department

[145] Comparable language has been moved to Article III, Section 10.

[146] The Exchange also proposes to make changes to other provisions of the Bylaws that reflect the changes made to these definitions.

[147] 15 U.S.C. 78c(a)(5).

or agency or political subdivision of any government.'' The new definition would define a ''person'' as ''a natural person, partnership, corporation, limited liability company, entity, government, or political subdivision, agency or instrumentality of a government.''

• Delete the specific reference to branch managers from the definition of ''person associated with an Exchange Member.''

• Delete the definition of ''Petition Candidates.''

• Delete the definition of ''Petition Deadline'' and replace the term ''Petition Date'' with the term ''Record Date.'' The Exchange would continue to define the ''Record Date'' as ''a date at least thirty-five (35) days before the date announced as the date for the annual meeting of stockholders.'' In addition, however, the Exchange proposes to clarify that the Record Date is ''set as the last date on which Exchange Members may petition to add to the List of Candidates and used to determine whether Exchange Members are entitled to vote on the final List of Candidates.''

• Amend the definition of ''Rules'' by deleting the parenthetical ''with respect to the company.''

• Delete the definition of ''SRO.'' [148]

• Corresponding technical, non-substantive changes to conform the paragraph letters for defined terms.

The Exchange notes that it is not proposing to change the statement in the definition of ''stockholder'' that identifies DEI as the sole stockholder of the Exchange.[149]

(ii) Changes To Conform to the BATS Exchanges' Proposed Changes to the Existing Bylaws in Connection With the Combination

In addition to the changes discussed above, the Exchange proposes to make the following amendments to the Exchange Bylaws, which are consistent with the changes proposed to be made by the BATS Exchanges in connection with the Combination:

• Adding new Section 2(b) and amending Section 3(b) of Article III of the Exchange Bylaws to clarify that the Chief Executive Officer of the Exchange is considered to be an Industry Director, but is excluded from being designated as a member of one of the three classes of directors for purposes of the Board's staggered three-year terms. The Exchange understands that the BATS Exchanges have proposed this amendment to clarify, rather than change, their current practice. The revised Exchange Bylaws require that the Board of Directors be composed of one Director who is the Chief Executive Officer of the Exchange, and a sufficient number of Non-Industry Directors (including Independent Directors), Industry Directors and Member Representative Directors such that (i) the number of Non-Industry Directors, including at least one Independent Director, equals or exceeds the sum of the number of Industry Directors and Member Representative Directors, and (ii) the number of Member Representative Directors equals at least 20 percent of the Board of Directors (the ''Exchange Board Composition Requirements'').[150] Because the definition of ''Industry Director'' includes a Director that has an employment relationship with the Exchange,[151] the Chief Executive Officer of the Exchange will always meet the definition of ''Industry Director.'' Consistent with this definition, and in order to effectuate the Exchange Board Composition Requirements, the Exchange considers the Chief Executive Officer to be an Industry Director. Were the Chief Executive Officer to not be considered for purpose of determining composition of the board, the total number of persons affiliated with the securities industry (including Industry Directors, Member Representative Directors and the Chief Executive Officer) could potentially exceed the number of Non-Industry Directors—a result that the Exchange believes the Exchange Board Composition Requirements were intended to prevent. The Exchange therefore proposes to add new Section 2(b) of Article III of the Exchange Bylaws to explicitly clarify that the Chief Executive Officer shall be considered to be an Industry Director. The Exchange Bylaws separately provide that each of the Non-Industry Directors and Industry Directors are divided into one of three classes to serve staggered three-year terms.[152] Unlike other Industry Directors, rather than serving a three-year term, the Chief Executive Officer of the Exchange serves on the Board of Directors until he or she ceases to be Chief Executive Officer.[153] The Exchange is therefore proposing to amend Section 3(b) of Article III of the Exchange Bylaws to explicitly clarify that the reference to each Industry Director serving a staggered three-year term excludes the Chief Executive Officer.

• Amending Section 4(a), Section 4(c) and Section 4(e) of Article III of the Exchange Bylaws to permit the Director nomination and election process (including the Member Representative Director nomination and election process conducted by the Member Nominating Committee) to be conducted through either an annual or special meeting of stockholders, rather than solely through an annual meeting of stockholders. Without this change, should one or more vacancies on the Board of Directors occur, the vacancies would continue until they can be filled at an annual meeting. As a result, vacancies that arise soon after an annual meeting could remain for close to a full year. The Exchange therefore proposes to amend the Exchange Bylaws to add flexibility to the governance process around the nomination and election of a Director position that may become vacant at a time that does not coincide with the Exchange's annual director election process, by permitting the process to occur at any time via a special meeting of stockholders.

