

the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2003-81 and should be submitted by November 7, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48650; File No. SR-BSE-2003-19]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the LLC Operating Agreement of the Proposed New Exchange Facility To Be Operated by the Boston Options Exchange Group LLC

October 17, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 16, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

As discussed in detail in the BOX Proposing Release,<sup>3</sup> the BSE proposes to establish rules for BOX,<sup>4</sup> a new Exchange facility, as that term is defined in Section 3(a)(2) of the Act.<sup>5</sup> BOX would be operated by Boston Options

Exchange Group LLC ("BOX LLC"), a Delaware limited liability company ("LLC"). The BSE is filing the Operating Agreement of BOX LLC ("Operating Agreement" or "Agreement") to establish BOX LLC's governance and operating authority for the facility. The Operating Agreement functions as the source of the company's governance and operating authority and, therefore, functions in a similar manner as by-laws or articles of incorporation function for a corporation. The BSE is requesting confidential treatment of the sections of the Operating Agreement which are confidential business information and which do not relate to the control and governance of BOX LLC. The redacted text of the Operating Agreement appears below; redacted portions are noted in brackets.

\* \* \* \* \*

Boston Options Exchange Group LLC  
Second Amended and Restated  
Operating Agreement

This AMENDED AND RESTATED OPERATING AGREEMENT is made as of July 25, 2003, by and among Bourse de Montreal Inc., a company incorporated in Quebec, Canada (the "Bourse"), Boston Stock Exchange, Inc., a company incorporated in Delaware, USA ("BSE"), Interactive Brokers Group LLC, a limited liability company organized under the laws of Connecticut ("IB"), Boston Options Exchange Group LLC, a limited liability company organized under the laws of Delaware ("BOX") and all other Persons who become a party hereto as Members of BOX in accordance with the terms hereof, for the purpose of recording their agreement regarding the affairs of BOX and the conduct of its business.

WHEREAS, on January 16, 2002 the Bourse, BSE and IB caused a Certificate of Formation (the "Certificate") in the form of *Exhibit 1* hereto to be filed with the Office of the Secretary of State of the State of Delaware for the purpose of commencing the existence of BOX pursuant to the Act (as defined below);

WHEREAS, the Bourse, BSE, and IB formed BOX for the purpose of developing and operating an electronic market as a facility of the BSE for trading (i) options on Individual U.S. Equities, U.S. equity indices and U.S. Exchange traded funds and (ii) single stock futures; and

WHEREAS, subsequent to the execution of this Agreement, it is anticipated that BOX will enter into each of the Related Agreements;

WHEREAS, the Bourse, BSE, IB and BOX are parties to that certain Operating Agreement of BOX, dated as

of January 17, 2002 (the "Original Operating Agreement"), as amended by an Amended and Restated Operating Agreement dated as of June 21, 2002 (the "Amended Operating Agreement"); and

WHEREAS, the Members desire to amend and restate the Amended Operating Agreement upon the terms and conditions hereinafter set forth.

Accordingly, the parties hereby agree to amend and restate the Amended Operating Agreement as follows:

#### Article 1—Definitions

1.1 *Certain Defined Terms:* As used in this Agreement, the following capitalized terms have the following meanings.

"Act" means the Delaware Limited Liability Company Act, 6 Del. G.L. § 18-101, *et seq.*, as amended and in effect from time to time, and any successor statute.

"Additional Capital Contribution" means any Capital Contribution effected after completion of the Initial Capital Contributions pursuant to Section 7.3 hereof.

"Advisors" means, with respect to any Person, any of such Person's attorneys, accountants or consultants.

"Affiliate" means, with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership.

"Agreement" means this Operating Agreement, including all exhibits and schedules hereto, as amended, restated or supplemented from time to time.

"Bankruptcy" has the meaning ascribed thereto in Section 18-304 of the Act.

"Board" has the meaning set forth in Section 4.1 hereof.

"Bourse" has the meaning set forth in the preamble.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 47186 (January 14, 2003), 68 FR 3062 (January 22, 2003) (SR-BSE-2002-15) ("BOX Proposing Release").

<sup>4</sup> The term "BOX" means the Boston Options Exchange or Boston Stock Exchange Options Exchange, an options trading facility of the Exchange under Section 3(a)(2) of the Act. See proposed BOX Rules, Chapter I, *General Provisions*, § 1(a)(6) (definition of "BOX").

<sup>5</sup> 15 U.S.C. 78c(a)(2).

“*Bourse License*” means the license, to be entered into between the Bourse and BOX, from the Bourse to BOX of the right to use the name “Bourse de Montreal” in connection with the business of BOX.

“*BOX*” has the meaning set forth in the preamble.

“*BOX Confidential Information*” means any confidential or proprietary information of BOX, including any confidential or proprietary information conveyed to BOX pursuant to this Agreement or any Related Agreements.

“*BOX Market*” means the market that will be developed and operated by BOX pursuant to Section 3.1 hereof.

“*BOX Products*” means (i) option contracts on Individual U.S. Equities, (ii) option contracts on U.S. Equity indices, (iii) option contracts on U.S. Exchange traded funds, (iv) single stock futures on Individual U.S. Equities and (v) such other products as the Board may from time to time approve for Trading on the BOX Market.

“*BSE*” has the meaning set forth in the preamble.

[Business confidential]

“*BSE License*” means the license, to be entered into between BSE and BOX, from BSE to BOX of the right to use the name “Boston Stock Exchange” in connection with the name and business of BOX.

[Business confidential]

“*Capital Contribution*” means the amount of cash and the fair market value of all property and/or services contributed to BOX by a Member in its capacity as such at any point in time, including any Additional Capital Contributions. All such amounts contributed shall be reflected on the books and records of BOX. Any reference in this Agreement to the Capital Contribution of a Member shall include the Capital Contribution of any prior Member in respect of the same Unit or Units.

“*Certificate*” has the meaning set forth in the recitals hereto.

“*Code*” means the United States Internal Revenue Code of 1986, as amended and in effect from time to time.

“*Company Minimum Gain*” means partnership minimum gain with respect to BOX, as determined under Treasury Regulations § 1.704–2(d).

“*Competing Business*” means any electronic market for the Trading of any of the BOX Products.

“*DGCL*” has the meaning set forth in Section 4.2(b) hereof.

“*Directors*” has the meaning set forth in Section 4.1(a) hereof.

“*Disclosing Member*” has the meaning set forth in Section 16.6 hereof.

“*Distributable Cash*” has the meaning set forth in Section 9.1 hereof.

“*Effective Date*” means the date hereof.

“*Fiscal Year*” has the meaning set forth in Section 12.3 hereof.

“*Government Authority*” means any federal, national, state, municipal, local, foreign, territorial, provincial or other governmental department, commission, board, bureau, agency, regulatory authority, instrumentality, judicial or administrative body, domestic or foreign.

“*IB*” has the meaning set forth in the preamble.

“*IB License*” means the license, to be entered into by IB and BOX, from IB to BOX of the right to use the name IB in connection with the business of BOX.

“*IB Offer Period*” has the meaning set forth in Section 8.5(b)(ii) hereof.

“*IB Transfer*” has the meaning set forth in Section 8.5(b)(i) hereof.

“*IB Transfer Notice*” has the meaning set forth in Section 8.5(b)(i) hereof.

“*Indemnitees*” has the meaning set forth in Section 14.1 hereof.

“*Individual U.S. Equities*” means (i) U.S. ordinary shares, (ii) foreign shares trading as U.S. dollar-denominated, U.S. registered American depository receipts, (iii) single stock futures and (iv) foreign ordinary shares trading in the U.S. as foreign ordinary shares whether or not these also trade as U.S. dollar denominated U.S. registered American Depository Receipts.

“*Initial BSE Asset Contribution*” has the meaning set forth in Section 7.1(b) hereof.

“*Initial Capital Contributions*” has the meaning set forth in Section 7.1(d).

“*Initial Chairman*” has the meaning set forth in Section 4.5 hereof.

“*Initial IB Asset Contribution*” has the meaning set forth in Section 7.1(a) hereof.

“*Initial Operating Budget*” has the meaning set forth in Article 6 hereof.

“*Launch Date*” means the date on which Trading on the BOX Market shall have commenced.

“*Liquidator*” has the meaning set forth in Section 11.1(b) hereof.

“*Major Action*” has the meaning set forth in Section 4.4(b) hereof.

“*Member*” means each Person named as a Member on *Schedules* hereto, their successors and assigns, and any additional members admitted as provided by this Agreement.

“*Member Entities*” has the meaning set forth in Section 5.6 hereof.

“*Member Information*” has the meaning set forth in Section 16.6 hereof.

“*Member Nonrecourse Deductions*” means partner nonrecourse deductions with respect to a Member, as

determined under Treasury Regulations § 1.704–2(i)(2).

“*Member Nonrecourse Debt Minimum Gain*” means partner nonrecourse debt minimum gain with respect to a Member, within the meaning of Treasury Regulations § 1.704–2(i)(2).

“*Neutral Arbitrators*” has the meaning set forth in Section 13.1(a) hereof.

“*New Issuance*” has the meaning set forth in Section 8.5(c)(i) hereof.

“*New Issuance Notice*” has the meaning set forth in Section 8.5(c)(i) hereof.

“*New Issuance Period*” has the meaning set forth in Section 8.5(c)(ii) hereof.

[Business confidential]

[Business confidential]

“*Non-Transferring Member*” has the meaning set forth in Section 8.2 hereof.

“*Percentage Interest*” with respect to a Member means the ratio of the number of Units held by the Member to the total of all of the issued Units, expressed as a percentage.

“*Person*” means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof.

“*Proposed IB Transferee*” has the meaning set forth in Section 8.5(b)(i) hereof.

“*Proposed New Member*” has the meaning set forth in Section 8.5(c) hereof.

“*Regulatory Services Agreement*” means the Regulatory Services Agreement to be entered into between BSE or an Affiliate of BSE and BOX, or its duly adopted and executed replacement between a Regulatory Services Provider and BOX, as in effect from time to time.

“*Regulatory Services Provider*” shall initially mean BSE or an Affiliate of BSE and thereafter the provider of regulatory services contemplated by the Regulatory Services Agreement.

“*Related Agreements*” means the Technical and Operational Services Agreement, the Regulatory Services Agreement, the Bourse License, the BSE License, the IB License and any other agreement among or between any of the Members and BOX, or to which the Members or BOX are otherwise parties, in all cases necessary for the conduct of the business of BOX.

“*SEC*” means the United States Securities Exchange Commission.

“*Senior Executive*” has the meaning set forth in Section 4.7 hereof.

“*System*” means the technology, know-how, software, equipment,

communication lines or services, services and other deliverables or materials of any kind to be provided by Bourse (or any applicable third party) as may be necessary or desirable for the operation of the BOX Market.

