

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-58324; File Nos. SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01)

August 7, 2008

Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Boston Stock Exchange Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Amending the Certificate of Incorporation of Boston Stock Exchange, Incorporated; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Relating to the Acquisition of the Boston Stock Exchange, Incorporated by The NASDAQ OMX Group, Inc., and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1; Notice of Filing of Amendment No. 1 to a Proposed Rule Change Relating to a Proposal to Transfer Boston Stock Exchange, Incorporated's Ownership Interest in Boston Options Exchange Group, LLC and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1; Notice of Filing of Amendment No. 1 to a Proposed Rule Change by the Boston Stock Exchange Clearing Corporation Relating to Amendment of its Articles of Organization and By-Laws in Connection with the Planned Acquisition by The NASDAQ OMX Group, Inc., and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

I. Introduction

On April 21, 2008, the Boston Stock Exchange, Inc. ("BSE") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder² to: (1) amend and restate the BSE Certificate in its entirety to reflect the planned acquisition of BSE by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), the parent corporation of The NASDAQ Stock Market LLC ("Nasdaq"); (2) replace the BSE Constitution in its entirety with proposed new BSE By-Laws; (3) adopt a written operating agreement for its subsidiary, Boston Options Exchange Regulation, LLC ("BOXR"), and amend the BOXR By-Laws; (4) obtain approval for a change of control of BSX Group, LLC ("BSX"), which would operate, upon Commission approval of certain proposed rule changes, BSE's equities trading facility, and make related

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

amendments to the Operating Agreement of BSX; (5) adopt two rules; and (6) obtain Commission approval for the affiliation between BSE and certain broker-dealer subsidiaries of NASDAQ OMX (collectively, the “BSE Governance Proposal”). The BSE Governance Proposal was published for comment in the Federal Register on May 8, 2008.³ The Commission received no comments on the BSE Governance Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BSE Governance Proposal.⁴ This order provides notice of and requests comment on Amendment No. 1 to the BSE Governance Proposal and approves the BSE Governance Proposal, as modified by Amendment No. 1, on an accelerated basis.

On April 23, 2008, BSE filed with the Commission a proposed rule change (“BOX Transfer Proposal”) to transfer its ownership interest in the Boston Options Exchange Group, LLC (“BOX”), the operator of BSE’s Boston Options Exchange facility (“BOX Market”), to MX US 2, Inc. (“MX US”), a wholly-owned U.S. subsidiary of the Montréal Exchange Inc. (“MX”), and to amend the BOX LLC Agreement. The BOX Transfer Proposal was published for comment in the Federal Register on May 8, 2008.⁵ The Commission received no comments on the BOX Transfer Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BOX Transfer Proposal.⁶ This order provides notice of and requests comment on Amendment No. 1 to

³ See Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (SR-BSE-2008-23) (“BSE Governance Proposal Notice”).

⁴ In Amendment No. 1 to the BSE Governance Proposal, BSE filed NASDAQ OMX’s Certificate and By-Laws, as proposed to be amended in connection with the acquisition of BSE by NASDAQ OMX, and proposed to make a non-substantive correction in the purpose section of the original filing. See infra note 104 and accompanying text.

⁵ See Securities Exchange Act Release No. 57762 (May 1, 2008), 73 FR 26170 (SR-BSE-2008-25) (“BOX Transfer Proposal Notice”).

⁶ In Amendment No. 1 to the BOX Transfer Proposal, BSE proposes to clarify Section 8.4(g) of the BOX LLC Agreement.

the BOX Transfer Proposal and approves the BOX Transfer Proposal, as modified by Amendment No. 1, on an accelerated basis.

On April 23, 2008, BSE filed with the Commission a proposed rule change (“BSE Interim Certificate Proposal”) to amend the BSE Certificate to permit BSE to make distributions to BSE membership owners in connection with the transfer of its ownership interest in BOX. The BSE Interim Certificate Proposal was published for comment in the Federal Register on May 7, 2008.⁷ The Commission received no comment letters regarding the BSE Interim Certificate Proposal. On July 28, 2008, BSE filed Amendment No. 1 to the BSE Interim Certificate Proposal.⁸ This order approves the BSE Interim Certificate Proposal as modified by Amendment No. 1.

On April 24, 2008, the Boston Stock Exchange Clearing Corporation (“BSECC”) filed with the Commission a proposed rule change (“BSECC Governance Proposal”). The BSECC Governance Proposal was published for comment in the Federal Register on May 13, 2008.⁹ The Commission received no comments on the BSECC Governance Proposal. On July 28, 2008, BSECC filed Amendment No. 1 to the BSECC Governance Proposal.¹⁰ This order provides notice of and requests comment on Amendment No. 1 to the BSECC Governance Proposal and

⁷ See Securities Exchange Act Release No. 57760 (May 1, 2008), 73 FR 25809 (SR-BSE-2008-02) (“BSE Interim Certificate Proposal Notice”).

⁸ In Amendment No. 1 to the BSE Interim Certificate Proposal, BSE proposes to correct typographical errors in the proposed amendments to the current BSE Certificate. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

⁹ See Securities Exchange Act Release No. 57782 (May 6, 2008), 73 FR 27583 (SR-BSECC-2008-01) (“BSECC Governance Proposal Notice”).

¹⁰ In Amendment No. 1 to the BSECC Governance Proposal, BSECC filed NASDAQ OMX’s Certificate and NASDAQ OMX’s By-Laws, as proposed to be amended in connection with the acquisition of BSE by NASDAQ OMX. See infra note 258 and accompanying text.

approves the BSECC Governance Proposal, as modified by Amendment No. 1, on an accelerated basis.

II. Discussion and Commission Findings

After careful review, the Commission finds that the BSE Interim Certificate Proposal, the BSE Governance Proposal, and the BOX Ownership Transfer Proposal are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ Specifically, the Commission finds that these proposed rule changes are consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be 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, and 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 Commission also finds that these proposed rule changes are consistent with Section 6(b)(1) of the Act,¹³ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and 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; Section 6(b)(3) of the Act,¹⁴ which requires, in part, that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of

¹¹ In approving these proposed rule changes, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78f(b)(1).

¹⁴ 15 U.S.C. 78f(b)(3).

its affairs; and Section 6(b)(7) of the Act,¹⁵ which requires, in part, that the rules of an exchange provide a fair procedure for disciplining members.

The Commission also finds that the BSECC Governance Proposal is consistent with Section 17A(b)(3)(C) of the Act,¹⁶ which requires, in part, that the rules of a registered clearing agency assure the fair representation of its shareholders (or members) and participants in the selection of its board of directors and administration of its affairs.

The discussion below does not review every detail of each of the proposed rule changes, but focuses on the most significant rules and policy issues considered by the Commission in reviewing the proposals.

NASDAQ OMX, the parent corporation of Nasdaq, and BSE have entered into an agreement pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE (“BSE Acquisition”).¹⁷ Following the BSE Acquisition, BSE would be a wholly-owned subsidiary of NASDAQ OMX. The BSE Acquisition would have the effect of: (1) converting BSE, a registered national securities exchange, from a Delaware, non-stock corporation into a Delaware stock corporation; and (2) demutualizing BSE by separating equity ownership in BSE from trading privileges on BSE. BSE members would receive cash as consideration for their ownership interests in BSE and would not retain any ownership interest in BSE or its affiliates. NASDAQ OMX plans that BSE would operate as a separate self-regulatory organization (“SRO”) with rules, memberships, and listings that are separate and distinct from those of Nasdaq.¹⁸

¹⁵ 15 U.S.C. 78f(b)(7).

¹⁶ 15 U.S.C. 78q-1(b)(3)(C).

¹⁷ See BSE Governance Proposal Notice, supra note 3, 73 FR 26159.

¹⁸ See Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182, at 26183

BSE has four affiliates: BSX, BOX, BOXR, and BSECC. BSE owns 53.21% of BSX, which operated the Boston Equities Exchange (“BeX”) until BeX ceased operations in September 2007.¹⁹ The remaining 46.79% of BSX is owned by Citigroup Financial Strategies Inc., Credit Suisse First Boston Next Fund Inc., LB 1 Group, Inc., Fidelity Global Brokerage Group, Inc., and Merrill Lynch L.P. Holdings Inc. Following the BSE Acquisition, NASDAQ OMX indirectly would own, through its ownership of BSE, the 53.21% of BSX that BSE would continue to own. In addition, NASDAQ OMX would acquire the 46.79% interest in BSX that is not presently owned by BSE. Consequently, BSX would become a wholly-owned subsidiary of NASDAQ OMX.²⁰

NASDAQ OMX would not acquire BSE’s interest in BOX, the transfer of which to a third party is a condition to the closing of the BSE Acquisition.²¹ BSE proposes to transfer its 21.87% ownership interest in BOX to MX US, a wholly-owned subsidiary of MX.²² BSE intends to distribute the proceeds from the BOX transfer to its member owners by redeeming a portion of each BSE member ownership for a pro rata share of the net proceeds.²³ Although BSE no longer would hold an ownership interest in BOX, as discussed in greater detail below,²⁴ the BOX Market would remain a facility of BSE and, therefore, BSE would continue to have self-regulatory obligations with respect to the BOX Market.²⁵

(SR-NASDAQ-2008-035) (“NASDAQ OMX By-Laws Proposal Notice”).

¹⁹ See infra note 222.

²⁰ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159. See also infra notes 222-244 and accompanying text.

²¹ See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

²² See BOX Transfer Proposal Notice, supra note 5, 73 FR at 26170.

²³ See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

²⁴ See infra notes 124-136 and accompanying text.

²⁵ 15 U.S.C. 78c(a)(2). See also BOX Transfer Proposal Notice, supra note 5, 73 FR at

Finally, BOXR and BSECC are wholly-owned subsidiaries of BSE and, therefore, following the BSE Acquisition would become wholly-owned, indirect subsidiaries of NASDAQ OMX.²⁶

Following the BSE Acquisition, Nasdaq OMX would own five SROs: Nasdaq, BSE, BSECC, Philadelphia Stock Exchange, Inc. (“Phlx”) and Stock Clearing Corporation of Philadelphia (“SCCP”).²⁷ As discussed below, the Commission believes that the ownership of BSE and BSECC by the same public holding company that owns Nasdaq, Phlx, and SCCP would not impose any burden on competition not necessary or appropriate in furtherance of the Act’s purposes.²⁸ The Commission previously has approved proposals in which a holding company owns multiple SROs.²⁹ However, the BSE Acquisition is the first instance in which the Commission is approving the ownership by one holding company of three exchanges and two clearing agencies.³⁰ The Commission’s experience to date with the issues raised by the

26171.

²⁶ See BSECC Governance Proposal Notice, supra note 9, 73 FR at 27583.

²⁷ See Securities Exchange Act Release No. 57703 (April 23, 2008), 73 FR 23293 (April 29, 2008) (SR-Phlx-2008-31) (notice of proposed rule change related to NASDAQ OMX’s acquisition of Phlx (“Phlx Acquisition”)). See also Securities Exchange Act Release No. 57818 (May 14, 2008), 73 FR 29171 (May 20, 2008) (SR-SCCP-2008-01) (notice of proposed rule change to amend and restate the Articles of Incorporation of the Stock Clearing Corporation of Philadelphia (“SCCP”) in connection with the Phlx Acquisition). See also Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (order approving SR-Phlx-2008-31) and 58180 (July 17, 2008), 73 FR 42890 (July 23, 2008) (order approving SR-SCCP-2008-01).

²⁸ 15 U.S.C. 78f(b)(8) and 15 U.S.C. 78q-1(b)(3)(I).

²⁹ See, e.g., Securities Exchange Act Release Nos. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (approving proposed rule change relating to the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58179, supra note 27.

³⁰ The Depository Trust and Clearing Corporation (“DTCC”) is a holding company that at one point owned five registered clearing agencies: the National Securities Clearing Corporation (“NSCC”), the Depository Trust Company (“DTC”), the Government

ownership by a holding company of one or more SROs has not presented any concerns that have not been addressed, for example, by Commission-approved measures at the holding company level that are designed to protect the independence of each SRO.³¹

The Commission believes that the current market for cash equity trading venues is highly competitive. Existing exchanges face significant competition from other exchanges and from non-exchange entities such as alternative trading systems that trade the same or similar financial instruments.³² New entrants to the market do not face significant barriers to entry. In this regard, the Chicago Board Options Exchange, Incorporated and the International Securities Exchange, LLC a few years ago commenced trading of cash equity securities.³³ In addition,

Securities Clearing Corporation (“GSCC”), the MBS Clearing Corporation (“MBSCC”), and the Emerging Markets Clearing Corporation (“EMCC”). See Securities Exchange Act Release Nos. 41786 (August 24, 1999), 64 FR 47882 (September 1, 1999) (SR-DTC-99-17); 41800 (August 27, 1999), 64 FR 48694 (September 7, 1999) (SR-NSCC-99-10); 44987 (October 25, 2001), 66 FR 55218 (November 1, 2001) (SR-EMCC-2001-03); 44988 (October 25, 2001), 66 FR 55222 (November 1, 2001) (SR-MBSCC-2001-01); and 44989 (October 25, 2001), 66 FR 55220 (November 1, 2001) (SR-GSCC-2001-11). These clearing agencies provided clearance and settlement services for different instruments or provided different clearance and settlement services for the same instruments. The GSCC and the MBSCC have since merged to form the Fixed Income Clearing Corporation (“FICC”). See Securities Exchange Act Release No. 47015 (December 17, 2002), 67 FR 78531 (December 24, 2002) (SR-GSCC-2002-09 and SR-MBSCC-2002-01). The EMCC no longer operates as a clearing agency.

³¹ See infra notes 38-47, 258-261 and accompanying text for a discussion of proposals by BSE and BSECC to adopt NASDAQ OMX’s By-Laws as part of their rules. See also Securities Exchange Act Release No. 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (order approving SR-NASDAQ-2008-035) (“NASDAQ OMX By-Laws Approval Order”).

³² See, e.g., Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008), in which the Commission recognized that “[n]ational securities exchanges registered under Section 6(a) of the Exchange Act face increased competitive pressures from entities that trade the same or similar financial instruments”

³³ See Securities Exchange Act Release Nos. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving the establishment of CBOE Stock Exchange, LLC); 55392 (March 2, 2007), 72 FR 10572 (March 8, 2007) (order approving trading rules for non-option securities trading on CBOE Stock Exchange, LLC); 54528 (September 28,

other entities have recently applied for exchange registration, which provides evidence that they have determined there are benefits in starting a new exchange to compete in the marketplace.³⁴ In addition, since BeX ceased operating in September 2007, BSE has zero market share in cash equity trading, and prior to September 2007, BSE had a very small market share. Therefore, the BSE Acquisition would not change the number of active exchanges or the distribution of market share across exchanges. Accordingly, the Commission finds that the BSE's proposed rule changes are consistent with Section 6(b)(8), which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

With regard to NASDAQ OMX's ownership of two registered clearing agencies following the BSE Acquisition, the Commission does not believe the acquisition of BSECC and SCCP by NASDAQ OMX would reduce competition with respect to the clearance and settlement of securities transactions. The Commission notes that NSCC currently provides clearance and settlement services and a central counterparty guarantee for virtually all trades on the New York Stock Exchange LLC, Nasdaq, the American Stock Exchange LLC and for all regional exchanges, electronic communications networks and alternative trading systems in the U.S.³⁵ In September 2007, BSECC ceased processing trades and currently provides only limited account maintenance services to its participants. SCCP continues to forward trades to NSCC for

2006), 71 FR 58650 (October 4, 2006) (order approving rules governing ISE's electronic trading system for equities).