• Amending Section 2(a) of Article V of the Exchange Bylaws to clarify that the Chairman, with the approval of the Board, not only appoints the members of all committees of the Board, but also the chair of each committee. The Exchange understands that this amendment is intended to reflect the current committee and committee Chair appointment processes utilized by the BATS Exchanges.

• Amending Section 6(c) of Article V of the Exchange Bylaws to clarify that the Regulatory Oversight Committee responsibilities include, in consultation with the Chief Executive Officer of the Exchange, establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer of the Company. These amendments are intended to reflect the current responsibilities of the Regulatory Oversight Committee for the Exchange.

• Expanding the prohibition contained in Section 2 of Article XI of the Exchange Bylaws. Currently, Section 2 prohibits DEI and DE Holdings directors, officers, employees, agents or advisors who are not also directors, officers, staff, counsel or advisors of the Exchange from participating in any meetings of the Exchange's Board of Directors (or any committee thereof) pertaining to the self-regulatory function of the Exchange (including disciplinary matters). Because, following the Combination, the Exchange also will be owned indirectly by New BGM, instead

[148] As discussed above, the Exchange also proposes to change the name of the ''Exchange Member Nominating Committee'' to ''Member Nominating Committee,'' and move the definition from Art. I(q) to I(r).

[149] *See* Exchange Bylaws, Art. I(hh) (to be renumbered Article I(cc)).

[150] *See* Exchange Bylaws, Art. III, Section 2(b).

[151] *See* Exchange Bylaws, Art. I, para. (o)(vi).

[152] *See* Exchange Bylaws, Art. III, Section 3(b).

[153] *See* Exchange Bylaws, Art. III, Section 3(a).

of only directly by DEI and indirectly by DE Holdings, the Exchange is proposing to expand this prohibition to cover both its direct and indirect parent companies. The Exchange believes that this amendment will protect the independence of the Exchange's self-regulatory activities.

• Correcting certain typographical errors, including conforming the spelling of ''Bylaws'' throughout the organizational documents of the Exchange and its parent companies.

9. Exchange Rule 2.3—Member Eligibility

Pursuant to Exchange Rule 2.3, in order to be eligible for membership in the Exchange, a registered broker or dealer is required to be a member of at least one other national securities association or national securities exchange. However, membership in the Exchange's affiliated national securities exchange, EDGA, is not sufficient for purposes of eligibility for Exchange membership. As a result of the Combination, the Exchange will additionally become affiliated with the BATS Exchanges. The Exchange continues to believe that it is appropriate to limit its membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the Exchange. Therefore, the Exchange proposes to amend Exchange Rule 2.3 to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than or in addition to BATS, BYX, or EDGA. The proposed amendments to Exchange Rule 2.3 are set forth in Exhibit 5I.

10. Exchange Rule 2.12—DE Route as Inbound Router

DE Route provides Members of the Exchange and EDGA with optional routing services to other market centers. Thus, in certain circumstances, DE Route provides inbound routing from EDGA to the Exchange. Exchange Rule 2.12 governs this inbound routing of orders by DE Route to the Exchange in DE Route's capacity as a facility of EDGA. Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange has implemented limitations and conditions on DE Route's affiliation with the Exchange in order to permit the Exchange to accept inbound orders that DE Route routes in its capacity as a facility of EDGA. These conditions and limitations, set forth in Exchange Rule 2.12(a), require that:

(1) The Exchange must enter into (a) a plan pursuant to Rule 17d-2 under the Act with a non-affiliated self-regulatory organization (''SRO'') to relieve the Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (b) a regulatory services contract (''Regulatory Contract'') with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique Exchange rules.

(2) The Regulatory Contract must require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively ''Exceptions'') in which DE Route is identified as a participant that has potentially violated Exchange or Commission Rules, and requires that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which DE Route is identified as a participant that has potentially violated Exchange or Commission rules.

(3) The Exchange, on behalf of its parent company, must establish and maintain procedures and internal controls reasonably designed to ensure that DE Route does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Members of the Exchange.