“*Tax Amount*” of a Member for a fiscal year or other period shall mean the product of (a) the Member’s Tax Rate for such fiscal year or other period, and (b) the Member’s Tax Amount Base for such fiscal year or other period, and shall be reduced by (c) any United States federal, state or local income tax credits allocated to the Member by BOX for such Fiscal Year or other period, all as estimated in good faith by the Board.

“*Tax Amount Base*” of a Member for a fiscal year or other period shall mean the taxable income (for U.S. federal income tax purposes) allocated to the Member by BOX for such fiscal year or other period; *provided* that such taxable income shall be computed (i) without regard to the application of Code § 704(c) with respect to any variation between the fair market value and tax basis of any assets at the time such assets were contributed to BOX and (ii) without regard to any taxable income or loss recognized by a Member in connection with the dissolution, initial public offering, sale of substantially all equity or assets of BOX or any similar event.

“*Tax Rate*” of a Member for a fiscal year or other period shall mean the highest effective marginal combined United States federal, state and local income tax rate applicable during such fiscal year to business entities of the same type as the Member that do business exclusively in the Commonwealth of Massachusetts, giving proper effect to the federal deduction for state and local income taxes and taking into account any special tax rates (such as special capital gains tax rates) applicable to any portion or portions of the Member’s Tax Amount Base.

“*Technical and Operational Services Agreement*” means that agreement or agreements to be entered into by the Bourse or an Affiliate of the Bourse and BOX, or its or their duly adopted and executed replacement agreement or agreements, as in effect from time to time relating to the System.

“*Total Votes*” has the meaning set forth in Section 4.3.

“*Trading*” means the availability of the System to authorized users for entering, modifying, and canceling orders concerning the BOX products.

“*Transferee*” has the meaning set forth in Section 8.2 hereof.

“*Transfer Notice*” has the meaning set forth in Section 8.2(a) hereof.

“*Transferring Member*” has the meaning set forth in Section 8.2 hereof.

“*Treasury Regulations*” means the regulations promulgated under the Code, as amended and in effect from time to time.

“*Units*” shall mean the units of interest in the ownership and profits and losses of BOX and such Member’s right to receive distributions in its capacity as a Member.

“*Unpermitted Deficit*” has the meaning set forth in Section 10.3 hereof.

#### 1.2. Other Definitions

The words “include,” “includes,” and “including” where used in this agreement are deemed to be followed by the words “without limitation.”

Any reference to “Dollars” or “\$” in this Agreement refers to U.S. Dollars.

Except as otherwise provided in this Agreement or unless the context otherwise clearly requires, (a) terms used in this Agreement that are defined in the Act will have the meaning set forth in the Act; (b) all references in this Agreement to one gender also include, where appropriate, the other gender, the singular includes the plural and the plural includes the singular; and (c) references in this Agreement to the preamble, Sections, Schedules, and Exhibits shall be deemed to mean the preamble and sections of, and schedules and exhibits to, this Agreement.

#### Article 2—Organization

2.1. *Formation of BOX.* Each of the Bourse, BSE and IB hereby (a) authorizes and ratifies the formation of BOX as a limited liability company under the Act, the execution of the Certificate and the filing of the Certificate in the Office of the Secretary of State of the State of Delaware and (b) agrees that the rights, duties and liabilities of the Members shall be as provided in the Act, except as otherwise provided herein. The name of BOX shall be Boston Options Exchange Group LLC. The principal place of business of BOX shall be located at 100 Franklin Street, Boston, MA 02110. The Board may, at any time, change the name or the principal place of business of BOX and shall give notice thereof to the Members.

2.2. *Registered Agent and Office.* The registered agent for service of process on BOX in the State of Delaware required to be maintained by § 18–104 of the Act shall be Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, New Castle County, Delaware 19808 and the registered office of BOX in the State of Delaware shall be c/o Corporation Service Company at the same address. The Board may at any

time change the registered agent of BOX or the location of such registered office and shall give notice thereof to the Members.

2.3. *Term.* The legal existence of BOX shall be perpetual, unless BOX is sooner dissolved as a result of an event specified in the Act or pursuant to a provision of this Agreement.

2.4. *Interest of Members; Property of Company.* Units held by a Member shall be personal property for all purposes. All real and other property owned by BOX shall be deemed BOX property owned by BOX as an entity, and no Member, individually, shall own any such property. The name and mailing address of each initial Member and the number of Units held by each and the Percentage Interest represented thereby shall be as listed on *Schedule A* attached hereto. The Board shall be required to update said *Schedule A* from time to time as necessary to accurately reflect the information contained therein upon (i) the withdrawal of a Member, (ii) the admission of a new Member or (iii) any change in the number of Units owned by a Member, in each case pursuant to the terms and conditions specified in this Agreement.

#### 2.5. The Units.

(a) Except as otherwise provided in this Agreement, all Units are identical to each other and accord the holders thereof the same obligations, rights and privileges as are accorded to each other holder thereof. Except as otherwise provided in this Agreement, BOX will not subdivide or combine any Units, or make or pay any distribution on any Units, or accord any other payment, benefit or preference to any Units, except by extending such subdivision, combination, distribution, payment, benefit or preference equally to all Units.

(b) Units have no par value. To the extent that any Units must be cancelled or any Units shall be issued, the amount of such Units shall be rounded to the nearest whole number, to the extent feasible, as determined by the Board.

2.6. *Intent.* It is the intent of the Members that BOX (a) shall always be operated in a manner consistent with its treatment as a partnership for United States federal income tax purposes (and, to the extent possible, for state income tax purposes within the United States), and (b) to the extent not inconsistent with the foregoing clause (a) shall not be operated or treated as a partnership for purposes of § 303 of the Federal Bankruptcy Code (11 U.S.C. § 303). Neither BOX nor any Member shall take any action inconsistent with the express intent of the parties hereto as set forth in the immediately preceding sentence.

*Article 3—Purpose*

3.1. *Purpose.* The purpose of BOX is to develop an electronic market for Trading BOX Products and to engage in all related activities arising therefrom or relating thereto or necessary, desirable, advisable, convenient, or appropriate in connection therewith as the Members may determine. BOX shall not engage in any other business or activity except as approved in accordance with Section 4.4(b)(ii) hereof.

3.2. *Roles of Founding Members.* It is the intention of the Bourse, BSE, IB and BOX that the Bourse, BSE and IB will initially provide the following products and services to BOX:

(a) Pursuant to the Regulatory Services Agreement, BSE will provide U.S. Securities and Exchange Commission approved self-regulatory organization (“SRO”) services and status as the regulatory framework for the BOX Market. As the Regulatory Services Provider, BSE will have the sole regulatory responsibility for the activities of BOX. BSE will also provide certain administrative services.

(b) [Business confidential]

(c) [Business confidential]

*Article 4—Governance*4.1. *Board of Directors.*

(a) The Members shall establish a Board of Directors of BOX (the “Board” or “Directors”) to implement this Agreement. The Board shall be comprised of from six (6) to thirteen (13) Directors. The Board will manage the development, operations, business and affairs of BOX.

(b) IB, Bourse and the BSE shall initially be entitled to designate two (2) Directors each. Thereafter, if IB, Bourse or BSE maintains a Percentage Interest of [business confidential] or greater, it shall have the right to designate two (2) Directors. If IB, Bourse or BSE maintains a Percentage Interest of from [business confidential], it shall have the right to designate one (1) Director. Additionally, as long as BOX remains a facility of the BSE pursuant to Section 3(a)(2) of the Exchange Act of 1934, the BSE shall have the right to designate one (1) Director, whether or not the BSE maintains any Percentage Interest.

(c) Transferee Members [business confidential] who purchase and hold a Percentage Interest of [business confidential] or greater shall have the right to designate one (1) Director each.

(d) Each Director shall serve at the pleasure of the Member which designated such Director and may from time to time be replaced by such Member. Any such replacement must be a member of senior management or

Board of Directors of the designating party or an Affiliate of such designating party or of its principal owner or owners. Each Member shall notify the other Members in writing of any person designated by it to serve as a Director and any replacement for such person promptly following such designation or replacement. A Director shall be terminated by the Board: (i) in the event such Director has violated any provision of this Agreement, or (ii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

(e) Subject to the provisions of paragraph (c) above, in the event of the addition of any New Members or the transfer of interest from a Member to a Transferee Member, the Board shall determine the number of Board seats, if any, to be held by the New or Transferee Member and will determine the disposition of the Board seats held by any Transferring Member.

[Business confidential]

4.2. *Authority and Duties of Board; Committees.*

(a) *Authority and Conduct.* The Board shall have the specific authority delegated to it pursuant to this Agreement. Each Director agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the U.S. Securities and Exchange Commission and the BSE pursuant to their regulatory authority and the provisions of this Agreement. Furthermore, each Director shall take into consideration whether his or her actions as a Director would cause BOX to 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 of a free and open market and a national market system, and, in general, protect investors and the public interest.

(b) *Duties of Board.* Without limiting the general duties and authority of the Board as set forth in this Article 4, the Board shall have all of the powers of the Board of Directors of a corporation organized under the General Corporation Law of the State of Delaware, as from time to time in effect (the “DGCL”), including the power and responsibility to manage the business of BOX, select, and evaluate the performance of, the Senior Executive,

and establish and monitor capital and operating budgets.

(c) *Executive Committee.* There may be an executive committee of the Board consisting of at least one or more Directors designated by each of IB, BSE and the Bourse, as long as such Person is still a Member, such executive committee to be formed by resolution passed by the Board. The act of a majority of the members of such committee shall be the act of the committee. Said committee may meet at stated times or on notice to all by any of their own number, and, subject to Section 4.2(g) below, shall have and may exercise those powers of the Board in the management of the business affairs of the Company as are provided by this Agreement. Vacancies in the membership of the committee shall be filled by the Board in accordance with this Section 4.2(c) at a regular meeting or at a special meeting of the Board called for that purpose.

(d) [deleted]

(e) *Other Committees.* The Board may also designate one or more committees in addition to the executive committee, by resolution or resolutions passed by a majority of the whole Board; such committee or committees shall consist of one or more Directors of BOX, and, subject to Section 4.2(g) below, to the extent provided in the resolution or resolutions designating them, shall have and may exercise specific powers of the Board in the management of the business and affairs of BOX to the extent permitted by this Agreement. Such committee or committees shall have such name or names as may be determined from time to time by resolution adopted by the Board.

(f) *Powers Denied to Committees.* Committees of the Board shall not, in any event, have any power or authority to transact any Major Action or an action specifically covered by Section 4.4(c) or 4.4(d).

(g) *Substitute Committee Member; Minutes.* In the absence or on the disqualification of a member of a committee, the Member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint, in accordance with the provisions of this Section 4.2, another individual to act at the meeting in the place of such absent or disqualified member. All committees shall keep regular minutes of its proceedings and report the same to the Board as may be required by the Board.