³⁴ See Securities Exchange Act Release No. 57322 (February 13, 2008), 73 FR 9370 (February 20, 2008) (File No. 10-182) (notice of application and Amendment No. 1 thereto by BATS Exchange, Inc. for registration as a national securities exchange).

³⁵ See Annual Report for the Depository Trust and Clearing Corporation for 2007, page 14. NSCC is a subsidiary of the DTCC, as are the FICC and the DTC.

clearance and settlement.³⁶ The Commission will continue to evaluate the competitive environment should the operations of either BSECC or SCCP expand, taking into account the maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents.³⁷ For these reasons, the Commission finds that the BSECC's proposed rule change is consistent with Section 17A(b)(3)(I), which requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

Finally, the Commission will continue to monitor holding companies' ownership of multiple SROs for compliance with the Act, the rules and regulations thereunder, as well as the SRO's own rules.

A. BSE

1. Relationship between NASDAQ OMX and BSE; Jurisdiction over NASDAQ OMX

After the BSE Acquisition, BSE would become a subsidiary of NASDAQ OMX.

Although NASDAQ OMX is not itself an SRO, its activities with respect to the operation of BSE must be consistent with, and must not interfere with, the self-regulatory obligations of BSE. NASDAQ OMX's By-Laws make applicable to all of NASDAQ OMX's SRO subsidiaries, including BSE (after the BSE Acquisition), certain provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary

³⁶ In recent years, both BSECC and SCCP have forwarded all trades to NSCC for clearance and settlement.

³⁷ See 15 U.S.C. 78q-1(a)(2)(A).

and the Commission to fulfill their regulatory and oversight obligations under the Act.³⁸

The By-Laws of NASDAQ OMX specify that NASDAQ OMX and its officers, directors, employees, and agents irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each self-regulatory subsidiary of NASDAQ OMX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any self-regulatory subsidiary.³⁹ Further, NASDAQ OMX agreed to provide the Commission with access to its books and records.⁴⁰ NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function of BSE and not to use such information for any non-regulatory purpose.⁴¹ In addition, the NASDAQ OMX Board, as well as its officers, employees, and agents are required to give due regard to the preservation of the independence of BSE's self-

³⁸ Provisions of NASDAQ OMX's Certificate and By-Laws are rules of BSE and BSECC because they are stated policies, practices, or interpretations of BSE and BSECC, pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. Accordingly, BSE and BSECC filed them with the Commission. See Amendment No. 1 to the BSE Governance Proposal, supra note 4, and Amendment No. 1 to the BSECC Governance Proposal, supra note 10 and infra note 258 and accompanying text.

³⁹ See proposed Section 12.3, NASDAQ OMX By-Laws.

⁴⁰ See proposed Section 12.1(c), NASDAQ OMX By-Laws. To the extent that they relate to the activities of BSE, all books, records, premises, officers, directors, and employees of NASDAQ OMX would be deemed to be those of the BSE. See id.

⁴¹ See proposed Section 12.1(b), NASDAQ OMX By-Laws. This requirement to keep confidential non-public information relating to the self-regulatory function is designed to prevent attempts to limit the Commission's ability to access and examine such information or limit the ability of directors, officers, or employees of NASDAQ OMX from disclosing such information to the Commission. See id. Other holding companies with SRO subsidiaries have undertaken similar commitments. See, e.g., Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, at 71983 (December 19, 2007) (SR-ISE-2007-101) (order approving the acquisition of International Securities Exchange, LLC's parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG).

regulatory function.⁴² Similarly, the NASDAQ OMX Board, when evaluating any issue, would be required to take into account the potential impact on the integrity, continuity, and stability of its SRO subsidiaries.⁴³ Finally, the NASDAQ OMX By-Laws require that any changes to the NASDAQ OMX Certificate and By-Laws be submitted to the Board of Directors of each of its SRO subsidiaries, including BSE, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the BSE Acquisition, are designed to facilitate the BSE's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,⁴⁴ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and 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.

Under Section 20(a) of the Act,⁴⁵ any person with a controlling interest in NASDAQ OMX would be jointly and severally liable with and to the same extent that NASDAQ OMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In

⁴² See Section 12.1(a), NASDAQ OMX By-Laws.

⁴³ See proposed Section 12.7, NASDAQ OMX By-Laws.

⁴⁴ 15 U.S.C. 78f(b)(1).

⁴⁵ 15 U.S.C. 78t(a).

addition, Section 20(e) of the Act⁴⁶ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act⁴⁷ authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

2. BSE Certificate

In the BSE Governance Proposal, BSE proposes to amend and restate the BSE Certificate in its entirety. The restated BSE Certificate would provide for the issuance of 1,000 shares of common stock (“BSE Common Stock”), all of which would be held by NASDAQ OMX.⁴⁸ The restated BSE Certificate would further provide that NASDAQ OMX may not transfer or assign any shares of BSE Common Stock, in whole or in part, to any entity, unless such transfer or assignment is filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder.⁴⁹ In addition, the restated BSE Certificate would contain provisions relating to the BSE board of directors (“BSE Board”) including that the total number of directors (“BSE Directors”) constituting the BSE Board would be fixed from time to time by NASDAQ OMX, as the sole stockholder, and would be elected by NASDAQ OMX to hold office until their respective successors have been duly elected and qualified.⁵⁰ Of particular importance are the BSE Board composition requirements in the BSE By-Laws relating to

⁴⁶ 15 U.S.C. 78t(e).

⁴⁷ 15 U.S.C. 78u-3.

⁴⁸ See Article Fourth, restated BSE Certificate.

⁴⁹ Id.

⁵⁰ See Article Fifth, restated BSE Certificate.

independence and fair representation of members.⁵¹ Finally, the restated BSE Certificate would specifically provide that BSE's business would include actions that support its regulatory responsibilities under the Act.⁵²

The Commission finds that the BSE Certificate, as proposed to be amended and restated, is consistent with the Act, and, in particular, with Sections 6(b)(1) and 6(b)(3) of the Act. The Commission believes that the restated BSE Certificate is designed to allow BSE to exercise those powers necessary to carry out the purposes of the Act and ensure compliance by its members with the Act and BSE rules. The Commission further believes that the restriction on the transfer or assignment of any shares of BSE Common Stock without Commission approval would minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, BSE, or BOXR to carry out their regulatory responsibilities under the Act.

3. Proposed New BSE By-Laws

In the BSE Governance Proposal, the BSE proposes to replace its Constitution with new BSE By-Laws. The new BSE By-Laws reflect NASDAQ OMX's expectation that BSE would be operated with governance, regulatory, and market structures similar to those of Nasdaq. Key provisions of these new BSE By-Laws are discussed below.

The property, business, and affairs of BSE would be managed under the direction of the BSE Board.⁵³ The exact number of BSE Directors would be determined by NASDAQ OMX, as the sole stockholder, but in no event would the BSE Board have fewer than ten directors.⁵⁴

⁵¹ See infra notes 53-84 and accompanying text.

⁵² See Article Third, restated BSE Certificate.

⁵³ See Article IV, BSE By-Laws.

⁵⁴ See Section 4.2, BSE By-Laws. In addition, no decrease in the number of BSE Directors would shorten the term of any incumbent BSE Director. See Article Fifth, restated BSE Certificate.

Moreover, the number of Non-Industry Directors,⁵⁵ including at least three Public Directors⁵⁶ and at least one BSE Director representative of issuers and investors,⁵⁷ would have to equal or exceed the sum of the number of Industry Directors⁵⁸ and Member Representative Directors.⁵⁹ Further, at least 20% of the BSE Directors would have to be Member

⁵⁵ “Non-Industry Director” is a BSE Director (excluding Staff Directors) who is: (i) a Public Director; (ii) an officer or employee of an issuer of securities listed on BSE; or (iii) any other individual who would not be an Industry Director. See Article I(bb), BSE By-Laws.

⁵⁶ “Public Director” is a BSE Director who has no material business relationship with a broker or a dealer, BSE or its affiliates, or FINRA. See Article I(gg), BSE By-Laws.

⁵⁷ See Section 4.3(a), BSE By-Laws. The BSE Director representative of issuers and investors would be nominated by the Nominating and Governance Committee and elected by NASDAQ OMX as the sole stockholder. See Sections 4.4(a) and 4.14(b), BSE By-Laws.

⁵⁸ “Industry Director” is a person 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 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Industry Director or 20% or more of the gross revenues received by the Industry Director’s firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director’s, officer’s, or employee’s professional capacity and constitute 20% or more of the professional revenues received by the Industry Director or 20% or more of the gross revenues received by the Industry Director’s firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to BSE or any affiliate thereof or to FINRA or has had any such relationship or provided any such services at any time within the prior three years. See Article I(t), BSE By-Laws.

⁵⁹ See Section 4.3(a), BSE By-Laws. “Member Representative Director” is a BSE Director who has been elected by NASDAQ OMX as the sole stockholder after having been nominated by the Member Nominating Committee or voted upon by BSE members pursuant to the BSE By-Laws (or elected by the stockholders without such nomination or voting in the case of the initial Member Representative Directors elected pursuant to Section 4.3(b) of the BSE By-Laws). See Article I(x), BSE By-Laws.

Representative Directors and, as is currently the case, one Industry Director would have to be selected as a representative of a firm or organization that is registered with BSE for the purposes of participating in options trading on the BOX Market (“BOX Participant Director”).⁶⁰ A BSE Director could not be subject to a statutory disqualification.⁶¹ The new BSE By-Laws also permit up to two officers of BSE, who would otherwise be considered Industry Directors, to be designated as Staff Directors,⁶² and thereby be excluded from the definition of Industry Director.⁶³

The initial BSE Board would be selected by NASDAQ OMX, as the sole stockholder, immediately following the BSE Acquisition. NASDAQ OMX would hold a special meeting (or sign a consent in lieu thereof) for the purpose of electing the BSE Board. The initial BSE Board would satisfy the compositional requirements in the BSE By-Laws.⁶⁴ Specifically, the initial BSE Board would consist of at least three Public Directors, one or two Staff Directors, at least two Member Representative Directors,⁶⁵ an Industry Director representing BOX Participants,⁶⁶ at

⁶⁰ See Section 4.4, BSE By-Laws, and Section 14, BOXR By-Laws.

⁶¹ See Section 4.3(a), BSE By-Laws.

⁶² “Staff Director” is a BSE Director, selected at the sole discretion of the BSE Board, who is an officer of BSE. See Article I(g), BSE By-Laws.

⁶³ The exclusion of Staff Directors from the definition of Industry Director is consistent with provisions previously approved by the Commission. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving application of Nasdaq for registration as a national securities exchange) (“Nasdaq Exchange Approval Order”). See also Securities Exchange Act Release No. 44280 (May 8, 2001), 66 FR 26892 (May 15, 2001) (order approving amendment to the National Association of Securities Dealers (“NASD”) By-Laws to allow for the treatment of Staff Governors as “neutral” for purposes of Industry/Non-Industry balancing on the NASD Board of Governors).

⁶⁴ See Section 4.3(b), BSE By-Laws.

⁶⁵ The initial Member Representative Directors would be officers, directors, or employees of BSE members. See BSE Governance Proposal Notice, *supra* note 3, at 73 FR 26162.

⁶⁶ “BOX Participant” is a firm or organization that is registered with BOX for purposes of

least one Non-Industry Director representative of issuers and investors, and such additional Industry and Non-Industry Directors as NASDAQ OMX, as the sole stockholder, deems appropriate, consistent with the compositional requirements of the BSE By-Laws.⁶⁷ As soon as practicable after election of the initial BSE Board, BSE would hold its annual meeting for the purpose of electing directors in accordance with the procedures set forth in the BSE By-Laws.⁶⁸ For subsequent boards, BSE Directors, other than the Member Representative Directors and the BOX Participant Director,⁶⁹ would be nominated by a Nominating Committee appointed by the BSE Board⁷⁰ and then elected by NASDAQ OMX as sole stockholder.⁷¹

The BSE Board also would appoint a Member Nominating Committee composed of no fewer than three and no more than six members.⁷² All members of the Member Nominating Committee would be associated persons of a current BSE member. The BSE Board would

participating in options trading on the BOX Market as an order flow provider or market maker. See Section 1.1, 6th BOX LLC Agreement. See also BOX Rules, Chapter II.

⁶⁷ See Section 4.3(b), BSE By-Laws. See also BSE Governance Proposal Notice, supra note 3, 73 FR at 26162.

⁶⁸ Id. Specifically, in accordance with Section 14.4(b) of the BSE By-Laws, the initial BSE Board selected by NASDAQ OMX would appoint a Nominating Committee and Member Nominating Committee, and such committees would nominate candidates for election pursuant to the procedures set forth in Section 4.4 of the BSE By-Laws, which process is described below. Telephone conversation between John Yetter, Vice President and Deputy General Counsel, Nasdaq, and Nancy Burke-Sanow, Assistant Director, and Jennifer Dodd, Special Counsel, Division of Trading and Markets, Commission, on June 11, 2008. In Amendment No. 1 to the BSE Governance Proposal, BSE states that the initial BSE Board will populate the Committees of the BSE Board and BSE's standing committees in accordance with the compositional requirements of Sections 4.13 and 4.14 of the BSE By-Laws. See Amendment No. 1 to the BSE Governance Proposal, supra note 4. The Commission notes that this would include the initial Nominating Committee and Member Nominating Committee. See Section 4.14(b), BSE By-Laws.

⁶⁹ See infra notes 207-216 and accompanying text for a description of the nomination and election process for the BOX Participant Director who would serve on the BSE Board.

⁷⁰ See Section 4.14(b), BSE By-Laws.

⁷¹ See Section 4.4(a), BSE By-Laws.

⁷² See Section 4.14, BSE By-Laws.

appoint such individuals after appropriate consultation with representatives of BSE members.

The Member Nominating Committee would nominate candidates for the Member Representative Director positions to be filled. The candidates nominated by the Member Nominating Committee would be included on a formal list of candidates (“List of Candidates”).

BSE members may nominate additional candidates for inclusion on the List of Candidates by submitting, within the prescribed timeframe that is based on the preceding year’s voting date (“Voting Date”),⁷³ a timely written petition executed by the authorized representatives of 10% or more of all BSE members. If there is only one candidate for each

⁷³ The Voting Date is a date selected by the BSE Board for BSE members to vote with respect to Member Representative Directors in the event there is more than one candidate for a Member Representative Director position (“Contested Vote”). As described below, the BSE Board would select a Voting Date each year. However, a vote would be conducted on the Voting Date only in the event of Contested Vote. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26161, n.11.

In Amendment No. 1 to the BSE Governance Proposal, BSE states that: “In order to make the intent of this definition clearer, immediately following the closing of the [BSE Acquisition], [BSE] will propose to the newly constituted Board of the Exchange an amendment to the definition to read as follows: “‘Voting Date’ means the date selected by the Board on an annual basis, on which [BSE members] may vote with respect to Member Representative Directors in the event of a Contested Vote.” Following approval by the [BSE] Board, [BSE] will immediately file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE’s] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE’s] members must approve amendments to the [BSE] Constitution. The [BSE] members voted, on December 4, 2007, to approve the [BSE] By-Laws as submitted in this filing and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new By-Laws, the [BSE] Board will have authority to approve By-Law amendments.” See Amendment No. 1 to the BSE Governance Proposal, supra note 4.

Also, in the case of the first annual meeting held pursuant to the new BSE By-Laws, a nomination for the Member Representative Director positions would be considered timely if delivered not earlier than the close of business on the later of the 120th day prior to the first Voting Date and not later than the close of business on the 90th day prior to the first Voting Date, or the 10th day following the day on which public announcement of such Voting Date is first made. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26161, n.12. See also Section 4.4(d), BSE By-Laws.