(4) The Exchange may furnish to DE Route only the same information and on the same terms as the Exchange makes available in the normal course of business to other users.[154]

In addition, Exchange Rule 2.12(b) states that, provided the conditions in Exchange Rule 2.12(a) are complied with, and provided further that DE Route operates as an outbound router on behalf of EDGA on the same terms and conditions as it does for the Exchange, and in accordance with the rules of EDGA, DE Route may provide inbound routing services to the Exchange from EDGA.

Similar to the role of DE Route with respect to the DE Exchanges, the Exchange understands that BATS Trading provides members of the BATS Exchanges with optional routing services to other market centers, which may include routing from a BATS Exchange to the Exchange. Following the Combination, it is expected that BATS Trading will continue to provide these routing services, which may involve routing to the Exchange. Because, following the Combination, BATS Trading will be affiliated with and potentially routing to the Exchange, the Exchange believes that the potential conflict of interest currently addressed by Exchange Rule 2.12 with respect to DE Route must also be addressed with respect to BATS Trading.

The Exchange is therefore proposing to amend and expand Exchange Rule 2.12 such that substantially the same conditions and limitations that currently apply to the inbound routing of orders by DE Route apply to the inbound routing of orders by BATS Trading. The proposed amendments to Exchange Rule 2.12, as set forth in Exhibit 5K, would provide that, in order for the Exchange to accept inbound routed orders from BATS Trading, the conditions and limitations currently set forth in Exchange Rule 2.12 with respect to DE Route must also be satisfied with respect to BATS Trading.

The Exchange believes that these proposed amendments will adequately manage the potential for a conflict of interest that could arise from BATS Trading routing orders to the Exchange. The Exchange expects to arrange that these conditions be met prior to the Closing so as to allow BATS Trading to continue routing to the Exchange following the Closing without interruption.[155]

In addition, the language in Exchange Rule 2.12(a) leading into the four conditions described above incorrectly refers to the conditions being undertaken by ''each of the Exchange and DE Route.'' However, by their terms, the conditions contained in Exchange Rule 2.12 are undertaken only by the Exchange and, in one case, the Exchange on behalf of its parent company. The Exchange therefore proposes to delete the incorrect reference to DE Route.

11. Exchange Rule 2.10—Affiliation Between Exchange and a Member

a. Affiliation With BATS Trading

Exchange Rule 2.10 provides that, subject to certain exceptions, without the prior approval of the Commission, (i) the Exchange or any entity with which the Exchange is affiliated (as defined in Rule 12b–2 under the Act), may not directly or indirectly acquire or

[154] *See* Exchange Rule 2.12(a)(2).

[155] If such conditions and limitations are not satisfied by Closing, the Exchange will not accept inbound orders from BATS Trading until such conditions and limitations are satisfied.

maintain an ownership interest in a Member of the Exchange, and (ii) a Member of the Exchange may not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange. BATS Trading is currently a Member of the Exchange. As a result of the Combination, (i) New BGM, an entity affiliated with the Exchange, will acquire and maintain an indirect ownership interest in BATS Trading, and (ii) BATS Trading will become an affiliate of the Exchange. Pursuant to Exchange Rule 2.10, the Exchange is seeking the Commission's prior approval to permit this affiliation.

The Exchange notes that the purpose of Exchange Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the Exchange or its affiliates having an ownership interest in an Exchange Member, particularly with respect to the Exchange's obligation under Section 19(g) of the Act to enforce its Members' compliance with the Act, the Commission's rules thereunder, and Exchange Rules.[156]

The Exchange believes that it should be permitted to become affiliated with BATS Trading, notwithstanding BATS Trading's Exchange membership. As described above, as a result of the proposed amendments to Exchange Rule 2.12, the Exchange intends on addressing the potential conflicts of interests arising from its expected affiliation with BATS Trading by, among other things, entering into (i) a plan pursuant to Rule 17d–2 under the Act with a non-affiliated SRO to relieve the Exchange of regulatory responsibilities for BATS Trading with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (ii) a Regulatory Contract with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique Exchange rules. The Exchange believes that any potential conflict of interest that would arise as a result of its affiliation with BATS Trading will be mitigated by the same procedures that the Exchange anticipates adopting to satisfy the proposed amendments to Exchange Rule 2.12. The Exchange therefore requests that, pursuant to Exchange Rule 2.10, the Commission approve the indirect acquisition of BATS Trading by an affiliate of the Exchange and the resulting affiliation between the Exchange and BATS Trading, so long as the requirements under Exchange Rule 2.12, as proposed to be amended, are satisfied.