4.3 (a) *Meetings.* The Board will meet as often as the members thereof deem necessary, but not less frequently than every three (3) months. Meetings may be

conducted in person or by telephone or in any other manner agreed to by the Board. Any of the Members may call a meeting of the Board upon reasonable prior written notice. No notice of a meeting shall be necessary when all members of the Board are present. In the event that the Board consists of less than eight (8) Directors, the attendance of at least four (4) Directors shall constitute a quorum for purposes of any meeting of the Board. In the event that the Board consists of eight (8) or more Directors, the attendance of at least a majority of all the Directors shall constitute a quorum for purposes of any meeting of the Board. Except as may otherwise be provided by this Agreement, each of the Directors will be entitled to vote on any action to be taken by the Board, except that the Senior Executive (if a Director) shall not be entitled to vote on matters relating to his or her powers, compensation or performance. There shall be a total of 100 votes (the "Total Votes") available to be voted on any action to be taken by the Board. Each Director, except as limited by the provisions of Section 8.4(h), below, shall be entitled to vote that percentage of the Total Votes equal to the quotient obtained by dividing (i) the quotient of (A) the number of Units held by the Member that designated such Director (if applicable, rounded down to the nearest whole Unit) divided by (B) the aggregate number of Units held by all Members that designated Directors by (ii) the number of Directors designated by such Member. All quorum and voting requirements shall be adjusted accordingly for the suspension of any Member made pursuant to Section 5.9, 8.4(g) or 8.4(h). Any Director shall be entitled to vote the votes allocated to another Director after having received such Director's proxy in writing. Any action to be taken by the Board shall be considered effective only if approved by at least a majority of the votes entitled to be voted on such action. Meetings of the Board may be attended by other representatives of the Members and other persons related to BOX as agreed to from time to time by the Board. The Board will set up procedures relating to the recording of minutes of its meetings. Actions of the Board may also be taken without a meeting by written consent of the Board.

(b) *Voting Trusts.* Members are prohibited from entering into voting trust agreements with respect to their Units.

4.4. *Special Voting Requirements.* (a) Notwithstanding the provisions of Section 4.3 regarding voting requirements, no action with respect to

any Major Action (as defined in paragraph (b) below), shall be effective unless (i) at all times when IB, BSE and the Bourse are the only Members of BOX, approved by unanimous consent of the Board, or (ii) at all times when IB, BSE and the Bourse are *not* the only Members of BOX, approved by a majority of the Board including the affirmative vote of all of the votes of Directors designated by each of IB, BSE and the Bourse, in each case acting at a meeting or by unanimous written consent as provided in Section 4.3. In addition, unless unanimously approved by the Board as provided above, none of the Members on behalf of BOX shall enter into or permit BOX to enter into any Major Action.

(b) For purposes of this Agreement, "Major Action" means any of the following:

(i) Merger or consolidation of BOX with any other entity or the sale by BOX of any material portion of its assets;

(ii) Entry by BOX into any line of business other than the business described in Article 3;

(iii) Conversion of BOX from a Delaware limited liability company into any other type of entity;

(iv) Except as expressly contemplated by this Agreement and the Related Agreement, entering into any agreement, commitment, or transaction with the Bourse or any of its Affiliates, BSE or any of its Affiliates, or IB or any of its Affiliates or any other Member or any of its Affiliates other than transactions or agreements upon commercially reasonable terms that are no less favorable to BOX than BOX would obtain in a comparable transaction or agreement with a third party;

(v) Taking any action to effect the voluntary, or which would precipitate an involuntary, dissolution or winding-up of BOX;

(vi) Except as otherwise provided in the Technical and Operational Services Agreement, operating the BOX Market utilizing any other software system other than the System;

(vii) Except as otherwise provided in the Regulatory Services Agreement, operating the BOX Market utilizing any other Regulatory Services Provider other than BSE or an Affiliate of BSE;

(viii) Entering into any partnership, joint venture or other similar joint business undertaking;

(ix) Making any fundamental change in the market structure of BOX from that contemplated by the Members as of the date hereof;

(x) Subject to Article 8, the acquisition of any Percentage Interest by any Member that results in such Member, alone or together with any

Affiliate of such Member, newly holding an aggregate Percentage Interest equal to or greater than twenty percent (20%);

(xi) [Business confidential]

(xii) Altering the provisions for Board membership for IB, BSE or Bourse, specified in Section 4.1(b); or

(xiii) Purchasing Units pursuant to Section 8.2.

(c) [Business confidential]

(d) [Business confidential]

4.5. *Officers.* One of the Bourse designees to the Board of Directors shall initially be the Chairman of the Board of BOX (the "Initial Chairman"), subject to the approval of BSE and IB, which approval shall not be unreasonably withheld. The Board will appoint such other officers and agents of BOX, including a Senior Executive, as it shall from time to time deem necessary. Such officers and agents shall have such terms of employment, shall receive such compensation and shall exercise such powers and perform such duties as the Board shall from time to time determine.

4.6. *Duties of the Chairman of the Board.* The Chairman of the Board shall preside at all meetings of the Members and at all meetings of the Board. The Chairman of the Board shall have the general powers and duties of management usually vested in the office of Chairman of the Board, and shall have such other duties and responsibilities related to the development of BOX as the Board shall from time to time direct. The Initial Chairman of the Board shall be designated by the Bourse and will serve until the commencement of Trading on the BOX Market and thereafter until his or her successor is duly elected by the Board.

4.7. *Duties of the Senior Executive.* Subject to the supervision and direction of the Board, a senior executive (referred to herein as the "Senior Executive") shall have general supervision, direction and control of the business and the officers of BOX. The Senior Executive shall have the general powers and duties of management usually vested in the office of Chief Executive Officer, and shall have such other duties and responsibilities related to BOX as the Board shall from time to time direct. The Senior Executive shall be responsible for advising the Board on the status of BOX on a regular basis or more frequently as requested by the Board.

4.8. *No Management by Members.* Except as otherwise expressly provided herein or as requested by the Board, no Member shall take part in the day-to-day management or operation of the business and affairs of BOX. Except and

only to the extent expressly provided for in this Agreement and the Related Agreements and as delegated by the Board to duly appointed officers or agents of BOX, no Member or other Person other than the Board shall be an agent of BOX or have any right, power or authority to transact any business in the name of BOX or to act for or on behalf of or to bind BOX.

4.9. *Reliance by Third Parties.* Any Person dealing with BOX or the Board may rely upon a certificate signed by the Chairman of the Board, or such other officer of BOX designated by the Board of the Company, as to:

(a) The identity of the members of the Board, any officer or agent of BOX or any Member hereof;

(b) The existence or non-existence of any fact or facts which constitute a condition precedent to acts by the Board or in any other manner germane to the affairs of BOX;

(c) The Persons who are authorized to execute and deliver any agreement, instrument or document of or on behalf of BOX; or

(d) Any act or failure to act by BOX or any other matter whatsoever involving BOX or any Member.

*Article 5—Powers, Duties, and Restrictions of BOX and the Members*

5.1. *Powers of BOX.* In furtherance of the purposes set forth in Section 3, and subject to the provisions of Section 4, BOX, acting through the Board, will possess the power to do anything not prohibited by the Act, by other applicable law, or by this Agreement, including but not limited to the following powers: (i) To undertake any of the activities described in Section 3; (ii) to make, perform, and enter into any contract, commitment, activity, or agreement relating thereto; (iii) to open, maintain, and close bank and money market accounts, to endorse, for deposit to any such account or otherwise, checks payable or belonging to BOX from any other Person, and to draw checks or other orders for the payment of money on any such account; (iv) to hold, distribute, and exercise all rights (including voting rights), powers, and privileges and other incidents of ownership with respect to assets of BOX; (v) to borrow funds, issue evidences of indebtedness, and refinance any such indebtedness in furtherance of any or all of the purposes of BOX, to guarantee the obligations of others, and to secure any such indebtedness or guarantee by mortgage, security interest, pledge, or other lien on any property or other assets of BOX, (vi) to employ or retain such agents, employees, managers, accountants,

attorneys, consultants and other Persons necessary or appropriate to carry out the business and affairs of BOX, and to pay such fees, expenses, salaries, wages and other compensation to such Persons as the Board shall determine, (vii) to bring, defend, and compromise actions, in its own name, at law or in equity, and (viii) to take all actions and do all things necessary or advisable or incident to the carrying out of the purposes of BOX, so far as such powers and privileges are necessary or convenient to the conduct, promotion, or attainment of BOX's business, purpose, or activities.

5.2. *Powers of Members.* Except as otherwise specifically provided by this Agreement or required by the Act or by the U.S. Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, no Member shall have the power to act for or on behalf of, or to bind, BOX, and unless otherwise determined by the Board, all Members shall constitute one class or group of members of BOX for all purposes of the Act.

5.3. *Member Conduct.* Each Member agrees to comply with the federal securities laws and the rules and regulations thereunder; to cooperate with the U.S. Securities and Exchange Commission and the BSE pursuant to their regulatory authority and the provisions of this Agreement; and to engage in conduct that fosters and does not interfere with BOX's ability to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

5.4. *Member's Compensation.* Except as otherwise specifically provided in this Agreement or in any of the Related Agreements, the Members shall not be entitled to any compensation for their services hereunder.

5.5. *Withdrawal.* Except as contemplated by Section 8, no Member shall withdraw from BOX unless and until such Member's required Initial Capital Contribution has been satisfied or specifically assumed by another Person and such Person has become a Member.

5.6. *Cessation of Status as a Member.* A Member will cease to be a member of BOX upon the Bankruptcy or the involuntary dissolution of such Member.

5.7. *Claims Against or By Members.* Except as set forth in the Related Agreements or required by the U.S. Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended, any and all matters relating to claims (i) by BOX against a Member or a former Member or any Affiliate of a Member or a former Member (collectively the "Member Entities") or (ii) by a Member Entity against BOX shall be controlled by the Member or Members that are not affiliated with such Member Entity. No Director shall be entitled to vote on (A) whether to initiate a claim by BOX against the Member that appointed such Director or an Affiliate of such Member, (B) any matter concerning a claim initiated by BOX against the Member that appointed such Director or a Member Entity affiliated with such Member, or (C) any matter concerning a claim initiated against BOX by the Member that appointed such Director or a Member Entity affiliated with such Member. Any action to be taken by the Board with respect to any such claim shall be considered effective only if approved by at least a majority of the Directors that are not affiliated with such Member Entity.

5.8. *Purchased Services.* Except as set forth in the Related Agreements, all products and services to be obtained by BOX will be evaluated by BOX's management with a view to best practices and all such products and services will be obtained from Members, their Affiliates or third-parties based upon arms-length negotiations, including obtaining quotes for such products or services from third-parties, as appropriate. Notwithstanding the forgoing, Members and their Affiliates will be given preference over third-parties if such Members or Affiliates are willing and able to provide services and terms at least as favorable to BOX as those offered by the third parties.