Member Representative Director seat by the date on which a BSE member may no longer submit a timely nomination, the Member Representative Directors would be elected by NASDAQ OMX directly from the List of Candidates nominated by the Member Nominating Committee. If the number of candidates on the List of Candidates exceeds the number of Member Representative Director positions to be filled, there would be a Contested Vote,⁷⁴ in which case each BSE member would have the right to cast one vote for each Member Representative Director position to be filled.⁷⁵ The persons on the List of Candidates who receive the most votes would be submitted to NASDAQ OMX for election,⁷⁶ and NASDAQ OMX would elect those candidates.⁷⁷

The Commission finds that the proposed changes regarding the composition of the BSE Board are consistent with the Act, including Section 6(b)(1) of the Act,⁷⁸ which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act

⁷⁴ See Section 1(k), BSE By-Laws.

⁷⁵ In Amendment No. 1 to the BSE Governance Proposal, BSE states that: “In order to limit the influence that a single affiliated group of members might exercise over [BSE], immediately following the closing of the [BSE Acquisition], [BSE] will propose to the newly constituted [BSE Board] an amendment to stipulate that no [BSE member], either alone or together with its affiliates, may account for more than 20% of the votes cast for a candidate, and any votes cast by such [BSE member], either alone or together with its affiliates, in excess of such 20% limitation shall be disregarded. Following approval by the [BSE] Board, [BSE] will immediately file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE’s] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE’s] members must approve amendments to the Constitution. The members voted, on December 4, 2007, to approve the By-Laws as submitted in this filing and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new [BSE] By-Laws, the [BSE] Board will have authority to approve [BSE] By-Law amendments.” See Amendment No. 1 to the BSE Governance Proposal, supra note 4.

⁷⁶ See Section 4.4(f), BSE By-Laws.

⁷⁷ See Section 4.4(b), BSE By-Laws.

⁷⁸ 15 U.S.C. 78f(b)(1).

and comply with the requirements of the Act. The Commission previously has stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.⁷⁹ Further, public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the BSE Board to address issues in a non-discriminatory fashion and foster the integrity of BSE. The Commission also finds that the composition of the BSE Board satisfies Section 6(b)(3) of the Act,⁸⁰ which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange or with a broker or dealer.

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. The Commission finds that the requirement under BSE By-Laws that at least 20% of the BSE Directors represent members,⁸¹ and the process for selecting Member Representative Directors, are designed to ensure the fair representation of BSE members on the BSE Board. The Commission believes that the method for selecting Member Representative Directors on the BSE Board allows members to have a voice in BSE's use of its self-regulatory authority.⁸² In

⁷⁹ See Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). See also Securities Exchange Act Release Nos. 53382, supra note 29, 71 FR at 11261 n.121 and accompanying text; 53128, supra note 63, 71 FR at 3553, n.54 and accompanying text; and 44442 (June 18, 2001), 66 FR 33733, n.13 and accompanying text, (June 25, 2001) (SR-PCX-01-03).

⁸⁰ 15 U.S.C. 78f(b)(3).

⁸¹ See Section 4.3(a), BSE By-Laws.

⁸² In addition, the BSE By-Laws provide that one BSE Director would represent BOX Participants. See infra notes 207-216 and accompanying text for a description of the

particular, the Commission notes that the Member Nominating Committee is composed solely of persons associated with BSE members and is selected after consultation with representatives of BSE members. In addition, the BSE By-Laws include a process by which members can directly petition and vote for representation on the BSE Board. The Commission therefore finds that the process for selecting Member Representative Directors to the BSE Board is consistent with Section 6(b)(3) of the Act.⁸³ The Commission also notes that these provisions are consistent with previous proposals approved by the Commission.⁸⁴

4. Committees

The proposed new BSE By-Laws would include provisions governing the composition and authority of various BSE committees established by the BSE Board.⁸⁵ The BSE By-Laws would establish several standing BSE Board committees that are composed solely of BSE Directors and would delineate their general duties and compositional requirements.⁸⁶ These committees are the Executive Committee, the Finance Committee, the Management Compensation Committee, the Audit Committee, and the Regulatory Oversight Committee (“BSE ROC”). In addition to these committees, the BSE By-Laws provide for the appointment by the BSE Board of certain standing committees, not composed solely of BSE Directors, to administer various provisions of the rules that BSE expects to propose with respect to

nomination and election process for the BOX Participant Director who would serve on the BSE Board.

⁸³ 15 U.S.C. 78f(b)(3).

⁸⁴ See, e.g., Securities Exchange Act Release Nos. 58179, supra note 27; 53128, supra note 63; and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (order approving the demutualization of Phlx).

⁸⁵ See Sections 4.12-4.14, BSE By-Laws.

⁸⁶ See Section 4.13, BSE By-Laws.

governance, listing, equity trading, and member discipline.⁸⁷ These committees include the Member Nominating Committee, the Nominating Committee, the BSE Listing and Hearings Review Council, the BSE Review Council, the Quality of Markets Committee, the Market Operations Review Committee, the Arbitration and Mediation Committee, and the Market Regulation Committee.

As noted above, all members of the Member Nominating Committee must be associated persons of a BSE member. In addition, at least 20% of the members of the BSE Listing and Hearings Review Council, the BSE Review Council, the Quality of Markets Committee, and the Market Operations Review Committee must be composed of Member Representatives.

Moreover, the Nominating Committee, the BSE Review Council, the Quality of Markets Committee, the Arbitration and Mediation Committee, and the Market Regulation Committee must be compositionally balanced between Industry members⁸⁸ and Non-Industry members.⁸⁹ These compositional requirements are designed to ensure that members are protected from unfair, unfettered actions by an exchange pursuant to its rules, and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission believes that the proposed compositional balance of these BSE committees is consistent with the Section 6(b)(3) of the Act because it provides for the fair representation of BSE members in the administration of the affairs of BSE.⁹⁰

5. Regulatory Oversight Responsibilities and Regulatory Funds

The BSE By-Laws would provide that the BSE Board, when evaluating any proposal,

⁸⁷ See Section 4.14 and Articles VI-VII, BSE By-Laws.

⁸⁸ See Article I(u), BSE By-Laws.

⁸⁹ See Article I(cc), BSE By-Laws.

⁹⁰ See, e.g., Securities Exchange Act Release Nos. 58179, supra note 27; 53128, supra note 63; and 49098, supra note 84.

would, to the fullest extent permitted by applicable law, take into account: (i) the potential impact thereof on the integrity, continuity, and stability of BSE and the other operations of BSE, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (ii) whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.⁹¹ Taken together, these provisions reinforce the notion that BSE, while wholly-owned by NASDAQ OMX, is not solely a commercial enterprise, but rather is an SRO registered pursuant to the Act and subject to the obligations imposed by the Act.

The BSE ROC would be composed of Public Directors, each of whom also would need to qualify as an independent director pursuant to Nasdaq Rule 4200.⁹² The BSE ROC would be responsible for monitoring the adequacy and effectiveness of BSE's regulatory program and assisting the BSE Board in reviewing BSE's regulatory plan and the overall effectiveness of BSE's regulatory functions.⁹³ BSE also would have a Chief Regulatory Officer ("BSE CRO") who would have general supervision of the BSE's regulatory operations, including responsibility for overseeing BSE's surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another SRO to which BSE is a party.⁹⁴ The BSE CRO would have to meet with the BSE ROC in executive session at regularly scheduled meetings of such committee and at any time upon request of the BSE CRO or any

⁹¹ See Section 4.9, BSE By-Laws.

⁹² See Section 4.13(e), BSE By-Laws.

⁹³ Id.

⁹⁴ See Section 5.10, BSE By-Laws.

member of the BSE ROC. The BSE CRO could also serve as the General Counsel of BSE.⁹⁵

In addition, the BSE By-Laws would contain a stipulation that dividends could not be paid to the stockholders using regulatory funds, which are fees, fines, or penalties derived from the regulatory operations of BSE.⁹⁶ This restriction on the use of regulatory funds is intended to preclude BSE from using its authority to raise regulatory funds for the purpose of benefiting its shareholders, or for other non-regulatory purposes, such as executive compensation. Regulatory funds, however, would not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of BSE, even if a portion of such revenues are used to pay costs associated with the regulatory operations of BSE.⁹⁷

Section 6(b)(1) of the Act⁹⁸ requires an exchange to be so organized and have the capacity to be able to carry out the purposes of the Act. The Commission believes that BSE's regulatory structure is designed to insulate its regulatory functions from its market and other commercial interests so that it can carry out its regulatory obligations and, therefore, BSE's proposal is consistent with the Act.

⁹⁵ Id. The Commission has previously approved a similar structure. See Nasdaq Exchange Approval Order, supra note 63, 71 FR at 3555, n.103 and accompanying text (order approving application of Nasdaq for registration as a national securities exchange, including the ability of the CRO to serve as General Counsel).

⁹⁶ See Section 9.8, BSE By-Laws. See also Section 1(ii), BSE By-Laws.

⁹⁷ The Commission further notes that the BSX Operating Agreement is being amended to adopt a restriction on distributions of regulatory funds comparable to the restriction proposed for inclusion in the BSE By-Laws. See proposed Section 9.2, BSX Operating Agreement.

⁹⁸ 15 U.S.C. 78f(b)(1).

6. Restrictions on Affiliation between BSE and Its Members: Proposed BSE Chapter XXXIX

a. Limitations on BSE Members' Ownership of NASDAQ OMX

In connection with the transaction, in the BSE Governance Proposal, BSE proposes to add a new Chapter XXXIX, Section 1 to the BSE Rules to prohibit BSE members and persons associated with BSE members from beneficially owning more than 20% of the then-outstanding voting securities of NASDAQ OMX. Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.⁹⁹ A member that is a controlling shareholder of an exchange or an exchange's holding company might be tempted to exercise that controlling influence by pressuring or directing the exchange to refrain from, or the exchange otherwise may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

In addition, the NASDAQ OMX Certificate imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of its SRO subsidiaries and to ensure that its SRO subsidiaries and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person who

⁹⁹ See, e.g., Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521, 14523 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) ("NOM Approval Order"); 55389, supra note 33, 72 FR at 10578; 55293 (February 14, 2007), 72 FR 8033, 8037 (February 22, 2007) (SR-NYSE-2006-120); 53382, supra note 29, 71 FR at 11256; 51149 (February 8, 2005), 70 FR 7531, 7538 (February 14, 2005) (SR-CHX-2004-26); 49718 (May 17, 2004), 69 FR 29611, 29624 (May 24, 2004) (SR-PCX-2004-08); 49098, supra note 84, 69 FR at 3986; 49067 (January 13, 2004), 69 FR 2761, 2767 (January 20, 2004) (SR-BSE-2003-19) ("BOX LLC Agreement Order"); and Nasdaq Exchange Approval Order, supra note 63, 71 FR at 3552.

beneficially owns shares of common stock, preferred stock, or notes of NASDAQ OMX in excess of 5% of the securities generally entitled to vote may vote shares in excess of 5%.¹⁰⁰ This limitation would mitigate the potential for any NASDAQ OMX shareholder to exercise undue control over the operations of the BSE and facilitate BSE's and the Commission's ability to carry out their regulatory obligations under the Act.

The NASDAQ OMX Board may approve exemptions from the 5% voting limitation for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,¹⁰¹ provided that the NASDAQ OMX Board also determines that granting such exemption would be consistent with the self-regulatory obligations of Nasdaq.¹⁰² Further, any such exemption from the 5% voting limitation would not be effective until approved by the Commission pursuant to Section 19 of the Act.¹⁰³ The BSE Governance Proposal reflects an amendment to the NASDAQ OMX By-Laws to require the NASDAQ OMX Board, prior to approving any exemption from the 5% voting limitation, to determine that granting such exemptions would also be consistent with BSE's self-regulatory obligations.¹⁰⁴

¹⁰⁰ See Article Fourth.C., NASDAQ OMX Certificate.

¹⁰¹ 15 U.S.C. 78c(a)(39). See Article Fourth.C.6., NASDAQ OMX Certificate.

¹⁰² Specifically, the NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or Nasdaq or the other operations of NASDAQ OMX and its subsidiaries, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to an facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See Article Fourth.C.6, NASDAQ OMX Certificate.

¹⁰³ See Section 12.5, NASDAQ OMX By-Laws.

¹⁰⁴ See Amendment No. 1 to the BSE Governance Proposal, supra note 4. Specifically, the

The Commission finds that the ownership restriction in proposed Chapter XXXIX, Section 1 of the BSE Rules, combined with the voting limitations in Article Fourth.C of Section 12.5 of the NASDAQ OMX Certificate and the NASDAQ OMX By-Laws, is consistent with the Act, including Sections 6(b)(1) and 6(b)(5) of the Act. These limitations should reduce the potential for a BSE member to improperly interfere with or restrict the ability of the Commission or BSE to effectively carry out their respective regulatory oversight responsibilities under the Act.

b. Limitations on Affiliation Between BSE and its Members

BSE also proposes to prohibit BSE or an entity with which it is affiliated from acquiring or maintaining an ownership interest in, or engaging in a business venture¹⁰⁵ with, a BSE member or an affiliate of a BSE member in the absence of an effective filing with the Commission under Section 19(b) of the Act.¹⁰⁶ Further, the proposed rule would prohibit a BSE member from becoming an affiliate¹⁰⁷ of BSE or an affiliate of an entity affiliated with BSE in

NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or its SRO Subsidiaries or the other operations of NASDAQ OMX and its subsidiaries, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See proposed Section 12.5, NASDAQ OMX By-Laws.

¹⁰⁵ Proposed BSE Rule, Chapter XXXIX, Section 2. BSE defines “business venture” as an arrangement under which (1) BSE or an entity with which it is affiliated and (2) a BSE member or an affiliate of a BSE member, engage in joint activities with the expectation of shared profit and a risk of shared loss from common entrepreneurial efforts.

¹⁰⁶ Id. In connection with the Phlx Acquisition, Phlx proposed, and the Commission approved, a similar rule. See Phlx Rule 985(b) and Securities Exchange Act Release No. 58179, supra note 27, 73 FR at 42886-42887.

¹⁰⁷ Id. BSE defines “affiliate” as having the meaning specified in Rule 12b-2 under the Act,

the absence of an effective filing under Section 19(b) of the Act.¹⁰⁸ However, the proposed rule would exclude from this restriction two types of affiliations.

First, a BSE member or an affiliate of a BSE member could acquire or hold an equity interest in NASDAQ OMX that is permitted pursuant to proposed BSE Rules¹⁰⁹ (i.e., less than 20% of the outstanding voting securities) without the need for BSE to file such acquisition or holding under Section 19(b) of the Act.¹¹⁰ Second, BSE or an entity affiliated with BSE could acquire or maintain an ownership interest in, or engage in a business venture with, an affiliate of a BSE member without filing a proposed rule change relating to such affiliation under Section 19(b) of the Act, if there were information barriers between the BSE member and BSE and its facilities. These information barriers would have to prevent the member from having an “informational advantage” concerning the operation of BSE or its facilities or “knowledge in advance of other [BSE] members” of any proposed changes to the operations of BSE or its trading systems. Further, BSE may only notify an affiliated member of any proposed changes to its operations or trading systems in the same manner as it notifies non-affiliated members. BSE and its affiliated member may not share employees, office space, or data bases.¹¹¹ Finally, the BSE ROC must certify annually that BSE has taken all reasonable steps to implement and comply with the rule.¹¹²

17 CFR 240.12b-2, provided, however, that one entity would not be deemed to be an affiliate of another entity solely by reason of having a common director. Id.