[156] 15 U.S.C. 78s(g).

b. Proposed Amendments to Exchange Rule 2.10

The Exchange also proposes to make several changes to Exchange Rule 2.10 to reflect the proposed change in the corporate structure of the Exchange after Closing. Specifically, Rule 2.10 currently states that nothing in Rule 2.10 shall prohibit a Member or its affiliate from acquiring or holding an equity interest in DE Holdings that is permitted by the DE Holdings Ownership and Voting Limitations. Furthermore, Rule 2.10 currently states that nothing in Rule 2.10 shall prohibit a Member from being or becoming an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange, solely by reason of such Member or any officer, director, manager, managing member, partner or affiliate of such Member being or becoming a Director serving on the Board of Directors of DE Holdings. Because New BGM will replace DE Holdings as the ultimate parent company of the Exchange after Closing, New BGM's governing documents, as opposed to the revised DE Holdings governing documents, set forth the relevant ownership and voting limitations, and provide for Member representation on the New BGM Board. Therefore, the Exchange proposes to replace the references to DE Holdings and its governing documents in Rule 2.10 with references to New BGM and its governing documents. The proposed revisions to Exchange Rule 2.10 are set forth in Exhibit 5J.

In addition, current Exchange Rule 2.10 states that nothing in this Rule shall prohibit the Exchange from being an affiliate of DE Route or of EDGA Exchange, Inc. Because the Exchange will be affiliated with BATS Trading and the BATS Exchanges, as well as DE Route and EDGA, after Closing, the Exchange proposes to expand this provision to specifically permit the Exchange's affiliation with BATS Trading and the BATS Exchanges.

2. Statutory Basis

The Exchange believes that the Proposed Rule Change is consistent with the requirements of the Act[157] and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[158] In particular, the proposal is consistent with Section 6(b)(1) of the Act[159] in that it 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, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Rules of the Exchange. The Proposed Rule Change is designed to enable the Exchange to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. In particular, the Proposed Rule Change includes in the New BGM Charter and New BGM Bylaws, like the Current BGM Charter and Current BGM Bylaws, various provisions intended to protect and maintain the integrity of the self-regulatory functions of the Exchange upon Closing. Including such provisions in the New BGM Charter and New BGM Bylaws is important because New BGM will be the new ultimate parent company of the Exchange. For example, the New BGM Bylaws, as described above, are drafted to preserve the independence of the Exchange's self-regulatory function and ensure that the Exchange is able to obtain information it needs from the specified parties to detect and deter any fraudulent and manipulative acts in its marketplace and carry out their regulatory responsibilities under the Act. In addition, the New BGM Charter and New BGM Bylaws are drafted to make sure that the Exchange's Board of Directors receives notice of any amendment to the New BGM Charter and New BGM Bylaws so that the Exchange's Board of Directors may review and approve, and the Exchange may make any filings with the Commission necessary for the Exchange to fulfill its regulatory duties under the Act. The New BGM Charter also imposes the BGM Ownership Limitation and BGM Voting Limitation to preclude undue influence over or interference with the Exchange's self-regulatory functions and fulfillment of its regulatory duties under the Act. Moreover, to the extent any protections are being deleted in any governing documents, there are adequate substitutes proposed to be implemented. For example, the deletion of the DE Holdings Ownership and Voting Limitations are being deleted, in favor of the BGM Ownership Limitation and the BGM Voting Limitation.

Moreover, notwithstanding the Proposed Rule Change, including the change to the ownership structure of the Exchange, the Commission will continue to have regulatory authority[160]

[157] 15 U.S.C. 78s(b)(1).

[158] 15 U.S.C. 78f(b).

[159] 15 U.S.C. 78f(b)(1).

[160] *See, e.g.,* New DE Holdings LLC Agreement, Art. X, Section 10.03.

over the Exchange, as is currently the case, as well as jurisdiction over the Exchange's direct and indirect parents with respect to activities related to the Exchange.[161] As a result, the Proposed Rule Change will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities and their directors (where applicable), officers, employees and agents to the extent they are involved in the activities of the Exchange.