5.9. *Suspension of Voting Privileges and Termination of Membership.* After appropriate notice and opportunity for hearing, the Board, by a two-thirds vote, including the affirmative vote of the BSE and excluding the vote of such Member subject to sanction, may suspend or terminate a Member's voting privileges or membership: (i) in the event such Member has violated any provision of this Agreement, or (ii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

*Section 6—Initial Operating Budget*

The Members have agreed on an initial budget (the "Initial Operating

*Budget*) for the estimated costs and expenses anticipated to be incurred from initial startup activities, document and rule preparation, acquisition of rights to software, preparation of modifications to same, equipment acquisition, other steps relating to preparation for the commencement of operations through the point at which profitability will be achieved. *Exhibit 2* hereto sets forth (i) the Initial Operating Budget and (ii) the aggregate anticipated capital contributions of the Members (in kind and in cash) which the Members do hereby agree to make.

#### Section 7—Members; Financing BOX

- 7.1. [Business confidential]
- 7.2. [Business confidential]
- 7.3. [Business confidential]
- 7.4. [Business confidential]
- 7.5. [Business confidential]
- 7.6. *Liability of the Members and*

*Directors.* Except as otherwise provided by the Act, the debts, obligations and liabilities of BOX, whether arising in contract, tort or otherwise, will be solely the debts, obligations and liabilities of BOX and not that of any Member or Director.

#### Article 8—Transferability of Units

##### 8.1. *Restrictions on Transfer*

(a) Except for (i) transfers among Members; (ii) transfers by IB permitted under Section 8.5 hereof; or (iii) transfers to Affiliates of a Member, including officers of a Member or such Member's Affiliates, no Member shall have the right to dispose of, sell, alienate, assign, participate, subparticipate, encumber, or otherwise transfer all or any portion of its Units (other than assignments by operation of law) unless prior to such transfer the transferee is approved by the Board. To be eligible for such Board approval, the proposed transferee must (i) be of high professional and financial standing, (ii) be able to carry out their duties as a Member hereunder, and (iii) be under no regulatory or governmental bar or disqualification. Notwithstanding the foregoing, registration as a broker-dealer or self-regulatory organization is not required to be eligible for such Board approval.

(b) In addition to the foregoing requirements, the admission of a transferee Member shall be conditioned upon the transferee's written acceptance of the terms and provisions of this Agreement and its written assumption of the obligations hereunder of its assignor. Whether or not a transferee who acquired any Units has accepted in writing the terms and provisions of this Agreement and assumed in writing the obligations hereunder of its predecessor

in interest, such transferee shall be deemed, by the acquisition of such Units, to have agreed to be subject to and bound by all the obligations of this Agreement with the same effect and to the same extent as any predecessor in interest of such transferee.

(c) All costs incurred by BOX in connection with the admission to BOX of a substituted Member pursuant to this Article 8 shall be borne by the transferor Member (and if not timely paid, by the substituted Member), including, without limitation, costs of any necessary amendment hereof, filing fees, if any, and reasonable attorneys' fees.

(d) [Business confidential]

8.2. [Business confidential]

8.3 [Business confidential]

8.4. *Additional Restrictions.* Anything contained in the foregoing provisions of this Article 8 expressed or implied to the contrary notwithstanding:

(a) In no event shall a sale, transfer, assignment, exchange, or other disposition of any Member's Units take place if such sale, transfer, assignment, exchange, or other disposition is: (i) In the opinion of tax counsel to BOX, cause a termination of BOX within the meaning of Section 708 of the Code or, (ii) in the opinion of the Board, based on advice of tax counsel, that such transaction could cause a termination of BOX's status as a partnership or cause BOX to be treated as a publicly traded partnership for federal income tax purposes, (iii) prohibited by any state, federal or provincial securities laws, or (iv) prohibited by this Agreement.

(b) In no event shall all or any part of a Member's Units be assigned or transferred to a minor or incompetent.

(c) The Members may, in addition to any other requirement that the Members may impose, require as a condition of any sale, transfer, assignment, exchange, or other disposition of any Units that the transferor furnish to BOX an opinion of counsel satisfactory (both as to such opinion and as to such counsel) to counsel to BOX that such sale, transfer, assignment, exchange, or other disposition complies with applicable federal and state securities laws.

(d) Any sale, transfer, assignment, exchange, or other disposition in contravention of any of the provisions of this Article 8 shall be void and ineffectual and shall not bind or be recognized by BOX.

(e) Beginning after SEC approval of BOX, BOX shall provide the U.S. Securities and Exchange Commission with written notice ten (10) days prior to the Closing Date of any acquisition that results in a Member's Percentage Interest, alone or together with any Affiliate of such Member, meeting or

crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.

(f) Beginning after SEC approval of BOX, in addition to the notice requirement in subsection (e), the following transfers are subject to the rule filing process pursuant to Section 19 of the Securities Exchange Act of 1934: (i) any transfer that results in the acquisition and holding by any Member, alone or together with any Affiliate of such Member, of an aggregate Percentage Interest level which meets or crosses the threshold level of 20% or any successive 5% Percentage Interest level (*i.e.* 25%, 30%, etc.); (ii) any transfer that results in a reduction of the BSE's aggregate Percentage Interest to below the 20% threshold.

(g) For purposes of this subsection (g): (i) a "controlling interest" shall be defined as the ownership by any Person, alone or together with any Affiliate of such Person, of a 25% or greater interest in a Member, and (ii) an "Acquirer" shall be defined as a Person who, alone or together with any Affiliate of such Person, acquires a controlling interest in a Member. An Acquirer shall be required to execute an amendment to this Agreement upon establishing a controlling interest in any Member who, alone or together with any Affiliate of such Member, holds a Percentage Interest in BOX equal to or greater than 20%. In such amendment the Acquirer shall agree to become a new party to this Agreement and shall agree to abide by all the provisions of this Agreement. Beginning after SEC approval of this Agreement, any amendment to this Agreement executed pursuant to this subsection (g) is subject to the rule filing process pursuant to Section 19 of the Securities Exchange Act of 1934. The rights and privileges of the Member under this Agreement shall be suspended until such time as the amendment executed pursuant to this subsection (g) has become effective pursuant to Section 19 of the Securities Exchange Act of 1934 or the Acquirer no longer holds a controlling interest in the Member.

(h) In the event that a Member, or any Affiliate of such Member, is approved by the BSE as an Options Participant on the BOX Market pursuant to the rules of the BSE, and such Member owns more than 20% of the Units, alone or together with any Affiliate of such Member, (Units owned in excess of 20% being referred to as "Excess Units"), the Member shall have no voting rights nor give any proxy in relation to a vote of the Members with respect to the Excess Units held by such Member; provided, however, that whether or not such

Member otherwise participates in a meeting in person or by proxy, such Member's Excess Units shall be counted for quorum purposes and shall be voted by the person presiding over quorum and vote matters in the same proportion as the Units held by the other Members are voted (including any abstentions from voting).

IB shall have a temporary exemption, not to extend past January 1, 2014, from the voting limitation on Excess Units contained in this subsection, but only with respect to any vote regarding any merger, consolidation or dissolution of BOX or any sale of all or substantially all of the assets of BOX.

8.5. *Continuation of LLC.* The liquidation, dissolution, bankruptcy, insolvency, death, or incompetency of any Member shall not terminate the business of BOX or dissolve BOX, which shall continue to be conducted upon the terms of this Agreement by the other Members and by the personal representatives and successors in interest of such Member.

8.6. [Business confidential]

8.7. *New Membership Interests.* Upon the issuance of any new Units in BOX or the valid transfer of all or any portion of a Member's Units, the Board shall amend this Agreement and *Schedule A* hereto so as to specify the class of any new Members, the rights of such class and its or their Capital Contributions and make such further adjustments to *Schedule A* as may be necessary to reflect the admission of new Members.

8.8. *No Retroactive Effect.* No new Members shall be entitled to any retroactive allocation of losses, income or expense deductions incurred by BOX. The Board may, at the time an additional Member is admitted, close the Company books (as though BOX's Fiscal Year has ended) or make *pro-rata* allocations of loss, income and expense deductions to an additional Member for that portion of the BOX's Fiscal Year in which an additional Member was admitted in accordance with the provisions of § 706(d) of the Code.

#### Article 9—Distributions

9.1. *Current Distributions.* If at any time and from time to time the Board determines that BOX has cash that is not required for the operations of BOX, the payment of liabilities or expenses of BOX, or the setting aside of reserves to meet the anticipated cash needs of BOX ("*Distributable Cash*"), then:

(a) Within 10 days after the end of each fiscal quarter, BOX shall make distributions ("*Tax Distributions*") to the Members of their respective Tax Amounts for such fiscal quarter (or, in the event that Distributable Cash is less

than the total of all such Tax Amounts, BOX shall distribute the Distributable Cash in proportion to such Tax Amounts). If after the end of any fiscal year it is determined that a Member's Tax Amount for the fiscal year exceeds the sum of the Tax Distributions made to the Member hereunder and the distributions made to such member under Section 9.1(b) for such fiscal year (any such excess, a "*Shortfall Amount*"), then BOX shall, on or before the 75th day of the next fiscal year, make an additional Tax Distribution to the members of their respective Shortfall Amounts (or, in the event that Distributable Cash is less than the total of all such Shortfall Amounts, BOX shall distribute the Distributable Cash in proportion to such Shortfall Amounts). If the aggregate Tax Distributions to any Member pursuant to this subsection for a fiscal year exceed the Member's Tax Amount for such fiscal year, such excess shall be deducted from the Member's Tax Amount when calculating the Tax Distributions to be made to such Member for each subsequent fiscal year until the excess has been fully accounted for. All Tax Distributions to a Member shall be treated as advances against any subsequent distributions to be made to such Member under Section 9.1(b) or Section 11.2. Subsequent distributions made to the Member pursuant to Sections 9.1(b) and 11.2 shall be adjusted so that when aggregated with all prior distributions to the Member pursuant to those provisions, and with all prior Tax Distributions to the Member, the amount distributed shall be equal, as nearly as possible, to the aggregate amount that would have been distributable to such member pursuant to Section 9.1(b) and Section 11.2 if this Agreement contained no provision for Tax Distributions.

(b) After making the Tax Distributions described in subsection (a) hereof, the Board may distribute all or any portion of remaining Distributable Cash to the Members in proportion to their Percentage Interests, unless the distribution is a liquidating distribution, which shall be made in the manner set out in Section 11.1(b).

9.2. *Limitation.* BOX, and the Board on behalf of BOX, shall not make a distribution to any Member on account of its interest in BOX if and to the extent such distribution would violate the Act or other applicable law.