¹⁰⁸ 15 U.S.C. 78s(b).

¹⁰⁹ Proposed BSE Rule, Chapter XXXIX, Section 1.

¹¹⁰ Id. As discussed above, the proposed BSE Rules would provide that “[n]o member or person associated with a member shall be the beneficial owner of greater than twenty percent (20%) of the then-outstanding voting securities of [NASDAQ OMX].”

¹¹¹ Proposed BSE Rule, Chapter XXXIX, Section 2(b)(2)(A).

¹¹² Proposed BSE Rule, Chapter XXXIX, Section 2(b)(2)(B).

Proposed BSE Rules Chapter XXXIX is consistent with rules of Nasdaq, which the Commission previously found consistent with the Act.¹¹³ The Commission similarly finds that proposed Chapter XXXIX to the BSE Rules is consistent with the requirements of Section 6(b)(5) of the Act,¹¹⁴ which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.¹¹⁵

The Commission is concerned about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.¹¹⁶ The Commission believes that the proposed additions to the BSE Rules are designed to mitigate these concerns by requiring that BSE file a proposed rule change in connection with proposed affiliations between BSE and its members, unless such affiliation is due to a member's interest in

¹¹³ See Nasdaq Rules 2130 and 2140. See also Nasdaq Exchange Approval Order, *supra* note 63, 71 FR at 3552, n. 41 and accompanying text, and Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members). Also, in connection with the Phlx Acquisition, Phlx proposed, and the Commission approved, similar rules. See Phlx Rule 985(a) and (b) and Securities Exchange Act Release No. 58179, *supra* note 27, 73 FR at 42886-42887.

¹¹⁴ 15 U.S.C. 78f(b)(5).

¹¹⁵ *Id.*

¹¹⁶ See Securities Exchange Act Release No. 53382, *supra* note 29. See also Securities Exchange Act Release No. 54170, *supra* note 113.

NASDAQ OMX that is permitted under proposed Chapter XXXIX, Section 1 of the BSE Rules or conforms to the specified information barrier requirements.

If BSE entered into an affiliation with a BSE member (or any other party) that resulted in a change to a BSE Rule or the need to establish new BSE Rules, as defined under the Act, then such affiliation would be subject to the rule filing requirements of Section 19(b) of the Act and Rule 19b-4 thereunder.

7. Exceptions to Limitations on Affiliation Between BSE and its Members

NASDAQ OMX currently owns two broker-dealers: (1) NASDAQ Execution Services, LLC (“NES”), and (2) NASDAQ Options Services, LLC (“NOS”). NES and NOS are members of BSE. Absent relief, after the closing of NASDAQ OMX’s acquisition of BSE, NASDAQ OMX’s ownership of NES and NOS would cause NES and NOS to violate the provision in proposed BSE Rules Chapter XXXIX, Section 2 prohibiting BSE members from being affiliated with BSE.

BSE has proposed, in the BSE Governance Proposal, that NES and NOS be permitted to become affiliates of BSE, subject to certain conditions and limitations. First, BSE proposes that NES and NOS would only route orders to BSE that first attempt to access liquidity on Nasdaq.¹¹⁷ Second, NES and NOS would remain facilities of Nasdaq. Under Nasdaq Rules, NES operates

¹¹⁷ NES currently provides to Nasdaq members optional routing services to other market centers, including BSE, as set forth in Nasdaq’s rules. See Nasdaq Rules 4751, 4755, and 4758. NES does not currently route to BSE because BSE currently does not trade equity securities. See infra note 222. NOS provides to Nasdaq members that are Nasdaq Options Market (“NOM”) participants routing services to other market centers. Pursuant to Nasdaq’s rules, NOS: (1) routes orders in options currently trading on NOM, referred to as “System Securities;” and (2) routes orders in options that are not currently trading on NOM (“Non-System Securities”). See NOM Rules, Chapter VI Sections 1(b) and 11. See also NOM Approval Order, supra note 99. With respect to System Securities, NOM participants may designate orders to be routed to another market center when trading interest is not available on NOM or to execute only on NOM. See NOM Rules, Chapter VI, Section 11. See also NOM Approval Order, supra note 99, 73 FR at 14532-14533.

as a facility¹¹⁸ of Nasdaq and routes orders to other market centers as directed by Nasdaq. Similarly, NOS is operated and regulated as a facility of Nasdaq with respect to its routing of System Securities (“NOS facility function”), and, consequently, the operation of NOS in this capacity would be subject to BSE oversight, as well as Commission oversight.¹¹⁹ Nasdaq is responsible for ensuring that NES and NOS are operated consistent with Section 6 of the Act and Nasdaq’s Rules. In addition, Nasdaq must file with the Commission rule changes and fees relating to NES and NOS. Third, use of NES’s and NOS’s routing function by Nasdaq members would continue to be optional. Parties that do not desire to use NES may enter orders into Nasdaq as immediate-or-cancel orders or any other order-type available through Nasdaq that are ineligible for routing.¹²⁰ Similarly, NOM participants are not required to use NOS to route orders, and a NOM participant may route its orders through any available router it selects.¹²¹ In addition, the Commission notes that NES and NOS are members of an SRO unaffiliated with Nasdaq, which serves as their designated examining authority under Rule 17d-1.¹²²

In the past, the Commission has expressed concern that the affiliation of an exchange

¹¹⁸ See Nasdaq Rule 4758(b)(3). See also Securities Exchange Act Release No. 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078) (“NES Routing Release”). As a facility of Nasdaq, Nasdaq Rule 4758(b) acknowledges that Nasdaq is responsible for filing with the Commission rule changes related to the operation of, and fees for services provided by, NES and that NES is subject to exchange non-discrimination requirements.

¹¹⁹ See NOM Rules, Chapter 11(e). See also NOM Approval Order, *supra* note 99, 73 FR at 14533.

¹²⁰ See Nasdaq Rule 4758(b)(7).

¹²¹ See NOM Rules, Chapter VI, Section 11(a) (allowing Participants to designate orders as available for routing or not available for routing). See also NOM Approval Order, *supra* note 99, 73 FR at 14533, n.91 and accompanying text.

¹²² See Nasdaq Rule 4758(b)(4), and NOM Rules, Chapter 11(e). See also NES Routing Release, *supra* note 118; and NOM Approval Order, *supra* note 99, 73 FR at 14533, n.189 and accompanying text.

with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.¹²³ Although the Commission continues to be concerned about potential unfair competition and conflict of interest between an exchange’s self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, the Commission believes that it is appropriate and consistent with the Act to permit NES and NOS to become affiliates of BSE for the limited purpose of providing routing services for Nasdaq for orders that first attempt to access liquidity on Nasdaq’s systems before routing to BSE, and in light of the protections afforded by the other conditions described above.

B. BOX

1. BSE Transfer of BOX Interest

The BOX Market is a facility of BSE.¹²⁴ BOXR is BSE’s wholly-owned subsidiary,¹²⁵ to which BSE has delegated, pursuant to a delegation plan (“Delegation Plan”),¹²⁶ certain self-regulatory responsibilities related to the BOX Market (BSE together with BOXR with respect to the BOX Market, “Regulatory Authority”).¹²⁷

¹²³ See supra note 116 and accompanying text.

¹²⁴ See Securities Exchange Act Release Nos. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (SR-BSE-2003-17); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR-BSE-2003-04) (“BOXR Order”); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15); and BOX LLC Agreement Order, supra note 99. Section 3(a)(2) of the Act states that “[t]he term ‘facility’ when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.” 15 U.S.C. 78c(a)(2).

¹²⁵ See BOXR Order, supra note 124.

¹²⁶ See BSE Rules, Chapter XXXVI. See also BOXR Order, supra note 124.

¹²⁷ See Section 1.1, 6th BOX LLC Agreement.

In the BOX Transfer Proposal, BSE proposes to transfer its 21.87% ownership interest in BOX to MX US. Following this transfer, BSE no longer would have any ownership interest in BOX and MX US would have a 53.24% ownership interest.¹²⁸ Because BSE would no longer have an ownership interest, it no longer would be admitted and named as a BOX Member.¹²⁹ The proposed changes to the BOX LLC Agreement reflect this change. However, pursuant to the revised BOX LLC Agreement, the BOX Market would remain a facility of BSE, and BSE would remain the SRO for the BOX Market.¹³⁰ BSE, together with BOXR, would retain regulatory control over the BOX Market and BSE, as the SRO, would remain responsible for ensuring compliance with the federal securities laws and all applicable rules and regulations.¹³¹

Section 8.4(f) of the current BOX LLC Agreement requires that any transfer that results in the acquisition and holding by any person, alone or together with any affiliate of such person, of an aggregate percentage interest which meets or crosses the threshold of 20% or any successive 5% be subject to a rule filing pursuant to Section 19(b)(1).¹³² Section 8.4(f) also requires that any transfer that reduces BSE's aggregate ownership interest in BOX below the

¹²⁸ MX US currently has a 31.37% ownership interest in BOX. See Securities Exchange Act Release No. 57260 (February 1, 2008), 73 FR 7617 (February 8, 2008) (SR-BSE-2008-06).

¹²⁹ "BOX Member" means a person admitted and named as a member on schedules to the 5th BOX LLC Agreement and any person admitted to BOX as an additional or substitute member of BOX, in such person's capacity as a member of BOX. See Section 1.1, 5th BOX LLC Agreement.

¹³⁰ See Section 3.2(a)(i), 6th BOX LLC Agreement ("BSE will provide SEC-approved SRO status for the BOX Market, the Regulatory Authority will provide the regulatory framework for the BOX Market and the Regulatory Authority, together with BOX, will have regulatory responsibility for the activities of the BOX Market."). BSE also proposes that the SRO for the BOX Market may be changed by a vote of the BOX Board and the approval of the Commission. See Section 1.1, 6th BOX LLC Agreement.

¹³¹ See infra notes 144-164 and notes 185-199 and accompanying text.

¹³² See Section 8.4(f), 5th BOX LLC Agreement.

20% threshold be subject to a rule filing.¹³³ BSE has filed the proposed transfer of its interest in BOX to MX US in accordance with these provisions of the BOX LLC Agreement.

The Commission believes that BSE's transfer of its 21.87% interest in BOX to MX US is consistent with the Act. MX US is currently a BOX Member and therefore is bound by all the provisions of the current BOX LLC Agreement¹³⁴ and would similarly be bound by the provisions of the revised BOX LLC Agreement.¹³⁵ Further, although BSE no longer would hold ownership interest in BOX, BSE would remain the SRO for the BOX Market. As the Commission has noted in the past, "the Act does not require that an SRO have any ownership interest in the operator of one of its facilities."¹³⁶ Moreover, BOX is obligated under the BOX

¹³³

Id.

¹³⁴

MX, a parent corporation of MX US, has agreed to abide by all of the provisions of the 5th BOX LLC Agreement, including those provisions requiring submission to the jurisdiction of the Commission. See Securities Exchange Act Release No. 57713 (April 25, 2008), 73 FR 24327 (May 2, 2008) (SR-BSE-2008-28).

¹³⁵

These provisions of the BOX LLC Agreement provide that MX US would, among other things, comply with the federal securities laws and the rules and regulations thereunder; cooperate with the Commission and the Regulatory Authority pursuant to their regulatory authority and the provisions of the revised BOX LLC Agreement; and engage in conduct that fosters and does not interfere with BOX's ability 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 off a free and open market and a national market system; and, in general protect investors and the public interest. See Section 5.3, 6th BOX LLC Agreement. See also BOX LLC Agreement Order, supra note 99, 69 FR at 2765.

¹³⁶

In the BOX LLC Agreement Order, the Commission approved the operating agreement governing the BOX Market. At the time of the BOX LLC Agreement Order, BSE did not hold the largest ownership interest in BOX, but the Commission noted that the Act does not require that an SRO have any ownership interest in the operator of its facility. See BOX LLC Agreement Order, supra note 99, 69 FR at 2764. See also Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) ("ArcaEx Approval Order"). In the ArcaEx Approval Order, the Commission approved the establishment of Archipelago Exchange ("ArcaEx") as a facility of the Pacific Exchange, Inc. ("PCX," n/k/a NYSE Arca, Inc.). ArcaEx was operated by the

LLC Agreement to continue to operate the BOX Market in a manner consistent with the regulatory and oversight responsibilities of BSE and with the Act and rules and regulations thereunder.¹³⁷ As discussed below, BSE will have veto power over planned or proposed changes to BOX or the BOX Market, and if the Regulatory Authority, in its sole discretion, determines that a planned or proposed change to BOX or the BOX Market is not consistent with Regulatory Authority Rules or SEC Rules governing the BOX Market or BOX Participants, the Regulatory Authority could direct BOX to modify the proposal.¹³⁸ Moreover, the books, premises, officers, directors, agents and employees of BOX are deemed to be the books, premises, officers, directors, agents and employees of BSE.¹³⁹ In addition, the Commission has authority to inspect BOX's books and records because BOX is the operator of the BOX Market, a facility of an exchange. Accordingly, the Commission believes that the transfer of BSE's ownership interest in BOX would not impair BSE's or the Commission's ability to discharge their respective regulatory and oversight responsibilities, and is consistent with the Act.

2. BSE Interim Certificate

BSE plans to distribute the net proceeds from the transfer of its interest in BOX to BSE

Archipelago Exchange, L.L.C. ("Arca L.L.C."). At the time of the ArcaEx Approval Order, PCX's ownership interest in Arca L.L.C. consisted solely of a 10% interest in Archipelago Holdings, LLC, the parent company of Arca L.L.C. See also Securities Exchange Act Release Nos. 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (SR-Phlx-96-14) (order approving electronic system offering VWAP that was operated as a facility of Phlx, where Phlx had no ownership interest in the operation of the system) and 54538 (September 29, 2006), 71 FR 59184 (October 6, 2006) (SR-Phlx-2006-43) (order approving Phlx's New Equity Trading system and operation of optional outbound router as a facility of Phlx, where Phlx had no ownership interest in the third party operator).

¹³⁷ See infra notes 144-164 and notes 185-199 and accompanying text.

¹³⁸ See infra notes 147-164 and accompanying text.

¹³⁹ See infra note 187 and accompanying text.

member owners.¹⁴⁰ To effectuate this distribution, in the BSE Interim Certificate Proposal, BSE proposes to amend the BSE Certificate to remove a provision that prevents BSE from making distributions and to add a provision that would allow BSE to redeem a portion of each membership in exchange for a pro rata share of the net proceeds from its transfer of BSE's interest in BOX.¹⁴¹

The BSE Certificate as proposed to be amended as just described is referred to as the Interim Certificate and would be effective immediately prior to the transfer of BSE's interest in BOX to MX US.¹⁴² Immediately thereafter, this Interim Certificate would be amended and restated in its entirety in connection with the BSE Acquisition.¹⁴³

The Commission believes that the Interim Certificate is consistent with the Act. The sole purpose of the Interim Certificate is to enable BSE to distribute to BSE member owners the proceeds from the transfer of BSE's interest in BOX to MX US. The Interim Certificate would be in effect only until the BSE Certificate is amended and restated in its entirety, as discussed above, in connection with the BSE Acquisition. The Commission believes that allowing such a distribution would not have any adverse effect on the ability of BSE to fulfill its regulatory obligations in relation to the BOX Market, because funding for the regulation of the BOX Market would be established through a regulatory services agreement between BSE and BOX and not with the proceeds from the transfer of BSE's interest in BOX to MX US.

¹⁴⁰ All BSE members, including lessors but not lessees, and excluding electronic access members, would be entitled to receive their pro rata share of equity interest in BOX based on the outstanding number of such BSE memberships.