The Exchange also believes that the Proposed Rule Change furthers the objectives of Section 6(b)(5) of the Act.[162] The Proposed Rule Change is consistent with and facilitates a governance and regulatory structure that 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. The Proposed Rule Change provides transparency and certainty, and promotes efficiency, with respect to the governance and corporate structure of the Exchange and its direct and indirect parent companies. For example, the Exchange proposes to adopt an approach to corporate governance that is consistent with the approach taken by the BATS Exchanges and previously approved by the Commission.[163] The Exchange proposes to revise the Exchange Certificate of Incorporation and Exchange Bylaws to make them substantively consistent with the BATS Exchanges' existing governing documents. In addition, the Exchange proposes several amendments to the Exchange Bylaws that reflect changes that the BATS Exchanges propose to make to their Bylaws as a result of the Combination. The Exchange believes that these additional changes, among other things, will remove administrative impediments to, and reduce the potential for conflicts of interest in, the governance of the Exchange. By simplifying and unifying the governance structure of the four exchanges in this way, the Proposed Rule Change promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

In addition, the Exchange expects that the Combination will facilitate efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients, thus removing impediments to, and perfecting the mechanism of a free and open market and a national market system. The Combination will benefit investors, the market as a whole, and shareholders by, among other things, enhancing competition among securities venues and reducing costs. In particular, the Combination will result in a third major exchange operator which will have more streamlined and efficient operations, including the transition of the DE Exchanges to a technology platform in common with the BATS Exchanges, thereby intensifying competition for transaction order flow with other exchange and non-exchange trading centers, as well as potentially in other areas where the two major exchange operators lead, such as proprietary market data products and listings. This enhanced level of competition among trading centers will benefit investors through new or more competitive product offerings and, ultimately, lower costs.

Furthermore, the Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the change in ownership; the Exchange will operate in essentially the same manner upon Closing as it operates today. Therefore, the Exchange believes that it will continue to satisfy the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. The changes the Exchange is proposing to Exchange Rules 2.3 are designed to extend the membership eligibility criteria in a way that is consistent with the current rule, taking into account the prospective affiliation with the BATS Exchanges. The proposed changes to Exchange Rules 2.12 and 2.10 are designed to address the potential for conflicts of interest due to the prospective affiliation between the Exchange and BATS Trading. The Exchange believes that these proposed changes to its Rules are consistent with the requirements of the Act and the rules and regulations thereunder. The Exchange believes that these rule changes promote the maintenance of a fair and orderly market, the protection of investors and the public interest, and is in the best interests of the Exchange and its Members as it would continue to allow routing of orders between four affiliated exchanges.

Finally, with the Proposed Rule Change, the Exchange emphasizes that it believes that the Proposed Rule Change is not inconsistent with the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Order, entered by the Commission on October 13, 2011.[164]

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

The Exchange does not believe that the Proposed Rule Change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that the Proposed Rule Change will enhance competition among intermarket trading venues, as the Exchange believes that the Combination will produce a stronger and more efficient entity that will have an improved ability to provide innovative products and services. Moreover, the Exchange will continue to conduct regulated activities (including operating and regulating its market and Members) of the type it currently conducts, but will be able to do so in a more efficient manner to the benefit of its Members. Furthermore, the Exchange's conclusion that the Proposed Rule Change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act[165] is consistent with the Commission's prior conclusions about similar combinations involving multiple exchanges in a single corporate family.[166]

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

The Exchange has not solicited or received written comments on the Proposed Rule Change.

[161] *See, e.g.,* New BGM Bylaws, Section 14.05; BGM Holdings Bylaws, Section 7.3.

[162] 15 U.S.C. 78f(b)(5).

[163] *See* Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008); Securities Exchange Act Release No. 62716 (Aug. 13, 2010), 75 FR 51295 (Aug. 19, 2010).

[164] *See* Securities Exchange Act Release No. 65556 (Oct. 13, 2011).

[165] 15 U.S.C. 78f(b)(8).

[166] *See, e.g.,* Securities Exchange Act Release No. 66071 (Dec. 29, 2011), 77 FR 521 (Jan. 05, 2012) (SR–CBOE–2011–107 and SR–NSX–2011–14); Securities Exchange Act Release No. 58324 (Aug. 7, 2008), 73 FR 46936 (Aug. 12, 2008) (SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01); Securities Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (Mar. 06, 2006) (SR–NYSE–2005–77).

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate 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 or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2013–43 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–EDGX–2013–43. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing 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–EDGX–2013–43 and should be submitted on or before January 7, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[167]

Kevin M. O'Neill,

Deputy Secretary.

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[167] 17 CFR 200.30–3(a)(12).