9.3. *Withholdings Treated as Distributions.* Any amount that BOX is required to withhold and pay over to any governmental authority on behalf of a Member shall be treated as a distribution made to such Member

pursuant to Section 9.1(a), 9.1(b) or 11.2, and shall be deducted from the amounts next distributable to such Member pursuant to any of those provisions until the withholding has been fully accounted for. To the extent that such an amount is treated, pursuant to the previous sentence, as a distribution under Section 9.1(a), it shall also be treated as a Tax Distribution, with the consequences described in Section 9.1(a).

#### Article 10—Allocations of Profits and Losses

10.1. *Allocations of Profits; General.* Except as provided in Sections 10.3 through 10.9 below, all net profits and credits of BOX (for both accounting and tax purposes) for each fiscal year shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of losses under Section 10.2 not previously taken into account pursuant to this clause first, to the extent of such losses, and second, in proportion to their Percentage Interest.

10.2. *Allocations of Losses; General.* Except as provided in Sections 10.3 through 10.9 below, all net losses of BOX for each fiscal year (for both accounting and tax purposes), and all Nonrecourse Deductions, shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of profits under Section 10.1 not previously taken into account pursuant to this clause first, to the extent of such profits, second, in proportion to the Members' Capital Contributions, to the extent thereof, and third, in proportion to their Percentage Interest.

10.3. *Limitation.* Notwithstanding anything otherwise provided in Section 10.2, no Member will be allocated any losses not attributable to Nonrecourse Debt to the extent such allocation (without regard to any allocations based on Nonrecourse Debt), and after taking into account any reductions to the Member's Capital Account required by Treasury Regulations § 1.704-1(b)(2)(ii)(d) (4), (5), or (6) results in a deficit in such Member's Capital Account in excess of such Member's actual or deemed obligation, if any, to restore deficits on the dissolution of BOX (any such excess, an "*Unpermitted Deficit*"). Any losses not allocable to a Member under this sentence shall be allocated to the other Members. In the event any Member's Capital Account is adjusted (by way of distribution,



allocation or otherwise) to create an Unpermitted Deficit, BOX shall allocate to such Member, as soon as possible thereafter, items of income or gain sufficient to eliminate the Unpermitted Deficit.

10.4. *Qualified Income Offset.* In the event any Member unexpectedly receives adjustments, allocations, or distributions described in Treasury Regulations § 1.704–1(b)(2)(ii)(d) (4), (5) or (6), items of income and gain of BOX shall be specially allocated to such Member in an amount and manner sufficient to eliminate the deficit balance in such Member's Capital Account created by such adjustments, allocations or distributions as promptly as possible. The preceding sentence is intended to comply with the "qualified income offset" requirement in Treasury Regulations § 1.704–1(b)(2)(ii)(d), and shall be interpreted consistently therewith.

10.5. *Nonrecourse Debt and Chargebacks.* If at the end of any fiscal year of BOX, after taking into account all distributions made and to be made in respect of such year but prior to any allocation of profits and losses for such year except the allocations required by Section 10.3, any Member shall have a negative Capital Account by reason (and to the extent) of allocations of items of loss or deduction attributable in whole or part to Nonrecourse Debt secured by any of the assets of BOX, such Member shall be allocated (or if more than one Member has such a negative Capital Account, all such Members shall be allocated ratably among them in accordance with the respective proportions of such negative balances as are attributable to such deductions or losses) that portion of any items of income and gain for such year as may be equal to the amount by which the negative balance of such Member's Capital Account exceeds the sum of (A) such Member's allocable share of the aggregate Minimum Gain with respect to all of BOX's assets securing such Nonrecourse Debt plus (B) such Member's allocable share of aggregate BOX debt which is not Nonrecourse Debt, such allocable share to be determined in accordance with the provisions of Section 752 of the Code and the Treasury Regulations thereunder. In addition, if there is a net decrease in BOX's aggregate Minimum Gain with respect to all of its assets for a taxable year, each Member shall be allocated items of income and gain ratably in an amount equal to that Member's share of such net decrease in the manner and to the extent required by Treasury Regulations Section 1.704–2(f) or any successor regulation. The

preceding sentence is intended to comply with the minimum gain chargeback requirement of Treasury Regulations § 1.704–2(f), and shall be interpreted and applied in a manner consistent therewith.

10.6. *Member Nonrecourse Deductions.* Any Member Nonrecourse Deductions for any fiscal year or other period shall be allocated to the Member that (in its capacity, directly or indirectly, as lender, guarantor, or otherwise) bears the economic risk of loss with respect to the loan to which such Member Nonrecourse Deductions are attributable in accordance with Treasury Regulations § 1.704–2(i). If, during any fiscal year or other period, there is a net decrease in Member Nonrecourse Debt Minimum Gain, that decrease shall be charged back among the Members in accordance with Treasury Regulations § 1.704–2(i)(4). The preceding sentence is intended to comply with the partner nonrecourse debt minimum gain chargeback requirement of Treasury Regulations § 1.704–2(i)(4), and shall be interpreted and applied in a manner consistent therewith.

10.7. *Calculation of Profits and Losses.* For all purposes hereof, BOX's profits and losses shall be determined by taking into account all of BOX's items of income and gain (including items not subject to federal income tax) and all items of loss, expense, and deduction, in each case determined under federal income tax principles.

10.8. *Section 704(c) and Capital Account Revaluation Allocations.* The Members agree that to the fullest extent possible with respect to the allocation of depreciation and gain for U.S. federal income tax purposes, Section 704(c) of the Code shall apply with respect to non-cash property contributed to BOX by any Member. For purposes hereof, any allocation of income, loss, gain or any item thereof to a Member pursuant to Section 704(c) of the Code shall affect only its tax basis in its Percentage Interest and shall not affect its Capital Account. In addition to the foregoing, if BOX assets are reflected in the Capital Accounts of the Members at a book value that differs from the adjusted tax basis of the assets (e.g., because of a revaluation of the Members' Capital Accounts under Treasury Regulations § 1.704–1(b)(2)(iv)(f)), allocations of depreciation, amortization, income, gain or loss with respect to such property shall be made among the Members in a manner consistent with the principles of Section 704(c) of the Code and this Section 10.8.

10.9. *Offset of Regulatory Allocations.* The allocations required by Sections

10.3 through 10.6 and Section 10.8 are intended to comply with certain requirements of the Treasury Regulations. The Board may, in its discretion and to the extent not inconsistent with Section 704 of the Code, offset any or all such regulatory allocations either with other regulatory allocations or with special allocations of income, gain, loss or deductions pursuant to this section in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the regulatory allocations were not part of this Agreement.

10.10. *Terminating and Special Allocations.* Notwithstanding the foregoing allocation provisions, any profits or losses resulting from a liquidation, merger or consolidation of BOX, the sale of substantially all the assets of BOX in one or a series of related transactions, or any similar event (and, if necessary, specific items of gross income, gain, loss, or deduction incurred by BOX in the fiscal year of such transaction(s)) shall be allocated among the Members so that after such allocations and the allocations required by Section 11.3, and immediately before the making of any liquidating distributions to the Members under Section 11.2, the Members' Capital Accounts equal, as nearly as possible, the amounts of the respective distributions to which they are entitled under Section 11.2.

#### *Article 11—Dissolution and Winding Up*

11.1. (a) BOX shall be dissolved and its affairs shall be wound up upon:

(i) The election to dissolve BOX made by the Board pursuant to Section 4.4(b)(v); or

(ii) The entry of a decree of judicial dissolution under § 18–802 of the Act; or

(iii) The resignation, expulsion, Bankruptcy or dissolution of a member, or the occurrence of any other event which terminates the continued membership of a Member in BOX, unless the business of BOX is continued by the consent of remaining Members holding a majority of the issued and outstanding Units given within ninety (90) days following the occurrence of any such event; or

(iv) The occurrence of any other event that causes the dissolution of a limited liability company under the Act.

The legal representatives, if any, of any Member shall succeed as assignee to such Member's interest in BOX upon the Bankruptcy, insolvency or

dissolution of such Member, but shall be admitted as a substitute Member only with the written consent of the Board (such consent to be in the Board's sole discretion); unless and until such consent is given, any Percentage Interest in BOX held by such legal representatives of a Member shall not be included in calculating the Percentage Interests of the Members required to take any action under this Agreement.

(b) Upon dissolution of BOX, the business of BOX shall continue for the sole purpose of winding up its affairs. The winding up process shall be carried out by all of the Members unless the dissolution is caused by an event of withdrawal by the sole remaining Member, in which case a liquidating trustee may be appointed for BOX by vote of a majority in Percentage Interest of the Members (the Members or such liquidating trustee is referred to herein as the "Liquidator"). In winding up BOX's affairs, every effort shall then be made to dispose of the assets of BOX in an orderly manner, having regard to the liquidity, divisibility and marketability of BOX's assets. If the Liquidator determines that it would be imprudent to dispose of any non-cash assets of BOX, such assets may be distributed in kind to the Members, in lieu of cash, proportionately to their rights to receive cash distributions hereunder; *provided*, that the Liquidator shall in its sole discretion determine the relative shares of the Members of each kind of those assets that are to be distributed in kind. The Liquidator shall not be entitled to be paid by BOX any fee for services rendered in connection with the liquidation of BOX, but the Liquidator (whether one or more Members or a liquidating trustee) shall be reimbursed by BOX for all third-party costs and expenses incurred by it in connection therewith and shall be indemnified by BOX with respect to any action brought against it in connection therewith by applying, *mutatis mutandis*, the provisions of Article 14.

#### 11.2. *Application and Distribution of Assets.*

(a) [Business confidential]

(b) [Business confidential]

(c) *Reserve.* A reasonable reserve for contingent, conditional and unmatured liabilities in connection with the winding up of the business of BOX shall be retained by BOX until such winding up is completed or such reserve is otherwise deemed no longer necessary by the Liquidator.

11.3. *Capital Account Adjustments.* For purposes of determining a Member's Capital Account, if, on liquidation and dissolution, some or all of the assets of BOX are distributed in kind, BOX

profits (or losses) shall be increased by the profits (or losses) that would have been realized had such assets been sold for their fair market value on the date of dissolution of BOX, as determined by the Liquidator. Such increase (i) shall be allocated to the Members in accordance with Article 10 hereof and (ii) shall increase (or decrease) the Members' Capital Account balances accordingly, it being the general intent that the adjustments contemplated by this subsection shall have the effect, as nearly as possible, of causing the Members' Capital Account balances to be in proportion to their Percentage Interests.

#### 11.4. *Termination of the LLC.*

Subject to Section 19.1 of this Agreement, the separate legal existence of BOX shall terminate when all assets of BOX, after payment of or due provision for all debts, liabilities and obligations of BOX, shall have been distributed to the Members in the manner provided for in this Article 11, and a Certificate of Cancellation shall have been filed in the manner required by Section 18–203 of the Act.