¹⁴¹ See Article Fourth, Interim Certificate. The Interim Certificate also would delete obsolete text regarding BSE incorporators.

¹⁴² See BSE Interim Certificate Proposal Notice, supra note 7, 73 FR at 25810.

¹⁴³ See BSE Governance Proposal Notice, supra note 3, 73 FR 26159.

3. BOX LLC Agreement

In conjunction with BSE's divestiture of BOX, BSE also proposes, in the BOX Transfer Proposal, to amend the BOX LLC Agreement to reflect BSE's continuing role as the SRO of its facility, the BOX Market.

a. BSE as the SRO for the BOX Market

The BOX LLC Agreement provides that as long as BSE maintains 8% or greater interest in BOX, BSE would have the right to designate and retain two directors on the BOX board of directors ("BOX Board").¹⁴⁴ BSE no longer would be entitled to maintain two directors on the BOX Board following its transfer of interest to MX US. BSE, therefore, proposes to amend the BOX LLC Agreement to provide that as long as the BOX Market remains a facility of BSE, BSE would have the right to designate and retain one non-voting director ("Regulatory Director") on the BOX Board.¹⁴⁵ The Regulatory Director would have the right to attend all meetings of the BOX Board and committees thereof and receive notice of meetings and copies of the meeting materials provided to other BOX directors.¹⁴⁶

Under the current BOX LLC Agreement, BSE holds veto power over certain "Major Actions," which relate to both commercial and regulatory actions. After the transfer of its ownership interest to MX US, BSE, as the SRO for the facility, would continue to have a regulatory interest in the BOX Market. In connection with the sale of BSE's ownership interest, the BOX LLC Agreement is being amended to eliminate BSE's veto power over Major Actions

¹⁴⁴ See Section 4.1(b), 5th BOX LLC Agreement.

¹⁴⁵ See Section 4.1(a)(i), 6th BOX LLC Agreement. A Regulatory Director is a member of the senior management of the regulation staff of the Regulatory Authority, who is separated from the business operations of BSE via effective information barriers and is not an employee, officer, or director of NASDAQ OMX or its affiliates, other than BSE and BSE's subsidiaries. See Section 1.1, 6th BOX LLC Agreement.

¹⁴⁶ See Section 4.2(d), 6th BOX LLC Agreement.

of BOX, but BSE would continue to hold veto power over all regulatory actions.

Specifically, BSE proposes to amend the BOX LLC Agreement to provide that BSE, with certain exceptions discussed below,¹⁴⁷ would have veto power over planned or proposed changes to BOX or the BOX Market.¹⁴⁸ These amendments to the BOX LLC Agreement would provide that the Regulatory Authority¹⁴⁹ would receive notice of planned or proposed changes to BOX, or the BOX Market pursuant to request for change procedures established by the mutual agreement of the Regulatory Authority and BOX.¹⁵⁰ Moreover, if BSE, in its sole discretion, determines that a Regulatory Deficiency exists, BSE may direct BOX to undertake such modifications as are necessary or appropriate to eliminate the Regulatory Deficiency.¹⁵¹ Prior to implementation, the Regulatory Authority would be required to affirmatively approve such planned or proposed changes.¹⁵² If the Regulatory Authority, in its sole discretion, determines that a proposed or planned change to BOX or the BOX Market is not consistent with Regulatory Authority Rules¹⁵³ or SEC Rules¹⁵⁴ governing the BOX Market or BOX Participants, or impedes

¹⁴⁷ See infra note 159 and accompanying text.

¹⁴⁸ See Section 3.2, 6th BOX LLC Agreement.

¹⁴⁹ See supra text accompanying note 127.

¹⁵⁰ See Section 3.2(a)(ii), 6th BOX LLC Agreement.

¹⁵¹ See Section 3.2(a)(iv), 6th BOX LLC Agreement.

¹⁵² See Section 3.2(a)(ii), 6th BOX LLC Agreement. The Regulatory Authority would also receive notice of any planned or proposed change, pursuant to which the BOX Market would cease to be a facility of BSE. BOX would not be required, however, to obtain consent from the Regulatory Authority for any such planned or proposed change, provided that the Commission has approved such action. The BOX LLC Agreement does not affect BSE's obligations under Section 19 of the Act to file all proposed rule changes with the Commission. Accordingly, if any proposed change would be required to be filed as a proposed rule change under the Act, BOX could not implement such change until such change became effective under the Act.

¹⁵³ "Regulatory Authority Rules" means the rules of the Regulatory Authority, including the BOX Rules that constitute "rules of an exchange" within the meaning of Section 3 of the Act and that pertain to the BOX Market. See Section 1.1, 6th BOX LLC Agreement.

the Regulatory Authority’s ability to regulate the BOX Market or BOX Participants or to fulfill its obligations under the Act,¹⁵⁵ the Regulatory Authority, again in its sole discretion, could direct BOX to modify the proposal such that it does not cause a Regulatory Deficiency.¹⁵⁶ BOX would not implement the proposed change until such change, and any required modifications, are approved by the BOXR board of directors (“BOXR Board”).¹⁵⁷ Further, in the event that the Regulatory Authority, in its sole discretion, determines that a Regulatory Deficiency could exist or would result from the change as planned, the Regulatory Authority could direct BOX to undertake such modifications to BOX or the BOX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow the Regulatory Authority to perform and fulfill its regulatory responsibilities under the Act.¹⁵⁸

Notice would not be required to be provided to the Regulatory Authority if a proposed change were a “Non-Market Matter.”¹⁵⁹ Any planned or proposed change to BOX that has a regulatory component would not fall within the definition of Non-Market Matters.¹⁶⁰ The

¹⁵⁴ “SEC Rules” mean the Act and such statutes, rules, regulations, interpretations, releases, orders, determinations, reports, or statements as are administered, enforced, adopted or promulgated by the Commission. See Section 1.1, 6th BOX LLC Agreement.

¹⁵⁵ The operation of BOX or the BOX Market in such manner would be referred to as a “Regulatory Deficiency.” See Section 1.1, 6th BOX LLC Agreement.

¹⁵⁶ See Section 3.2(a)(iii), 6th BOX LLC Agreement.

¹⁵⁷ Id.

¹⁵⁸ The cost of any such modifications must be paid by BOX. See Section 3.2(a)(iv), 6th BOX LLC Agreement.

¹⁵⁹ Non-Market Matters include changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of BOX Members, communication with BOX Members, finance, location, and timing of BOX Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the BOX Market, and de minimis items. See Section 3.2(a)(ii), 6th BOX LLC Agreement.

¹⁶⁰ See Section 3.2(a)(ii), 6th BOX LLC Agreement.

presence of a Regulatory Director¹⁶¹ on the BOX Board is designed to help ensure that no matter with a regulatory component is considered a Non-Market Matter by BOX.

These proposed changes to the BOX LLC Agreement, which give the Regulatory Authority notice of changes and the authority to require modification prior to implementation if such changes would cause Regulatory Deficiencies, are designed to replace the current BOX LLC Agreement's provisions that state that, at all times when BSE is a BOX Member, Major Actions of BOX would not be effective unless BSE-designated directors affirmatively vote for such Major Actions.¹⁶² Major Actions of BOX include, among others, merger or consolidation of BOX with any other entity or the sale by BOX of any material portion of its assets, entry by BOX into any line of business other than the business contemplated in the BOX LLC Agreement, and making any fundamental change in the market structure of BOX.¹⁶³ Following BSE's divestiture of BOX, however, BSE would no longer have voting directors on the BOX Board. BSE, therefore, would be unable to affirmatively vote on Major Actions of BOX.

The Commission believes that these proposed changes are consistent with the Act. The revised BOX LLC Agreement reflects BSE's continuing status as the SRO for its facility, the BOX Market, by providing that the Regulatory Authority would receive notice of any planned or proposed changes to BOX or the BOX Market, which would include a wider range of matters than those matters considered Major Actions. Further, BOX would not be able to implement a planned or proposed change if the Regulatory Authority, in its sole discretion, determines that such change could cause a Regulatory Deficiency. In addition, if the Regulatory Authority determines that a Regulatory Deficiency exists or is planned, it may direct BOX to undertake

¹⁶¹ See Section 4.1(a)(i), 6th BOX LLC Agreement.

¹⁶² See Section 4.4(b), 5th BOX LLC Agreement.

¹⁶³ Id.

such modifications to BOX or the BOX Market as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency. As noted above, the Commission has stated that the Act does not require that an SRO have any ownership interest in the operator of one of its facilities.¹⁶⁴

Although BSE would not have an ownership interest in BOX, the Commission believes that the foregoing changes would not limit BSE's role as the SRO for the BOX Market. The Commission, therefore, finds that these proposed changes would allow BSE to carry out its regulatory and oversight responsibilities under the Act.

b. The BOX Committee

In the BOX Transfer Proposal, BSE proposes to adopt resolutions ("Resolutions") to establish a committee of the BSE Board, the BOX Committee.¹⁶⁵ The proposed Resolutions are rules of an exchange because they are stated policies, practices, or interpretations (as defined in Rule 19b-4 under the Act) of BSE, and must therefore be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. Accordingly, BSE filed the proposed Resolutions with the Commission.¹⁶⁶

Pursuant to the proposed Resolutions, the BSE Board would delegate to the BOX Committee all actions and decisions relating to BSE rules that govern the BOX Market, appeals from regulatory decisions of the BOXR Board, and, except to the extent otherwise delegated to the BSE ROC, regulation of the BOX Market.¹⁶⁷ The proposed Resolutions also would provide

¹⁶⁴ See supra note 136 and accompanying text.

¹⁶⁵ See Section 4.1(f), 6th BOX LLC Agreement.

¹⁶⁶ See Exhibit 3B to the BOX Transfer Proposal Notice.

¹⁶⁷ The BSE ROC would be responsible for monitoring the adequacy and effectiveness of BSE's regulatory program and assisting the BSE Board in reviewing BSE's regulatory plan and the overall effectiveness of BSE's regulatory function. Regulatory actions and decisions delegated to the BSE ROC are not subject to the power and authority of the BOX Committee. See supra note 93 and accompanying text.

that the BOX Committee include a director representing the BOX Participants and four other BSE Directors who do not have a material direct or indirect relationship with NASDAQ OMX, its affiliates (other than service as directors of BSE or BOXR), or any provider of BOX-related regulatory functions outsourced by BSE.¹⁶⁸ Furthermore, the proposed Resolutions would provide that at least 50% of members of the BOX Committee must be Public Directors.¹⁶⁹ The proposed Resolutions also would provide that any resolution or other action that would have the effect of dissolving the BOX Committee or altering, amending, removing, or abridging the Resolutions or the powers of the BOX Committee established thereby must be submitted to the BSE Board, and if the same must be filed with, or filed with and approved by, the Commission under Section 19 of the Act, then it would not be effective until filed with, or filed with and approved by, the Commission.¹⁷⁰

Section 6(b)(3) of the Act provides that the rules of an exchange must assure that its members are fairly represented in the selection of the exchange's directors and in the administration of its affairs.¹⁷¹ This requirement allows members to have a voice in an exchange's use of its self-regulatory authority. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its

¹⁶⁸ See proposed Resolutions. Material direct or indirect relationship include, without limitation, any of the following: being an affiliate; serving as a board member, employee, officer, consultant, advisor, or any provider of BOX-related regulatory functions outsourced by BSE; being a party to any contractual or other relationship pursuant to which more than \$50,000 is paid; reporting to, controlling, being controlled by or holding an investment greater than 5% in any such person; and being a parent, child, sibling, spouse or in-law of such person. See Section 4.1(f), 6th BOX LLC Agreement.

¹⁶⁹ See proposed Resolutions. See also infra note 207 and accompanying text.

¹⁷⁰ See proposed Resolutions.

¹⁷¹ 15 U.S.C. 78f(b)(3).

market or through its facilities. Because under the proposed Resolutions, the BSE Board would delegate to the BOX Committee its actions and decisions over the BOX Market, other than matters delegated to the BSE ROC, the Commission believes that the composition of the BOX Committee must be consistent with the fair representation requirement under Section 6(b)(3) of the Act.¹⁷² In this regard, the proposed Resolutions would require that one director of the five BSE Directors on the BOX Committee represent BOX Participants. Because 20% of the BOX Committee would be composed of directors who represent BOX Participants, the Commission believes that the proposed BOX Committee composition satisfies the Section 6(b)(3) requirement. The Commission previously has found 20% representation to satisfy the Section 6(b)(3) requirement.¹⁷³

c. BSE and BOXR Boards

The BOXR By-Laws require that at least 20% of the BOXR Board (but no fewer than two directors) be composed of directors representing BOX Participants.¹⁷⁴ In addition, the BOXR By-Laws require that at least 50% of the directors on the BOXR Board be public directors (“BOXR Public Directors”).¹⁷⁵ In the BSE Governance Proposal, BSE proposes to revise this definition such that a BOXR Public Director could not also have any material business relationship with an affiliate of BSE, BOX, or BOXR.¹⁷⁶ The Commission finds this proposed change to be consistent with the Act. This change would make BOXR’s definition of

¹⁷² 15 U.S.C. 78f(b)(3).

¹⁷³ See, e.g., Securities Exchange Act Release Nos. 54494 (September 25, 2006), 71 FR 58023 (October 2, 2006) (SR-CHX-2006-23) (order approving amendments to exchange by-laws and other governance changes) and 53382, supra note 29.

¹⁷⁴ See Section 4, BOXR By-Laws.

¹⁷⁵ Currently, a BOXR Public Director is a director who has no material relationship with a broker or dealer, BSE, BOX, or BOXR. See Section 1(p), BOXR By-Laws.

¹⁷⁶ See proposed Section 1(q), BOXR By-Laws.

Public Director substantially similar to the use of such term in BSE's By-Laws,¹⁷⁷ which the Commission is approving as part of this Order, and in Nasdaq's By-Laws,¹⁷⁸ which the Commission previously found consistent with the Act.¹⁷⁹ The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.¹⁸⁰ The Commission believes that public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. Further, the Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of BOXR to address issues in a nondiscriminatory fashion and foster the integrity of BOXR.

In addition, in the BOX Transfer Proposal, BSE proposes to change the BOX LLC Agreement to require BSE, for so long as the BOX Market remains a facility of BSE, to allow BOX to designate one non-voting participant to the BSE Board and to recommend at least 10%, but no fewer than one, of the BOXR directors to the BOXR Board.¹⁸¹ BSE also would be required to include on the BOXR Board at least two directors representing BOX Participants, but no fewer than 20% of all directors,¹⁸² and at least four directors who do not have a material direct or indirect relationship with NASDAQ OMX, its affiliates, or any provider of BOX-related

¹⁷⁷ See BSE By-Laws, Article I(gg) and supra notes 56 and 78-80 and accompanying text.

¹⁷⁸ See Nasdaq By-Laws, Article I(y).

¹⁷⁹ See Nasdaq Exchange Approval Order, supra note 63, 71 FR at 3553, n.47.

¹⁸⁰ Id. at 3553. See also Securities Exchange Act Release No. 40760, supra note 79.

¹⁸¹ The non-voting participant would have the right to attend all meetings of the BOX Committee and all BOX-related deliberations of the BSE Board and committees thereof and receive equivalent notice and meeting materials as BSE directors. See Section 4.1(f), 6th BOX LLC Agreement.