#### *Article 12—Books, Records and Accounting*

12.1. *Books of Account.* The Board shall cause to be entered in appropriate books, kept at BOX's principal place of business, all transactions of or relating to BOX. Each Member shall have access to and the right, at such Member's sole cost and expense, to inspect and copy such books and all other BOX records during normal business hours; *provided that* the inspecting Member shall be responsible for any out-of-pocket costs or expenses incurred by BOX in making such books and records available for inspection. Notwithstanding the foregoing, the books and records of BOX shall be subject at all times to inspection and copying by the Regulatory Services Provider and the SEC at no additional cost to the Regulatory Services Provider or the SEC. The books, records, premises, officers, directors, agents, and employees of BOX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Regulatory Services Provider and its Affiliates for the purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended. The Board shall not have the right to keep confidential from the Members any information that the Board would otherwise be permitted to keep confidential pursuant to § 18–305(c) of the Act.

12.2. *Deposits of Funds.* All funds of BOX shall be deposited in its name in such checking, money market, or other

account or accounts as the Board may from time to time designate; withdrawals shall be made therefrom on such signature or signatures as the Board shall determine.

12.3. *Fiscal Year.* The fiscal year of BOX shall be the calendar year (the "Fiscal Year").

12.4. *Financial Statements; Reports to Members.* BOX, at its cost and expense, shall prepare and furnish to each of the Members, within ninety (90) days after the close of each taxable year, financial statements of BOX, and all other information necessary to enable such Member to prepare its tax returns, including without limitation a statement showing the balance in such Member's Capital Account.

12.5. *Tax Elections.* The Members may, by unanimous agreement and in their absolute discretion, make all tax elections (including, but not limited to, elections relating to depreciation and elections pursuant to Section 754 of the Code) as they deem appropriate. Notwithstanding anything contained in Article 10 of this Agreement, any adjustments made pursuant to Section 754 of the Code shall affect only the successor in interest to the transferring Member. Each Member will furnish BOX with all information necessary to give effect to any such election and will pay the costs of any election applicable as to it.

12.6. *Tax Matters Member.* BSE shall be the tax matters Member of BOX for purposes of the Code, and shall be entitled to take such actions on behalf of BOX in any and all proceedings with the Internal Revenue Service as it, in its absolute discretion, deems appropriate without regard to whether such actions result in a settlement of tax matters favorable to some Members and adverse to other Members. Notwithstanding the foregoing, BSE shall (a) promptly deliver to the Bourse and IB copies of any notices, letters or other documents received by BSE as the tax matters Member of BOX, (b) keep the Bourse and IB informed with respect to all matters involving BSE as the tax matters Member of BOX, and (c) consult with the Bourse and IB and obtain the approval of the Bourse and IB prior to taking any actions as tax matters Member of BOX. The tax matters Member shall not be entitled to be paid by BOX any fee for services rendered in connection with any tax proceeding, but shall be reimbursed by BOX for all third-party costs and expenses incurred by it in connection with any such proceeding and shall be indemnified by BOX with respect to any action brought against it in connection with the settlement of any such proceeding by

applying, *mutatis mutandis*, the provisions of Article 14.

#### Article 13—Arbitration

13.1. (a) All disputes, claims, or controversies between Members or between BOX and any Member(s) arising under or in any way relating to this Agreement shall be (x) settled by arbitration before a panel of three neutral arbitrators (the “*Neutral Arbitrators*”) appointed in accordance with the Commercial Arbitration Rules of the American Arbitration Association, each having experience with and knowledge of the general field related to the dispute, claim or controversy (with at least one being an attorney), and (y) administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules as in effect at the time a request for arbitration is made. For the purposes of this Section 13.1, the following persons shall be deemed not to be a Neutral Arbitrator (i) a director, officer, employee, agent, partner or shareholder of any party to the dispute or BOX, (ii) a consultant to BOX or any party to the dispute, (iii) a person with a direct or indirect financial interest in any contract with any party to the dispute, (iv) a director, officer or key employee of a company at a time when such company was party to a contract with any party to the dispute, or (v) a relative of any person referred to in clauses (i), (ii), (iii) or (iv) above. Arbitration may be commenced at any time by any party to the dispute giving written notice to the other party or parties to the dispute that such dispute has been referred to arbitration under this Section 13.1. Any determination or award rendered by the Neutral Arbitrators shall be conclusive and binding upon the parties to such dispute and judgment on the award rendered by the Neutral Arbitrators may be entered and enforced in any court having jurisdiction thereof; *provided, however*, that any such determination or award shall be accompanied by a reasoned award of the Neutral Arbitrators giving the reasons for the determination or award. The parties hereby consent to the non-exclusive jurisdiction of the courts of the Commonwealth of Massachusetts or to any federal court located within the Commonwealth of Massachusetts for any action (i) to compel arbitration, (ii) to enforce the award of the Neutral Arbitrators or (iii) prior to the appointment and confirmation of the Neutral Arbitrators, for temporary, interim or provisional equitable remedies, and to service of process in any such action by registered mail, return receipt requested, or by any other

means provided by law. Any provisional or equitable remedy which would be available from a court of law shall be available from the arbitrators to the parties. In making any determination or award, the Neutral Arbitrators shall be authorized to award interest on any amount awarded. This provision for arbitration shall be specifically enforceable by the parties to the disputes and the determination or award of the Neutral Arbitrators in accordance herewith shall be final and binding and there shall be no right of appeal therefrom. Each of the parties to the dispute shall pay its own expenses of arbitration and the expenses of the Neutral Arbitrators shall be equally shared; *provided, however*, that if in the opinion of the Neutral Arbitrators any claim was frivolous or in bad faith, the Neutral Arbitrators may assess, as part of the determination or award, all or any part of the arbitration expenses of the other party or parties (including reasonable attorneys’ fees) and of the Neutral Arbitrators against any party so acting in bad faith or raising such frivolous claim.

(b) The place of arbitration shall be Boston, Massachusetts and the language of the arbitral proceedings shall be English.

#### Article 14—Exculpation and Indemnification

14.1. *Members Generally.* Except as set forth in the second sentence of this Section 14.1, no Member nor any of its shareholders, directors, employees, Advisors or other agents, nor any Directors, officers, agents, Advisors or employees of BOX (collectively, the “*Indemnitees*”), shall have any liability to BOX, to any other Member, or to any third party for any loss suffered by BOX, such other Member or such third party that arises out of any action or inaction of such Member (or any other Indemnitee), (a) with respect to its activities under this Agreement or the Related Agreements, unless otherwise specified in the Technical and Operational Services Agreement or the Regulatory Services Agreement or (b) otherwise in its capacity as a Member, if such Member or such other Indemnitee, in good faith, determined that such course of conduct was in the best interests of BOX and such course of conduct did not constitute gross negligence or willful misconduct of such Member (or other Indemnitees) or a material breach by such Member of this Agreement. To the fullest extent permitted by law, each Member (and such other Indemnitees) shall be indemnified by BOX against any losses, judgments, liabilities, expenses

(including, without limitation, reasonable attorneys’ fees and court costs) and amounts paid in settlement of any claims sustained by it in connection with BOX, provided that the same were not the result of gross negligence or willful misconduct of such Member (or such other Indemnitee) or a breach by such Member of this Agreement or any Related Agreement. Any Person claiming reimbursement of expenses under this Article 14 shall be paid amounts to which he or it would be entitled hereunder as such expenses are incurred upon presentation of appropriate documentation to BOX, subject to providing a written undertaking to repay any such amounts to which such Person ultimately turns out not to be entitled under the standards herein set forth. The indemnification and advancement of expenses provided by this Article shall continue as to an Indemnitee who has ceased to be a Member (or otherwise an Indemnitee), and shall inure to the benefit of the heirs, executors, administrators, and successors of such Member (and the other Indemnitees). Any indemnification pursuant to this Section 14.1 shall be solely out of the assets of BOX and shall not be a personal obligation of any Member.

14.2. *Duties of Indemnitee.* To the extent that, at law or in equity, an Indemnitee has duties (including fiduciary duties) and liabilities relating thereto to BOX or to the Members, the Members and any other Indemnitee acting in connection with BOX’s business or affairs shall not be liable to BOX or to any Member for its good faith reliance on the provisions of this Agreement and any Related Agreement. The provisions of this Agreement and any Related Agreement, to the extent that they restrict the duties and liabilities of an Indemnitee otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such Indemnitee.

14.3. *BOX Market Participant Indemnity.* The rules and regulations of BOX shall contain procedures whereby BOX shall require all BOX Market participants to execute an agreement before becoming participants in the BOX Market concerning such Person’s participation in the BOX Market, which agreement shall include, among other things, the agreement of such Person to waive liability of BOX, its Members and their respective Affiliates with respect to such Person’s participation in the BOX Market.

*Article 15—Maintenance of Separate Business*

BOX shall at all times (a) to the extent that any of BOX's offices are located in the offices of an Affiliate, pay fair market rent for its office space located therein, (b) maintain BOX's books, financial statements, accounting records and other partnership documents and records separate from those of any Affiliate or any other Person, (c) not commingle BOX's assets with those of any Affiliate or any other Person, (d) maintain BOX's books of account, bank accounts and payroll separate from those of any Affiliate, (e) act solely in its name and through its own authorized agents, and in all respects hold itself out as a legal entity separate and distinct from any other Person, (f) make investments directly or by brokers engaged and paid by BOX or its agents (provided that if any agent is an Affiliate of BOX it shall be compensated at a fair market rate for its services), (g) manage BOX's liabilities separately from those of any Affiliate and pay its own liabilities, including all administrative expenses and compensation to employees, consultants or agents, and all operating expenses, from its own separate assets, except that an Affiliate may pay the organizational expenses of BOX, and (h) pay from BOX's assets all obligations and indebtedness of any kind incurred by BOX. Notwithstanding the foregoing, the books, records, premises, officers, directors, agents and employees of BOX shall be deemed to be those of the Regulatory Services Provider and its Affiliates for purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended. In addition, the books and records of BOX shall be subject at all times to inspection and copying by the Regulatory Services Provider and its Affiliates and the SEC without charge to such Persons. BOX shall abide by all Act formalities, including the maintenance of current records of BOX affairs, and BOX shall cause its financial statements to be prepared in accordance with generally accepted accounting principles in a manner that indicates the separate existence of BOX. BOX shall (i) pay all its liabilities, (ii) not assume the liabilities of any Affiliate unless approved by unanimous consent of the Board and (iii) not guarantee the liabilities of any Affiliate unless approved by unanimous consent of the Board. The Board shall make decisions with respect to the business and daily operations of BOX independent of and not dictated by any Affiliate.

*Article 16—Confidentiality and Related Matters*

16.1. *Disclosure and Publicity.* The parties hereto agree that the initial public disclosures concerning the transactions contemplated by this Agreement and the Related Agreements shall require prior approval of all Members.

16.2. *Confidentiality Obligations of Members.*

(a) Each Member agrees that it will use BOX Confidential Information only in connection with the activities contemplated by this Agreement and the Related Agreements, and it will not disclose any BOX Confidential Information to any Person except as expressly permitted by this Section 16.2 and the Related Agreements.

(b) The Members may disclose BOX Confidential Information:

(i) To its directors, officers and employees who have a reasonable need to know the contents thereof;

(ii) On a confidential basis to those Advisors of the Member who have a reasonable need to know the contents thereof, so long as such disclosure is made pursuant to the procedures referred to in Section 16.4(b);

(iii) To the extent required by applicable statute, rule or regulation including, without limitation, any rules promulgated under the Securities Exchange Act of 1934, as amended; or in response to a valid request from the U.S. Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934 and the rules thereunder or the BSE (or Boston Options Exchange Regulation through delegated authority); or any court of competent jurisdiction; *provided* that the Member has made reasonable efforts to conduct its relevant business activities in a manner such that the disclosure requirements of such statute, rule or regulation or court of competent jurisdiction do not apply, and *provided further* that BOX is given notice and an adequate opportunity to contest such disclosure or to use any means available to minimize such disclosure (e.g., the "confidential treatment" provisions of Rule 24b-2 promulgated under the Securities Exchange Act of 1934, as amended); and

(iv) To the extent such BOX Confidential Information has become generally available publicly through no fault of the Bourse or its directors, officers, employees or Advisors.

16.3. *Member Information Confidentiality Obligation.* Each Member shall hold, and shall cause its respective Affiliates and their directors, officers, employees, agents, consultants

and Advisors to hold, in strict confidence, unless disclosure to an applicable regulatory authority is necessary or appropriate or unless compelled to disclose by judicial or administrative process or, in the written opinion of its counsel, by other requirement of law or the applicable requirements of any regulatory agency or relevant stock exchange, all non-public records, books, contracts, reports, instruments, computer data and other data and information (collectively, "Member Information") concerning the other Members (or, if required under a contract with a third party, such third party) furnished it by such other Member or its representatives pursuant to this Agreement or any other Related Agreement, except to the extent that such Member Information can be shown to have been (a) previously known by such Member on a non-confidential basis, (b) available to such Member on a non-confidential basis from a source other than the disclosing Member, (c) in the public domain through no fault of such Members or (d) later lawfully acquired from other sources by the Member to which it was furnished, and none of the Members shall release or disclose such Member Information to any other person, except its auditors, attorneys, financial advisors, bankers, other consultants and Advisors and, to the extent permitted above, to regulatory authorities. In the event that a Member becomes compelled to disclose any Member Information in connection with any necessary regulatory approval or by judicial or administrative process, such party shall provide the Member who provided such Member Information (the "Disclosing Member") with prompt prior written notice of such requirement so that the Disclosing Member may seek a protective order or other appropriate remedy and/or waive the terms of any applicable confidentiality arrangements. In the event that such protective order, other remedy or waiver is not obtained, only that portion of the Member Information which is legally required to be disclosed shall be so disclosed.

16.4. *Ongoing Confidentiality Program.*

(a) In order to ensure that the parties hereto comply with their obligations in Article 16, representatives designated by the Members and BOX shall meet from time to time as required to discuss issues relating to confidentiality and disclosure and other matters addressed by this Article 16.

(b) With respect to any disclosure by any of the parties hereto to any of their Advisors pursuant to Article 16, the representatives referred to in paragraph (a) above will institute procedures

designed to maintain the confidentiality of BOX Confidential Information while facilitating the business activities contemplated by this Agreement and the Related Agreements.

*Article 17—Non-Competition*

17.1. [Business confidential]

17.2. *Referrals.* Each of the Members shall, and shall cause each of their Affiliates to, refer all inquiries about the businesses conducted by BOX to BOX.

*Article 18—Intellectual Property*

Except as provided otherwise in the Related Agreements each of the Members shall retain all rights, title, and interests to all of its intellectual property. In addition to the Bourse License, the BSE License and the IB License, the parties shall enter into such other licenses involving the System and such other intellectual property of the Members as shall permit the use of such property by BOX in the manner intended by the Members.

*Article 19—General*

19.1. *Entire Agreement; Integration, Amendments.* This Agreement and the Related Agreements contain the sole and entire agreement of the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, including, without limitation, the Original Operating Agreement, relating to such subject matter. This Agreement may only be changed or terminated by a written agreement signed by all of the parties hereto. Each of the Members further acknowledges and agrees that, in entering into this Agreement, such Member has not in any way relied upon any oral or written agreements, statements, promises, information, arrangements, understandings, representations or warranties, express or implied, not specifically set forth in this Agreement or the exhibits and schedules hereto.

19.2. *Binding Agreement.* The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective representatives, successors in interest and permitted assigns.

19.3. *Notices.* Any and all notices contemplated by this Agreement shall be deemed adequately given if in writing and delivered in hand, or upon receipt when sent by telecopy confirmed by one of the other methods

for providing notice set forth herein, or one (1) business day after being sent, postage prepaid, by nationally recognized overnight courier (e.g., Federal Express), or five (5) days after being sent by certified or registered mail, return receipt requested, postage prepaid, to the party or parties for whom such notices are intended. All such notices to Members shall be addressed to the last address of record on the books of BOX; all such notices to BOX shall be addressed to BOX at the address set forth in Section 2.1 or at such other address as BOX may have designated by notice given in accordance with the terms of this subsection.

19.4. *Captions.* Captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this agreement or the intent of any provisions hereof.

19.5. *Governing Law, Etc.* This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, all rights and remedies being governed by such laws, without regard to its conflict of laws rules. All disputes, claims, or controversies between Members or between BOX and any Member(s) arising under or in any way relating to this Agreement shall be settled pursuant to Article 13 hereof.

19.6. *Member Books, Records, and Jurisdiction.*

(a) The Member acknowledges that to the extent they are directly related to BOX activities, the books, records, premises, officers, directors, agents, and employees of Members shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Regulatory Services Provider and its Affiliates for the purpose of and subject to oversight pursuant to the Securities Exchange Act of 1934, as amended.

(b) The Members, officers, directors, agents, and employees of Members irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, U.S. Securities and Exchange Commission, and the Boston Stock Exchange, for the purposes of any suit, action or proceeding pursuant to U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or directly relating to, BOX activities or Section 19.6(a), and hereby waives, and agrees not to assert by way of motion, as a defense or otherwise in

any such suit, action or proceeding, any claims that it is not personally subject to the jurisdiction of the U.S. Securities and Exchange Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter hereof may not be enforced in or by such courts or agency.

19.7. *Waiver of Certain Damages.* EACH OF THE MEMBERS, TO THE FULLEST EXTENT PERMITTED BY LAW, IRREVOCABLY WAIVES ANY RIGHTS THAT THEY MAY HAVE TO PUNITIVE, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES IN RESPECT OF ANY LITIGATION BASED UPON, OR ARISING OUT OF, THIS AGREEMENT OR ANY RELATED AGREEMENT OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS OR ACTIONS OF ANY OF THEM RELATING THERETO.

19.8. *Construction.* The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party.

19.9. *Severability.* The invalidity or unenforceability of any particular provision of this Agreement or any Related Agreement shall not affect the other provisions hereof or thereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision was omitted.

19.10. *Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19.11. *Survival.* The provisions of Article 13, 14, 16, 17, and 19 shall survive the termination of this Agreement for any reason. All other rights and obligations of the Members shall cease upon the termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of July \_\_, 2003.

Boston Options Exchange Group LLC.

By: Bourse de Montreal Inc., an authorized person

By: Boston Stock Exchange, Inc., an authorized person

By: Interactive Brokers Group LLC, an authorized person

[All attachments and exhibits deemed Business confidential, except below.]

SCHEDULED—MEMBERS NUMBER OF UNITS AND PERCENTAGE INTERESTS

[As of August 6, 2003]

Name and address	Number of units	Percentage interest
Interactive Brokers Group LLC, One Pickwick Plaza, Greenwich, CT 06830 .....	2,375	22.41
Bourse de Montréal Inc., Tour de la Bourse, P.O. Box 61, 800 Victoria Square, Montréal, Quebec H4Z 1A9 .....	3,325	31.37
Boston Stock Exchange, Inc., 100 Franklin Street, Boston, Massachusetts 02110 .....	2,850	26.89

\* \* \* \* \*

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

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

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

1. Purpose

As discussed in detail in the BOX Proposing Release, the BSE proposes to establish rules for BOX, a new Exchange facility, as that term is defined in Section 3(a)(2) of the Act. BOX would be operated by BOX LLC. BOX would administer a fully automated trading system for standardized equity options intended for the use of Options Participants.<sup>6</sup>

The BSE is a founding and controlling member of BOX LLC. In addition to its ownership stake in BOX LLC, the BSE has entered into various agreements with BOX LLC under which BOX LLC would operate BOX as a facility of the BSE. As discussed in detail in the BOX Delegation Plan Proposal,<sup>7</sup> pursuant to these agreements, the BSE, through Boston Options Exchange Regulation, LLC ("BOXR"), would maintain responsibility for all regulatory functions related to the facility, and BOX LLC would be responsible for the business operations of the facility to the

extent those activities are not inconsistent with the regulatory and oversight functions of the BSE and BOXR. This means that BOX LLC would not interfere with the BSE's self-regulatory responsibilities or those delegated to BOXR.

In this filing, the BSE is submitting those provisions of the Operating Agreement specifically relating to the control and governance of BOX LLC that would ensure that the BSE has the authority within BOX LLC to maintain its responsibility for all regulatory functions related to the BOX facility. These sections of the BOX Operating Agreement would ensure that the Commission and the BSE would have regulatory authority over the owners and Directors of BOX LLC. The sections of the BOX Operating Agreement the Exchange deems relevant to its authority for all regulatory functions of its proposed BOX facility are set forth below, as well as a majority of the other provisions of the Agreement. Moreover, due to the fact that the purpose of this filing is to focus on only those provisions of the Operating Agreement which are directly related to the BSE's authority for all regulatory functions of its proposed BOX facility, the Exchange will herein likewise focus its discussion on only those provisions.

*Operating Agreement, Article 4*

Under Section 4.1(b), as long as BOX remains a facility of the BSE pursuant to Section 3(a)(2) of the Act, the BSE would have the right to designate at least one (1) Director on the BOX Board, whether or not the BSE maintains any ownership interest in BOX LLC. The BSE currently owns an interest in BOX LLC of over 26%. Nevertheless, the BSE believes that this provision, in conjunction with other provisions discussed herein (e.g., Section 4.4(b), which guarantees the right of the BSE to have veto power over all Major Actions of the BOX Board) would ensure that the Exchange exercises control on the BOX Board in matters related to the BSE's regulatory responsibilities, regardless of its level of ownership interest in BOX LLC.