¹⁸² See Section 4.1(f), 6th BOX LLC Agreement. See also infra note 208 and accompanying text.

regulatory functions outsourced by BSE, other than service as directors of BSE or BOXR.¹⁸³

The proposed changes to the BOX LLC Agreement would further require that the directors on the BOXR Board, any committees thereof, or the BOX Committee, or the directors otherwise engaged in BOX-related meetings not have a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE, other than service as directors of BSE or BOXR.¹⁸⁴ The Commission finds that, with respect to the composition of the BOXR Board, the proposed changes satisfy the requirements of Section 6(b)(3) of the Act because at least 20% of BOXR Board directors must represent BOX Participants. The Commission further finds that the prohibition on BOXR Board directors, committee members, and others from having a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE are designed to preserve the independence of the self-regulatory functions of BSE that have been delegated to BOXR, BSE's wholly-owned subsidiary, and to enable BSE, together with BOXR, to carry out its SRO functions.

d. Oversight of BOX Market

Although BOX does not carry out any regulatory functions, all of its activities must be consistent with the Act. The BOX Market is a facility of BSE and is not solely a commercial

¹⁸³ Id. See also supra note 168.

¹⁸⁴ Id. Moreover, all other persons permitted to attend meetings of the BOXR Board or any committees thereof or the BOX Committee or otherwise engaged in BOX-related meetings could not have a material direct or indirect relationship with NASDAQ OMX or its affiliates or any provider of BOX-related regulatory functions outsourced by BSE unless they are Permitted Recipients (as defined below), BOXR directors, officers, or employees, other parties making presentations to directors of the BSE Board engaged in BOX-related meetings, the BOXR Board, the BOX Committee or the BSE ROC if such parties' participation is only to the extent necessary to make such presentations, or consented to by BOX. See Section 4.1(f), 6th BOX LLC Agreement.

enterprise, and is subject to the Act.¹⁸⁵ Accordingly, the current BOX LLC Agreement¹⁸⁶ has provisions designed to enable BOX to operate in a manner that complies with the federal securities laws, including the objectives and requirements of the Act. Because BOX's obligations endure as long as the BOX Market is a facility of BSE, regardless of the BSE's transfer of its ownership interest in BOX to MX US, BSE does not propose to amend the aforementioned provisions, except as provided below.

In accordance with BSE's obligations as the SRO for the BOX Market, the books, records, premises, officers, directors, agents, and employees of BOX are currently deemed to be the books, premises, officers, directors, agents, and employees of BSE for the purpose of, and subject to, oversight pursuant to the Act.¹⁸⁷ Furthermore, the books and records of BOX are subject at all times to inspection and copying by BSE and the Commission.¹⁸⁸ To this provision, BSE proposes to add in the BOX Transfer Proposal that inspection, copying, and review of the books and records of BOX by the Regulatory Authority at the premises of BOX, and access to any copied books and records removed from the premises of BOX or produced to the Regulatory Authority at its request, would in all cases be conducted by, or limited to, certain individuals (such individuals referred to as, "Permitted Recipients")¹⁸⁹ and directors or employees of

¹⁸⁵ See BOX LLC Agreement Order, supra note 99, 69 FR at 2765.

¹⁸⁶ See Sections 4.2, 12.1, 15, 16.5, and 19.6, 5th BOX LLC Agreement.

¹⁸⁷ See Section 12.1, 5th BOX LLC Agreement.

¹⁸⁸ Id.

¹⁸⁹ See Section 12.1, 6th BOX LLC Agreement. Permitted Recipients are (i) the BSE CRO and those regulatory staff members responsible for regulatory technology and budget, counsel to BSE CRO, or staff of BSE's internal audit department, (ii) any member of the BSE Board serving on the BOX Committee or BSE ROC, (iii) NASDAQ OMX CRO and staff in the Office of General Counsel, (iv) any member of the NASDAQ OMX Board of Directors serving on the NASDAQ OMX ROC, and (v) any Professional Services provider. "Professional Services" means services performed by outside counsel, consultants, any provider of BOX-related regulatory functions outsourced by BSE, or

BOXR.¹⁹⁰ BSE also proposes that the Regulatory Authority would inspect, copy, and review the books and records of BOX, and would use any information obtained thereby, only for purposes of fulfilling its regulatory obligations and for no other purpose.¹⁹¹ Further, BSE proposes to add language stating that although BOX would not be entitled to refuse the inspection, review, and/or copying its books and records by the Regulatory Authority, it would be entitled to damages in the event that such inspection, review, and/or copying was conducted for any purpose other than to fulfill the Regulatory Authority's regulatory responsibilities.¹⁹²

The Commission finds that these provisions are consistent with the Act. The Commission notes that BSE proposes to delegate to BOXR, together with the BOX Committee, much of its regulatory responsibilities over the BOX Market. Therefore, although BSE proposes that access to books and records would be limited to Permitted Recipients and BOXR directors and employees, within BSE's proposed regulatory framework, this limitation would not exclude any individuals who may need access to BOX books and records. Moreover, the Commission has authority under the Act to inspect BOX's books and records because BOX is the operator of the BOX Market, a facility of an exchange. In addition, the Commission finds it consistent with the Act that BSE proposes to specify that inspection, copying, and review of books and records and the use of any information obtained thereby be for purposes of fulfilling BSE's regulatory obligations. The Commission notes that, because BOX would not be entitled to preclude BSE from inspecting, reviewing, or copying of its books and records, BOX could not rely on the books and records provisions of the revised BOX LLC Agreement to improperly hinder BSE

subcontractors for the benefit of BOX or the BOX Market. See Section 1.1, 6th BOX LLC Agreement.

¹⁹⁰ See Section 12.1, 6th BOX LLC Agreement.

¹⁹¹ Id.

¹⁹² Id.

from carrying out its regulatory and oversight responsibilities under the Act.¹⁹³

In the BOX Transfer Proposal, BSE also proposes to add certain other provisions to the BOX LLC Agreement. Specifically, BSE proposes to provide that all confidential information pertaining to regulatory matters of BOX and the BOX Market (including, but not limited to, disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of BOX would not be made available to any persons other than to those officers, directors, employees, and agents of BOX that have a reasonable need to know the contents thereof and that such confidential information be retained in confidence by BOX and the officers, directors, employees, and agents of BOX and not be used for any commercial purposes.¹⁹⁴ BSE also proposes to add a provision in the BOX LLC Agreement requiring BOX to provide prompt notice to the Regulatory Authority and the Regulatory Director of any amendments, modifications, waivers, or supplements to the BOX LLC Agreement presented to the BOX Board for approval.¹⁹⁵ Any proposed change to the BOX LLC Agreement would be submitted to the BOX Committee and if such change is required under Section 19 of the Act and rules thereunder to be filed with, or filed with and approved by, the Commission before such change may be effective, then such change would not be effective until filed with, or filed with

¹⁹³ See Section 12.1, 6th BOX LLC Agreement. Instead, BSE proposes that BOX would be entitled to damages in the event any inspection, copying, or review of BOX books and records by the Regulatory Authority is, in whole or in part, used by the Regulatory Authority or any of its affiliates for any purpose other than to fulfill the Regulatory Authority's regulatory obligations. See Section 12.1, 6th BOX LLC Agreement.

¹⁹⁴ See Section 16.6, 6th BOX LLC Agreement. BSE also proposes that the provision would not be interpreted to limit or impede the rights of the Commission or the Regulatory Authority to access and examine such confidential information or to limit or impede the ability of any officers, directors, employees, or agents of BOX to disclose such confidential information to the Commission or the Regulatory Authority. Id.

¹⁹⁵ See Section 19.1, 6th BOX LLC Agreement.

and approved by, the Commission, as the case may be.¹⁹⁶

The current BOX LLC Agreement provides that each BOX Member and its officers, directors, agents, and employees must submit to the jurisdiction of the federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to federal securities laws, rules, or regulations thereunder, arising out of, or relating to, BOX activities.¹⁹⁷ BSE proposes to extend this provision such that BOX and its officers, directors, agents, and employees also would submit to the jurisdiction of the U.S. federal courts, the Commission, and the Regulatory Authority.¹⁹⁸

Finally, the current BOX LLC Agreement provides that BSE, as a party to the agreement, and BOX Members would take such action as is necessary to ensure that their officers, directors, and employees consent to the applicability of certain provisions in the BOX LLC Agreement, including the requirement to submit to the jurisdiction of the U.S. federal courts, the Commission, and BSE. BSE proposes to amend this provision such that BOX's officers, directors, and employees would also consent to the same provisions.¹⁹⁹

The Commission believes that the revised provisions to the BOX LLC Agreement are

¹⁹⁶ Id. BOX would not be required to obtain the approval of the Regulatory Authority for any amendment to the revised BOX LLC Agreement pursuant to which the BOX Market would cease to be a facility of BSE, provided that such amendment would be filed with, or filed with and approved by, the Commission, as the case may be, before such amendment may be effective.

¹⁹⁷ As a BOX Member, MX US would be subject to this provision.

¹⁹⁸ See Section 19.6(b), 6th BOX LLC Agreement.

¹⁹⁹ See Section 19.6(c), 6th BOX LLC Agreement. BSE proposes to expand the provisions to which individuals must consent. In addition, MX and the Regulatory Authority would take such action as is necessary to insure that with respect to their BOX related activities, MX's officers, directors and employees consent to the communication of their "personal information" as defined under Canada's Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q.c.P-39.1 ("Private Sector Privacy Act"), by MX to the Commission and the Regulatory Authority and agree to waive the protection of such "personal information" that is provided by the Private Sector Privacy Act.

intended to enhance BSE’s ability to fulfill its self-regulatory obligations and assist in administering and complying with the requirements of the Act. Therefore, the Commission finds that these provisions are consistent with the Act.

C. BOXR

As noted above, after the BSE Acquisition, BOXR would continue to be wholly-owned by BSE and would become the indirect, wholly-owned subsidiary of NASDAQ OMX. BOXR is currently governed by a Delegation Plan,²⁰⁰ the BOXR By-Laws, and the applicable BSE Rules, including the BSE Constitution (to be replaced by the BSE By-Laws), and would continue to be so governed after the BSE Acquisition and the transfer of BSE’s interest in BOX to MX US.

In addition, BSE now proposes to adopt a written operating agreement for BOXR (“BOXR LLC Agreement”) in which BSE would be the sole member. BSE also proposes to amend the BOXR By-Laws to reflect the BSE Acquisition. As discussed above, BSE would continue to delegate certain self-regulatory responsibilities relating to the BOX Market to BOXR, although BSE would retain ultimate responsibility.²⁰¹

1. BOXR LLC Agreement; Changes in Control of BOXR

BSE proposes to adopt the BOXR LLC Agreement.²⁰² The BOXR LLC Agreement would include provisions that reflect BOXR’s status as a wholly-owned subsidiary of an SRO and that are designed to preserve the independence of the self-regulatory functions of BSE that have been delegated to BOXR.²⁰³ Also, the BOXR LLC Agreement would preclude BOXR

²⁰⁰ See supra note 126 and accompanying text. See also BOXR Order, supra note 124. No changes to the Delegation Plan are proposed.

²⁰¹ See supra notes 125-127 and accompanying text.

²⁰² See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159.

²⁰³ See Section 7, BOXR LLC Agreement.

from making distributions to BSE using regulatory funds.²⁰⁴

In addition, BSE could not transfer or assign its ownership of BOXR, unless such transfer or assignment is filed with and approved by the Commission pursuant to Section 19 of the Act.²⁰⁵ Moreover, because BOX Participants are BSE members, they are subject to Chapter XXXIX of the BSE Rules, which requires that no member or person associated with a member may own more than 20% of the outstanding voting securities of NASDAQ OMX.²⁰⁶ Together, these ownership and voting restrictions are designed to minimize the potential that a person could improperly interfere with or attempt to restrict the ability of the Commission or BSE to effectively carry out their regulatory oversight responsibilities under the Act. The Commission believes that the proposed BOXR LLC Agreement is consistent with the Act.

2. Amendments to the BOXR By-Laws; BOXR Board; Fair Representation

The BOXR Board would continue to be composed of at least 50% BOXR Public Directors²⁰⁷ and at least 20% (but no fewer than two directors) would continue to be officers or directors of a firm approved as a BOX Participant (“BOXR BOX Participant Directors”).²⁰⁸ The BOXR BOX Participant Directors would be selected pursuant to BOXR’s current procedures for the nomination and election of BOXR BOX Participant Directors by BOX Participants, as would

²⁰⁴ See Section 15, BOXR LLC Agreement. Pursuant to Schedule A of the proposed BOXR LLC Agreement, BOXR regulatory funds means fees, fines, or penalties derived from the regulatory operations of BOXR, but would not include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of BOXR, even if a portion of such revenues are used to pay costs associated with the regulatory operations of BOXR.

²⁰⁵ See Section 20, BOXR LLC Agreement.

²⁰⁶ See supra note 99 and accompanying text.

²⁰⁷ See supra notes 175-176 and accompanying text.

²⁰⁸ See proposed Section 4, BOXR By-Laws.

be the BOX Participant Director candidate for the BSE Board.²⁰⁹ The successful candidates for BOXR Participant Director positions would be submitted to BSE, as the sole member of BOXR, for election.²¹⁰ The successful candidate for the BOX Participant Director position on the BSE Board would be submitted to NASDAQ OMX, as the sole shareholder of BSE, for election.²¹¹ In connection with this process, BSE proposes, in the BSE Governance Proposal, that the BSE By-Laws include a provision that requires BSE's Nominating Committee to give due consideration to the recommendation of the BOXR Nominating Committee in nominating the BOX Participant Director to the BSE Board.²¹²

Although the BSE By-Laws require only due consideration of the recommendation made by the BSE Nominating Committee, BSE states in its proposed rule change that, in nominating

²⁰⁹ See current Section 14(e), BOXR By-Laws, and proposed Section 14(e), proposed BOXR By-Laws. See also BOXR Order, supra note 124, 69 FR 2768, at notes 21-26 and 52-57, and accompanying text, and discussion supra at note 60 accompanying text. The BOXR Nominating Committee would continue to be responsible for nominating the BOXR BOX Participant Director candidates for the two positions on the BOXR Board and the BOX Participant Director candidate for the one position on the BSE Board. See supra note 59 and accompanying text. In addition, BOX Participants would continue to be able to submit additional nominees for each of these positions and vote on and elect from the slate of nominees the candidates to be elected to those positions. See Section 14(e), BOXR By-Laws.

²¹⁰ See proposed Section 14(e)(iii), BOXR By-Laws.

Pursuant to proposed Section 14(e)(iii)(E) of the BOXR By-Laws, the two nominees for the BOXR Participant Director positions receiving the highest number of votes would be declared elected thereto, and the one nominee for the BOX Participant Director position on the BSE Board would be recommended by the BOXR Nominating Committee for election thereto.

Proposed Section 22 of the BOXR LLC Agreement, which otherwise generally provides that the provisions of the BOXR LLC Agreement would not be deemed to create any right in any person not a party to the BOXR LLC Agreement, would make clear that the limitations of Section 22 would not apply to BOX Participants to the extent provided in Section 14 of the BOXR By-Laws.

²¹¹ Id.

²¹² See proposed Section 4.14, BSE By-Laws.

the BOX Participant Director to the BSE Board, the BSE Nominating Committee would adopt the recommendation of the BOXR Nominating Committee, and NASDAQ OMX, as the sole stockholder of BSE, would elect such candidate.²¹³ To reconcile the BSE By-Laws and this representation, BSE states that immediately following the closing of the BSE Acquisition, BSE would propose to the BSE Board an amendment to the BSE By-Laws to make it clear that the candidate nominated by the BOXR Nominating Committee to serve as the BOX Participant Director on the BSE Board would also be nominated by the BSE Nominating Committee and elected by NASDAQ OMX, unless such nominee is not otherwise eligible for service pursuant to BSE By-Laws Section 4.3.²¹⁴ The Commission believes that the proposed petition process, coupled with the right to vote for their representatives, should help to ensure that BOX Participants have the opportunity to be involved in the selection of their representatives for the BOXR Board and the BSE Board. The Commission notes that this proposed process is consistent with the current process for electing BOX Participant Directors previously approved by the Commission.²¹⁵

The Commission finds that the proposed changes are consistent with Sections 6(b)(3) of

²¹³ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26159, n.16, and accompanying text.

²¹⁴ In Amendment No. 1 to the BSE Governance Proposal, BSE states that, after such proposal to the BSE Board: “[BSE] shall promptly file the amendment as a proposed rule change for approval by the Commission. This clarifying change could not be included in this filing because Article XX of [BSE’s] current Constitution, which is being replaced by the proposed [BSE] By-Laws, provides that [BSE’s] members must approved amendments to the [BSE] Constitution. The [BSE] members voted to approve the [BSE] By-Laws as submitted in this filing on December 4, 2007, prior to the submission of this filing to the Commission, and it would have been impracticable and unduly expensive to seek a second member vote for approval of this clarifying change. Following adoption of the new [BSE] By-Laws, the [BSE] Board will have authority to approve [BSE] By-Law amendments.” See Amendment No. 1 to the BSE Governance Proposal, supra note 4.

²¹⁵ See BOXR Order, supra note 124, 69 FR at 2771.

the Act,²¹⁶ which requires BSE to assure a fair representation of its members in the selection of its directors and administration of its affairs because the proposal is designed to ensure that BOX Participants continue to participate in the selection of their representatives to the BOXR and BSE Boards.

3. Disciplining of Affiliated Members

In the BSE Governance Proposal, BSE proposes to amend the BOXR By-Laws to provide that neither the BSE Board nor the BOXR Board would consider appeals of disciplinary actions involving BOX Participants that are affiliates of NASDAQ OMX.²¹⁷ Currently, any BOX Participant “adjudged guilty in any disciplinary proceeding” by the BOXR Hearing Committee²¹⁸ or any panel thereof may appeal such decision to the BOXR Board and subsequently to the BSE Board. Any initial decision that is rendered by the BOXR Hearing Committee regarding the affiliated BOX Participant would instead constitute final disciplinary action of BSE under Rule 19d-1(c)(1) under the Act.²¹⁹ This proposed change is consistent with the process for appeals by affiliated members of Nasdaq under Nasdaq’s rules, which previously was approved by the Commission.²²⁰

²¹⁶ 15 U.S.C. 78f(b)(3).

²¹⁷ See proposed Section 14(f)(i), BOXR By-laws.

²¹⁸ See BOXR By-Laws, Section 14(f). The “BOXR Hearing Committee” is appointed by the Chairman of the BOXR Board and must include one BOX Participant, but may not include members of the BOXR Board or BSE Board. The BOXR Hearing Committee has exclusive jurisdiction to conduct disciplinary proceedings brought by BOXR against any BOX Participant for violation of the Act, the rules and regulations thereunder, the BSE By-Laws, BOX Rules, the BOXR LLC Agreement or By-Laws, or the interpretations and stated policies of either the BSE or BOXR Boards. Id. The BOX Committee would hear appeals from regulatory decisions of the BOXR Board. See supra note 167 and accompanying text.

²¹⁹ 17 CFR 240.19d-1(c)(1).

²²⁰ See Securities Exchange Act Release No. 54170, supra note 113, 71 FR at 42151.

The Commission believes that this proposed change is consistent with the Act, including Section 6(b)(7) thereunder,²²¹ which requires that the rules of an exchange must provide a fair procedure for disciplining members. Specifically, this proposal, which specifies that the BSE Board and the BOXR Board may not be involved in review of disciplinary actions involving affiliated BOX Participants, would mitigate a conflict of interest that could occur as a result of Nasdaq OMX's ownership of BSE.

D. BSX

1. NASDAQ OMX Ownership of BSX

In addition to the BSE Acquisition, NASDAQ OMX would acquire all of the outstanding limited liability company interests in BSX held by investors other than BSE.²²² As a result, NASDAQ OMX would own 46.79% of BSX directly and would own indirectly through BSE the remaining 53.21% of BSX. Following the BSE Acquisition, BSE would remain the SRO and would provide the regulatory framework for BSX,²²³ and BSE expects to operate in the future a facility for the trading of cash equity securities through BSX. BSE would not resume trading of cash equity securities until it has filed a proposed rule change under Section 19(b) of the Act proposing amendments to BSE Rules, and the Commission has approved the new BSE Rules.²²⁴

The current BSX Operating Agreement requires that any transfer that results in the acquisition and holding by any person, alone or together with any affiliate of such person, of an aggregate percentage interest level that meets or crosses the threshold of 20% be subject to a rule

²²¹ 15 U.S.C. 78f(b)(7).

²²² BSX was formed in 2004 as a joint venture between BSE and several investors to operate an electronic trading facility, BeX, for the trading of cash equity securities. BeX ceased its operations in September 2007. See BSE Governance Proposal Notice, supra note 3, 73 FR at 26166.

²²³ See proposed Section 3.2, BSX Operating Agreement.

²²⁴ See BSE Governance Proposal Notice, supra note 3, 73 FR at 26167.

filing pursuant to Section 19(b)(1) of the Act.²²⁵ In accordance with this requirement, BSE proposes in the BSE Governance Proposal that the Commission approve the transfer of ownership interests in BSX to NASDAQ OMX.

The Commission notes that following the transfer of ownership interests in BSX to NASDAQ OMX, BSE and NASDAQ OMX would be the sole members of BSX. In accordance with proposed Section 18.1 of the BSX Operating Agreement, any amendment to the BSX Operating Agreement, including to permit the admission of additional or substitute members, would have to be submitted to the BSE Board for review, and, if any such amendment would be required under Section 19 of the Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment would not be effective until filed with, or filed with and approved by the Commission.²²⁶ As the operator of a facility of BSE, BSX must continue to be operated in a manner consistent with the regulatory and oversight responsibilities of BSE and with the Act and rules and regulations thereunder. The Commission believes that, because BSE would remain the SRO and would provide the regulatory framework for BSX, the transfer of ownership interests in BSX to NASDAQ OMX would not impair the continued ability of BSE or the Commission to discharge their respective regulatory and oversight responsibilities. The Commission therefore finds that the transfer of ownership interests in BSX to NASDAQ OMX is consistent with the Act.

2. BSX Operating Agreement

In conjunction with the BSE Acquisition, BSE also proposes in the BSE Governance Proposal to amend the BSX Operating Agreement to reflect the sole ownership of BSX by BSE

²²⁵ See current Section 18.1, BSX Operating Agreement.

²²⁶ See proposed Section 8.2(e), BSX Operating Agreement.

and NASDAQ OMX.

a. Transfer, Ownership and Voting Restrictions

The amended BSX Operating Agreement would continue to state that BSX must provide the Commission with written notice ten days prior to the closing date of any acquisition that results in a BSX Member's percentage ownership interest in BSX, alone or with any affiliate, meeting or crossing the 5%, 10%, or 15 % thresholds.²²⁷ In addition, the amended BSX Operating Agreement would continue to provide that any transfer of BSX units that results in the acquisition and holding by any person, alone or together with an affiliate, of an interest that meets or crosses the 20% threshold or any successive 5% threshold (i.e., 25%, 30%, etc.) would trigger the requirement to file an amendment to the BSX Operating Agreement with the Commission under Section 19(b) of the Act.²²⁸

Further, the amended BSX Operating Agreement would continue to provide that any person that acquires a controlling interest (i.e., an interest of 25% or greater) in a BSX Member that holds 20% or more of BSX units would be required to become a party to the BSX Operating Agreement and abide by its terms.²²⁹ The addition of any such indirect controlling party would

²²⁷ See proposed Section 8.2(d), BSX Operating Agreement.

²²⁸ See supra note 225. In addition, the amended BSX Operating Agreement would provide that any transfer of BSX units that would reduce BSE's ownership in BSX below the 20% threshold would require a proposed rule change under Section 19(b) of the Act. Moreover, Commission approval would be required to permit any person, alone or together with any affiliate, to control 20% of the Total Votes. See current Section 8.4(e), BSX Operating Agreement, and proposed Section 8.2(e), BSX Operating Agreement. The Commission notes that proposed Section 18.1 of the BSX Operating Agreement requires the submission of any proposed amendment thereto to the BSE Board for review. If such amendment is required under Section 19 of the Act to be filed with, or filed with and approved by, the Commission, it could not take effect until filed with, or filed with and approved by the Commission.

²²⁹ See proposed Section 8.2(f), BSX Operating Agreement.

also require a filing with the Commission pursuant to Section 19(b) of the Act.²³⁰

In the BSE Governance Proposal, BSE proposes to amend the BSX Operating Agreement to remove provisions that allow BSX Members to exercise rights of first refusal in the event that one member proposes to transfer its ownership interests in BSX to another member or BSX proposes to issue additional units of ownership.²³¹ Because BSX would be 100% owned, directly and indirectly, by NASDAQ OMX, this provision is no longer relevant. In addition, BSE proposes to expand those provisions of the BSX Operating Agreement that currently prohibit BeX Participants and their affiliates from owning or voting more than 20% of BSX to include all BSE members and their affiliates. To make the BSX Operating Agreement consistent with the exception from BSE Rules to permit NES and NOS to become affiliates of BSE,²³² the proposed amendment to the BSX Operating Agreement would state that these ownership and voting restrictions do not limit NASDAQ OMX's or BSE's ownership interests in BSX.²³³

The Commission believes that the proposed changes to provisions in the BSX Operating Agreement on transfer, ownership, and voting restrictions would not affect the ability of BSE to carry out its self-regulatory responsibilities or the ability of the Commission to fulfill its responsibilities under the Act. In particular, the proposal would not change the current percentage thresholds in the transfer, ownership, and voting provisions. The Commission finds that the proposed revisions to the BSX Operating Agreement discussed above are consistent with the Act.

²³⁰

Id.

²³¹

See current Sections 8.2 and 8.3, BSX Operating Agreement.

²³²

See supra notes 117-123 and accompanying text.

²³³

See proposed Sections 8.3 and 8.4, BSX Operating Agreement

b. BSE's Authority over BSX

Although NASDAQ OMX would own directly 46.79% of BSX, BSE would be entitled to designate all of the directors of the BSX board of directors (“BSX Board”).²³⁴ In addition, in the BSE Governance Proposal, BSE proposes to delete a provision in the BSX Operating Agreement that currently requires a super-majority of BSX directors’ votes, including the affirmative votes of all directors designated by BSE, before BSX could take certain significant actions, such as entering into a new line of business or replacing BSE as BSX’s regulatory service provider.²³⁵ Instead, BSE would have the authority to veto or mandate actions that relate to regulatory requirements.²³⁶ Specifically, the proposal sets forth that BSE’s affirmative vote would be required with respect to any action, transaction, or aspect of an action or transaction that BSE, in its sole discretion, determines is necessary or appropriate for, or interferes with, the performance or fulfillment of BSE’s regulatory functions, its responsibilities under the Act or as specifically required by the Commission.²³⁷ In addition, BSE would have the sole and exclusive right to direct that any required, necessary, or appropriate act be undertaken without regard to the vote, act, or failure to vote or act by any other party in any capacity.²³⁸

Further, the amended BSX Operating Agreement would state that any amendment thereto must be submitted to the BSE Board for review and, if such amendment is required under Section 19(b) of the Act and the rules thereunder to be filed with, or filed with and approved by

²³⁴ See proposed Section 4.1(b), BSX Operating Agreement. In addition, BSE proposes to reduce the number of BSX directors from six to five. See proposed Section 4.1(a), BSX Operating Agreement.

²³⁵ See current Section 4.4, BSX Operating Agreement.

²³⁶ See proposed Section 4.4, BSX Operating Agreement.

²³⁷ Id.

²³⁸ Id.

the Commission, then such amendment would not be effective until filed with, or filed with and approved by the Commission, as the case may be.²³⁹

The Commission believes that these proposals are designed to preserve BSE's regulatory authority over BSX, and any proposed facility for the trading of cash equity securities that BSX may operate, and are consistent with the Act because they would grant BSE the ability to direct BSX to perform any required, necessary, or appropriate act and would allow BSE to veto or mandate actions that relate to regulatory requirements. The Commission notes that BSE could not operate a facility for the trading of cash equity securities until it has filed under Section 19(b) of the Act, and the Commission has approved, the new BSE Rules. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,²⁴⁰ which requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and 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.

c. Confidentiality Provisions

In the BSE Governance Proposal, BSE proposes to amend the BSX Operating Agreement to provide that all confidential information pertaining to the self-regulatory function of BSE or the business of BSE relating to the trading of cash equity securities (including disciplinary matters, trading data, trading practices and audit information) in the books and records of BSX would not be made available to any persons. The proposal would allow such information to be made available to officers, directors, employees and agents of BSX who have a reasonable need to know the contents thereof. However, such confidential information would be required to be

²³⁹ See proposed Section 18.1, BSX Operating Agreement.

²⁴⁰ 15 U.S.C. 78f(b)(1).

retained in confidence by BSX and its officers, directors, employees and agents and not be used for any commercial purposes.²⁴¹ The Commission believes that the revised confidentiality provisions would not impair BSE's self-regulatory obligations with respect to BSX and finds that this provision is consistent with the Act.

d. Jurisdiction

The current BSX Operating Agreement provides that BSX and each BSX Member as well as the officers, directors, agents, and employees of BSX and each BSX Member must submit to the jurisdiction of the federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder, arising out of, or relating to BSX's activities.

In the BSE Governance Proposal, BSE proposes to amend Section 18.6(b) of the BSX Operating Agreement to: (1) clarify that the jurisdiction of the U.S. federal courts, the Commission, and BSE over BSX, its members, and their respective officers, directors, agents, and employees is exclusive; (2) require BSX and its members and their respective officers, directors, agents, and employees to agree not to assert lack of personal jurisdiction by the U.S. federal courts or BSE;²⁴² and (3) include a provision regarding the waiver of the defense or application of any foreign secrecy or blocking statutes by BSX and its members and their respective officers, directors, agents, and employees, with respect to BSX's activities or their participation therein.

²⁴¹ See proposed Section 16.7, BSX Operating Agreement. BSE also proposes that the provision would not be interpreted to limit or impede the ability of any officers, directors, employees or agents of the Company to disclose confidential information to the Commission or the BSE.

²⁴² Section 18.6(b) of the BSX Operating Agreement currently requires BSX and its members and their respective officers, directors, agents, and employees, to agree not to assert lack of personal jurisdiction by the Commission.

The Commission believes that these changes, in conjunction with other provisions of the BSX Operating Agreement that would remain unchanged, would enhance BSE's ability to fulfill its self-regulatory obligations and assist in administering and complying with the requirements of the Act. Moreover, BSE is required to enforce compliance with these provisions because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Act.²⁴³ A failure on the part of BSE to enforce its rules could result in a Commission enforcement action pursuant to Section 19(h)(1) of the Act.²⁴⁴

E. BSECC

As a result of the BSE Acquisition, BSECC, BSE's wholly-owned subsidiary and a registered clearing agency, would become a wholly-owned indirect subsidiary of NASDAQ OMX. As noted above, BSECC ceased processing trades in 2007. In connection with the transaction, BSECC proposes, in the BSECC Governance Proposal, to amend its Articles of Organization ("BSECC Articles of Organization"). BSECC also proposes to update the BSECC Articles of Organization and By-Laws ("BSECC By-Laws") in certain other respects, including, according to BSE, to reflect modern corporate practice for Massachusetts corporations. In addition, BSECC has filed the NASDAQ OMX Certificate and By-Laws as proposed rules.²⁴⁵

In connection with the BSE Acquisition, BSECC proposes to amend the BSECC Articles of Organization such that the total number of shares of each class of stock that BSECC would be authorized to issue is 150 shares of common stock. This amendment would reflect a reduction in the total authorized share capital of BSECC from 1000 shares of common stock to the 150 shares of common stock currently held by BSE. Thus, following the amendment, all of the authorized

²⁴³ 15 U.S.C. 78c(a)(27).

²⁴⁴ 15 U.S.C. 78s(h)(1).

²⁴⁵ See supra note 10 and accompanying text.

shares of common stock of BSECC would be outstanding and would be owned by BSE.²⁴⁶

BSECC also proposes to amend the BSECC Articles of Organization to provide that BSE may not transfer or assign any shares of stock of BSECC unless such transfer or assignment has been filed with and approved by the Commission under Section 19 of the Act.²⁴⁷ These proposed changes are designed to ensure that, absent Commission approval, BSECC would remain a wholly-owned subsidiary of BSE. Further, BSECC proposes to amend the BSECC By-Laws to expressly state that the BSECC By-Laws may be amended only upon approval by the Commission and in accordance with the rules of BSECC.²⁴⁸

BSECC also proposes several other changes to the BSECC Articles of Organization and BSECC By-Laws, which BSECC states are primarily for the purpose of updating those documents in accordance with modern corporate practice for Massachusetts corporations.²⁴⁹ Specifically, BSECC proposes to adopt what it terms “modern provisions” stipulating the conditions under which BSECC may indemnify its officers and directors and the scope of that indemnification. Such provisions provide that directors of BSECC are not personally liable to it for breaches of fiduciary duty, except for breaches involving (1) a breach of the duty of loyalty, (2) acts or omissions not in good faith or that involve intentional misconduct or knowing violation of law, (3) distributions of assets that would render BSECC insolvent, or (4) any transaction from which the director derived an improper personal benefit.²⁵⁰ BSECC also proposes to amend the BSECC By-Laws to clarify the time periods allowed or required for

²⁴⁶ See proposed BSECC Articles of Organization, Article III.

²⁴⁷ See proposed BSECC Articles of Organization, Article V.

²⁴⁸ See proposed BSECC By-Laws Article VI.7. BSECC Rule XII requires notice to clearing members of amendments to the BSECC By-Laws.

²⁴⁹ See BSECC Governance Proposal Notice, supra note 9, 73 FR at 27584.

²⁵⁰ See proposed BSECC By-Laws Article VI.

notice to stockholders of meetings, the permissible duration of stockholder proxies, and the setting of a record date, which BSECC states are consistent with Massachusetts law.²⁵¹ BSECC further proposes to remove a provision from its By-Laws allowing close of the transfer books of BSECC, which BSECC states is no longer consistent with Massachusetts law.²⁵²

In addition, BSECC states that its proposed changes would allow stockholders, as well as directors, to fill vacancies on the BSECC Board of Directors (“BSECC Board”) in accordance with Massachusetts law²⁵³ and to clarify that directors of BSECC, if such directors also serve on the BSE Board, must tender resignations from the BSECC Board if they cease to be BSE Directors.²⁵⁴ The proposed changes also would clarify the requirements for action by the BSECC Board and the stockholders to be taken without a meeting.²⁵⁵

The Commission finds that the proposed changes to the BSECC Articles of Organization and BSECC By-Laws are consistent with the requirements of the Act and the rules and regulations thereunder and particularly with the requirements of Section 17A(b)(3)(C) of the Act.²⁵⁶ The Commission notes that the proposed rule change does not amend BSECC’s rules or procedures with respect to the clearance and settlement of securities transactions or the safeguarding of securities and funds which are in BSECC’s control or for which it is responsible.

²⁵¹ See proposed BSECC By-Laws Article I.4, Article I.6, and Article V.3.

²⁵² See BSECC By-Laws Article V.3. BSECC represents that this change would not limit the effectiveness of the change to the Articles of Organization requiring Commission approval of transfers of BSECC’s stock. See BSECC Governance Proposal Notice, *supra* note 9, 73 FR 27583, n.5.

²⁵³ See proposed BSECC By-Laws Article II.4.

²⁵⁴ See proposed BSECC By-Laws Article II.7.

²⁵⁵ BSECC also proposes changes to eliminate the offices of “clerk” and “vice-chairman” from BSECC and to delete references to those offices from the By-Laws and to establish that the officers of BSECC are all appointed by and subject to removal by the BSECC Board. See proposed BSECC By-Laws Article III.1 and III.4.

²⁵⁶ 15 U.S.C. 78q-1(b)(3)(C).

Section 17A(b)(3)(C) of the Act requires that a clearing agency's rules assure the fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs. BSECC would remain a wholly-owned subsidiary of BSE following the acquisition by NASDAQ OMX and the BSECC By-Laws relating to the selection, composition, powers, and duties of the BSECC Board, committees, and officers, except as discussed above, would remain unchanged. Accordingly, the Commission finds that BSECC's rules would continue to assure the fair representation of its shareholders and participants in the selection of BSECC's directors and the administration of BSECC's affairs as required by Section 17A(b)(3)(C).

Furthermore, as discussed above with respect to BSE, BSECC also has filed the Certificate and By-Laws of NASDAQ OMX as proposed rules.²⁵⁷ As noted above, although NASDAQ OMX is not itself an SRO, its activities with respect to the operation of BSECC must be consistent with, and must not interfere with, the self-regulatory obligations of BSECC. NASDAQ OMX's By-Laws would make applicable to all of NASDAQ OMX's SRO subsidiaries, including BSECC (after the BSE Acquisition), certain provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory functions, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.²⁵⁸

Additionally, the Commission notes that the NASDAQ OMX By-Laws would provide that the NASDAQ OMX Board, as well as its officers, employees, and agents, may not take any

²⁵⁷ See supra note 38.

²⁵⁸ See Amendment No. 1 to the BSECC Governance Proposal, supra note 10.

action that would interfere with the decisions of the board of directors of any SRO subsidiary relating to its regulatory functions or the market structures or the clearing systems which it regulates or that would interfere with the ability of any SRO subsidiary to carry out its responsibilities under the Act.²⁵⁹ Also, the NASDAQ OMX By-Laws would specifically require the NASDAQ OMX Board to consider BSECC's regulatory obligations as a clearing agency when evaluating any issue,²⁶⁰ including granting any exemption from the NASDAQ OMX voting limitations discussed above.²⁶¹ The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the BSE Acquisition, are designed to facilitate BSECC's ability to fulfill its self-regulatory obligations and, accordingly, are consistent with Section 17A of the Act.

²⁵⁹ See proposed Section 12.1(a), NASDAQ OMX By-Laws.

²⁶⁰ The NASDAQ OMX Board would be required to consider, to the extent deemed relevant, when evaluating any issue, whether such would promote the prompt and accurate clearance and settlement of securities transactions (and to the extent applicable, derivative agreements, contracts and transactions), would assure the safeguarding of securities and funds in the custody or control of the SRO subsidiaries that are clearing agencies or securities and funds for which they are responsible, would foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and would remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. See proposed Section 12.7, NASDAQ OMX By-Laws.

²⁶¹ Specifically, the NASDAQ OMX Board would be required to determine that granting any such exemption would promote the prompt and accurate clearance and settlement of securities transactions (and to the extent applicable, derivative agreements, contracts and transactions), would assure the safeguarding of securities and funds in the custody or control of the SRO subsidiaries that are clearing agencies or securities and funds for which they are responsible, would foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and would remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. See proposed Section 12.5, NASDAQ OMX By-Laws; and Article Fourth.C.6, NASDAQ OMX Certificate. See also notes 100-104 and accompanying text.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning: (1) Amendment No. 1 to File No. SR-BSE-2008-23 (the BSE Governance Proposal), including whether Amendment No. 1 is consistent with the Act; (2) Amendment No. 1 to File No. SR-BSECC-2008-01 (the BSECC Governance Proposal), including whether Amendment No. 1 is consistent with the Act; and (3) Amendment No. 1 to File No. SR-BSE-2008-25 (the BOX Transfer Proposal), including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BSE-2008-23, SR-BSECC-2008-01, or SR-BSE-2008-25 as applicable, on the subject line.

Paper comments:

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

All submissions should refer to Amendment No. 1 to File No. SR-BSE-2008-23, Amendment No. 1 to File No. SR-BSECC-2008-01, or Amendment No. 1 to File No. SR-BSE-2008-25, as applicable. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission

and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of BSE or BSECC, as applicable. 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 Amendment No. 1 to File No. SR-BSE-2008-23, Amendment No. 1 to File No. SR-BSECC-2008-01, or Amendment No. 1 to File No. SR-BSE-2008-25, as applicable, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Accelerated Approval of the BSE Governance Proposal, as Modified by Amendment No. 1, the BSECC Governance Proposal, as Modified by Amendment No. 1, and the BOX Transfer Proposal, as Modified by Amendment No. 1

The Commission finds good cause for approving: (1) the BSE Governance Proposal, as modified by Amendment No. 1, (2) the BSECC Governance Proposal, as modified by Amendment No. 1, and (3) the BOX Transfer Proposal, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of filing of such amendments in the Federal Register.²⁶²

In Amendment No. 1 to the BSE Governance Proposal and Amendment No. 1 to the BSECC Governance Proposal, BSE and BSECC each propose to adopt as rules the NASDAQ OMX Certificate and NASDAQ OMX By-Laws. The NASDAQ OMX Certificate, as filed by

²⁶² 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

BSE and BSECC, was previously approved by the Commission as rules of Nasdaq.²⁶³ The NASDAQ OMX By-Laws were similarly approved previously by the Commission.²⁶⁴ As filed by BSE and BSECC, the NASDAQ OMX By-Laws include certain new terminology to reflect the acquisition of BSE and BSECC by NASDAQ OMX. These changes were filed by Nasdaq as a proposed rule change, were published for comment, and were approved by the Commission.²⁶⁵ The changes were also filed by Phlx, and were approved by the Commission, in connection with the Phlx Acquisition.²⁶⁶ The Commission received no comments on the proposed changes to the NASDAQ OMX By-Laws in either instance.²⁶⁷

As discussed more fully above in Sections II.A.1. and II.A.6., and in the NASDAQ OMX By-Law Proposal Notice, certain provisions of NASDAQ OMX's Certificate and By-Laws are designed to facilitate the ability of NASDAQ OMX's SRO subsidiaries, including BSE and BSECC, to maintain the independence of each of the SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.²⁶⁸ As stated above, the Commission finds that such

²⁶³ See Nasdaq Exchange Approval Order, supra note 63, 73 FR at 3552-3553.

²⁶⁴ See NASDAQ OMX By-Laws Proposal Notice, supra note 18, 73 FR 26182, and NASDAQ OMX By-Laws Approval Order, supra note 31, 73 FR 42850.

²⁶⁵ Id.

²⁶⁶ See Securities Exchange Act Release No. 58179, supra note 27.

²⁶⁷ In addition, Amendment No. 1 to the BSE Governance Proposal and Amendment No. 1 to the BSECC Governance Proposal incorporate a change to the Nasdaq OMX By-Laws to clarify the definition of Non-Industry Director with respect to issuer representation on the Nasdaq OMX Board of Directors that recently was approved by the Commission. See Securities Exchange Act Release No. 58201 (July 21, 2008), 73 FR 43812 (July 28, 2008) (SR-NASDAQ-2008-043).

²⁶⁸ See supra notes 38-47, 100-104 and accompanying text.

provisions are consistent with the Act.²⁶⁹ Notably, the NASDAQ OMX Certificate and By-Laws are rules of Nasdaq that have been approved previously by the Commission, as noted above, and the changes to the NASDAQ OMX By-Laws were published for notice and comment, as noted above, and the Commission did not receive any comments thereon.

Additionally, in Amendment No. 1 to the BSE Governance Proposal, BSE proposes to amend Section 8.2(f) of the BSX Operating Agreement. Section 8.2(f) currently requires that any person who, alone or together with any affiliate of such person, has 25% or greater interest in a BSX Member who, alone or together with any affiliate of such BSX Member, holds 20% or greater interest in BSX become party to, and abide by all the provisions of, the BSX Operating Agreement. In Amendment No. 1, BSE proposes to clarify that for the Section 8.2(f) requirement to apply, a person, alone or together with any affiliate of such person, must have direct or indirect ownership of 25% or more of the total voting power of all equity securities of a BSX Member, other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities. Notwithstanding the foregoing, BSE proposes to clarify that a person with zero percent direct or indirect interest in a BSX Member would not be required to become party to the BSX Operating Agreement pursuant to the revised Section 8.2(f).

The Commission finds these changes to the BSX Operating Agreement consistent with the Act. Section 8.2(f) of the BSX Operating Agreement is designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and BSE to effectively carry out their regulatory oversight responsibilities under the Act. The clarifications proposed by BSE do not hinder the intent of Section 8.2(f), because the Commission believes

²⁶⁹

See id.

that a person without voting power in the equity securities of a BSX Member, or a person with no direct or indirect interest in a BSX Member, could not interfere with or restrict the Commission's or the BSE's ability to carry out its regulatory responsibilities.

In Amendment No. 1 to the BOX Transfer Proposal, BSE proposes to amend Section 8.4(g) of the BOX LLC Agreement. Section 8.4(g) currently requires that any person who, alone or together with any affiliate of such person, has 25% or greater interest in a BOX Member who, alone or together with any affiliate of such BOX Member, holds 20% or greater interest in BOX become party to, and abide by all the provisions of, the BOX LLC Agreement. In Amendment No. 1, BSE proposes to clarify that for the Section 8.4(g) requirement to apply, a person, alone or together with any affiliate of such person, must have direct or indirect ownership of 25% or more of the total voting power of all equity securities of a BOX Member, other than voting rights solely with respect to matters affecting the rights, preferences, or privileges of a particular class of equity securities. Notwithstanding the foregoing, BSE proposes to clarify that a person with zero percent direct or indirect interest in a BOX Member would not be required to become party to the BOX LLC Agreement pursuant to the revised Section 8.4(g).

The Commission finds these changes to the BOX LLC Agreement consistent with the Act. Section 8.4(g) of the BOX LLC Agreement is designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and BSE to effectively carry out their regulatory oversight responsibilities under the Act. The clarifications proposed by BSE do not hinder the intent of Section 8.4(g) because the Commission believes that a person without voting power in the equity securities of a BOX Member, or a person with no direct or indirect interest in a BOX Member, could not interfere with or restrict the Commission's or the BSE's ability to carry out its regulatory responsibilities.

For the reasons described above, the Commission finds good cause for approving each of the following on an accelerated basis, pursuant to Section 19(b)(2) of the Act: (1) the BSE Governance Proposal, as modified by Amendment No. 1; (2) the BSECC Governance Proposal, as modified by Amendment No. 1; and (3) the BOX transfer Proposal, as modified by Amendment No. 1.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷⁰ that the BSE Interim Certificate Proposal (SR-BSE-2008-02), as modified by Amendment No. 1, be, and hereby is, approved; that the BSE Governance Proposal (SR-BSE-2008-23), as modified by Amendment No.1, be, and hereby is, approved on an accelerated basis; that the BOX Transfer Proposal (SR-BSE-2008-25), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis; and that the BSECC Governance Proposal (SR-BSECC-2008-01), as modified by Amendment No.1 be, and hereby is approved on an accelerated basis.

By the Commission.

Florence E. Harmon
Acting Secretary

²⁷⁰ 15 U.S.C. 78s(b)(2).