Under Section 4.1(d)(i) and (ii), a BOX LLC Director would be removed from

the BOX Board in the event such Director (i) has violated any provision of the Operating Agreement, or (ii) if the BOX Board determines that such action is necessary or appropriate in the public interest or for the protection of investors. In addition, under Section 4.2(a), each Director must comply with the federal securities laws and the rules and regulations thereunder and cooperate with the Commission and the BSE pursuant to their regulatory authority, and shall take into consideration whether his or her actions as a Director would cause BOX to 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 of a free and open market and a national market system, and, in general, protect investors and the public interest.

The BSE believes that these rules would require all BOX LLC Directors, regardless of the nature of their association with the BSE, to adhere to regulatory responsibilities in that they must comply with federal securities laws and the rules and regulations thereunder, and cooperate with the Commission and the BSE pursuant to their regulatory authority. In addition, all Directors would be required to take into consideration and facilitate the BSE's and BOX's responsibility to comply with the requirements under Section 6(b)(5) of the Act. Directors that do not adhere to these requirements face termination from the BOX Board and possible sanctions by regulatory authorities.

Moreover, under Section 4.3(b), the owners of BOX LLC ("Members") are prohibited from entering into voting trust agreements with respect to their ownership interest. The BSE believes that this rule protects the ability of the BSE, as well as other Members, to exercise its full ownership rights. In addition, as set forth in Section 4.4(a), no action with respect to any Major

<sup>6</sup> The term "Options Participant" or "Participant" means a firm or organization that is registered with the Exchange pursuant to Chapter II of the BOX Rules for purposes of participating in options trading on BOX as an "Order Flow Provider" or "Market Maker." See proposed BOX Rules, Chapter I, *General Provisions*, § 1(a)(39) (definition of "Options Participant").

<sup>7</sup> See Securities Exchange Act Release No. 48229 (July 25, 2003), 68 FR 45284 (August 1, 2003) (SR-BSE-2003-04) ("BOX Delegation Plan Proposal").

Action (as defined in Section 4.4(b)), shall be effective unless approved by a majority of the BOX Board, including the affirmative vote of all of the Directors designated by BSE. Thus, the BSE would have the authority to control the Major Actions of BOX LLC, especially as they relate to the regulatory responsibilities of the Exchange.

#### Article 5

Each Member shall comply with the federal securities laws and the rules and regulations thereunder; cooperate with the Commission and the BSE pursuant to their regulatory authority and the provisions of these BOX Rules; 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 of a free and open market and a national market system; and, in general, protect investors and the public interest.

Under Section 5.9, after appropriate notice and opportunity for hearing, the BOX Board, by a two-thirds vote, including the affirmative vote of the BSE Directors and excluding the vote of the Directors of such Member subject to sanction, may suspend or terminate a Member's voting privileges or ownership in the event such Member: (i) has violated any provision of the Agreement, or (ii) if the BOX Board determines that such action is necessary or appropriate in the public interest or for the protection of investors. The BSE believes that these provisions would require Members, regardless of the nature of their association with the BSE, to adhere to regulatory responsibilities in that they must comply with federal securities laws and the rules and regulations thereunder, and cooperate with the Commission and the BSE pursuant to their regulatory authority or face severe consequences such as termination of voting rights or ownership. In addition, the Members would be required to take into consideration and facilitate the BSE's and BOX's ability to comply with the requirements under Section 6(b)(5) of the Act.

#### Section 8.4(e)-(h)

BOX LLC shall provide the Commission with written notice ten (10) days prior to the closing date of any acquisition that results in a Member of

BOX LLC's percentage ownership interest, alone or together with any Affiliate<sup>8</sup> of such Member, meeting or crossing the threshold level of 5% or the successive 5% percentage ownership interest levels of 10% and 15%. Under Section 8.4(f), any transfer of ownership interest that results in the acquisition and holding by any Member of BOX LLC, alone or together with any Affiliate of such Member, of an aggregate percentage ownership interest level which meets or crosses the threshold level of 20% or any successive 5% percentage ownership interest level (*i.e.*, 25%, 30%, etc.), is subject to the rule filing process pursuant to Section 19 of the Act. Further, any transfer of ownership interest that results in a reduction of the BSE's aggregate percentage ownership interest below the 20% threshold is also subject to the rule filing process pursuant to Section 19 of the Act.

Under this Section, whenever a Person<sup>9</sup> seeks to acquire an ownership interest in BOX LLC of 20% or greater, or a current Member seeks to increase its ownership interest to the 20% threshold or greater, such an acquisition must be subject to the rule filing process pursuant to Section 19 of the Act. In addition, when a Member who already holds over a 20% interest increases its ownership interest to the 25% threshold or any successive 5% percentage ownership interest level, such an acquisition must also be subject to the rule filing process pursuant to Section 19 of the Act. For example, if an entity owned a 28% interest in BOX LLC and bought an additional interest of 3%, then the acquisition would be subject to the rule filing process pursuant to Section 19 of the Act because the entity

<sup>8</sup> "Affiliate" means, with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership. See Operating Agreement, § 1.1, "Definitions."

<sup>9</sup> The term "Person" means any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof. See Operating Agreement, § 1.1, "Definitions."

would hold a 31% interest after the transaction, thereby crossing the 30% ownership threshold. The BSE believes that this rule provides the Commission with the authority to review and subject to public comment any substantial transfer of ownership which the Commission may deem to have the potential to impact the Exchange's self-regulatory responsibilities regarding its proposed BOX facility.

Under Section 8.4(g), a "controlling interest" would be defined as the ownership by any Person, alone or together with any Affiliate of such Person, of a 25% or greater interest in a Member, and an "Acquirer" would be defined as a Person who, alone or together with any Affiliate of such Person, acquires a controlling interest in a Member. An Acquirer would be required to execute an amendment to the Agreement upon establishing a controlling interest in any Member who, alone or together with any Affiliate of such Member, holds a Percentage Interest in BOX equal to or greater than 20%. In such amendment, the Acquirer would agree to become a new party to the Operating Agreement and would agree to abide by all the provisions of the Agreement. Beginning after Commission approval of this filing, any amendment to the Agreement executed pursuant to this Section 8.4(g) would be subject to the rule filing process pursuant to Section 19 of the Act. The rights and privileges of the Member under the Agreement would be suspended until such time as the amendment has become effective pursuant to Section 19 of the Act or the Person no longer holds a controlling interest in the Member. For example, if Company XYZ owned a 20% interest in BOX LLC and Firm ABC acquired 25% of the shares of Company XYZ, then Firm ABC must sign an amendment to the Agreement whereby Firm ABC agrees to become a new party to the Agreement and abide by all the provisions of the Agreement. The amendment would be subject to the rule filing process pursuant to Section 19 of the Act.

The BSE believes that this provision provides the Commission with the authority to review and subject to public comment any substantial transfer of ownership that may effect the indirect control of BOX LLC and which the Commission may deem to have the potential to impact the Exchange's self-regulatory responsibilities regarding its proposed BOX facility.

Under Section 8.4(h) the BSE is specifically imposing a limit on voting rights ("voting collar") on any Member who, alone or together with an Affiliate,

owns in excess of 20% of the ownership units ("Units") of BOX LLC and is approved by the BSE as an Options Participant on the BOX Market pursuant to the rules of the BSE. The Units owned by a Member in excess of 20% of the Units are referred to as "Excess Units." No Member who is also an Options Participant would be permitted to vote or give proxy rights to vote with respect to the Excess Units. However, the Excess Units may be considered for quorum purposes of any meeting of the BOX Board, and shall be voted in the same proportion as the Units held by other Members are voted.

The BSE believes that this provision would specifically prevent any Member from exercising undue control over BOX LLC. By specifically imposing a voting collar on any Member who owns more than 20% of the Units of BOX LLC and who is also an Options Participant, the Exchange is ensuring that it is, in all cases, able to maintain proper control over the exercise of its regulatory functions in relation to BOX, and is not subject to influence that may be adverse to its regulatory responsibilities from a Member who may own a substantial number of the outstanding Units of BOX LLC. This provision, along with other related provisions relating to notice and rule filing requirements for any Member who acquires certain Percentage Interests in BOX LLC (*e.g.*, Section 8.4(g)) will serve to protect the sanctity of the Exchange's self-regulatory responsibilities and will allow the Commission to periodically review the ownership of BOX LLC.

Additionally, the BSE is proposing to extend a temporary exemption, until January 1, 2014, for Interactive Brokers, a Founding Member who is also an Options Participant of BOX, from the voting limitation on Excess Units, but only with respect to any vote regarding any merger, consolidation or dissolution of BOX or any sale of all or substantially all of the assets of BOX. This exemption is substantially similar to an exemption permitted for holders of Class A Common Stock on the International Securities Exchange when that organization restructured from an LLC to a Corporation.<sup>10</sup> The BSE believes that such an exemption provides IB with reasonable voting participation in Board matters concerning any merger, consolidation, or dissolution of BOX or any sale of all or substantially all of the assets of BOX, in light of IB's ownership interest in BOX LLC. Regardless of this exemption, however, as previously

discussed, the BSE has the ultimate authority to veto any actions of the Board which conflict with its regulatory responsibilities.

#### *Section 19.6(b)*

The Members of BOX LLC, officers, directors, agents, and employees of such Members, including non-U.S. entities, irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, the Commission, and the BSE, for the purposes of any suit, action or proceeding pursuant to U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or directly relating to, BOX activities or this proposed Chapter XIV of the BOX Rules, and hereby waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that it is not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceeding is improper, or that the subject matter hereof may not be enforced in or by such courts or agency.

The Exchange believes that this provision would serve as notice to Members that they will be subject to the jurisdiction of the U.S. courts, the Commission, and the BSE. While Members may represent a diverse group of business interests, the BSE believes that it is imperative that regulatory cooperation is assured from all Members, regardless of each Member's business location, country of domicile, or other circumstance which the Commission may deem to have the potential to be adverse to the regulatory responsibilities and interests of the Exchange, the Commission, or the U.S. courts. Accordingly, this proposed provision, as also set forth in the Operating Agreement and ratified by each Member, ensures that, should an occasion arise which requires regulatory cooperation or jurisdictional submission from a Member, it would be forthcoming and uncontested.

#### 2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(1),<sup>11</sup> in particular, in that it enables the Exchange to be organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of the Act) to enforce

compliance by its exchange members and persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of Section 6(b)(5),<sup>12</sup> in particular, in that it is designed to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change; or

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

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of

<sup>10</sup> See Securities Exchange Act Release No. 45529 (March 8, 2002), 67 FR 11732 (March 15, 2002) (SR-ISE-2002-01).

<sup>11</sup> 15 U.S.C. 78f(b)(1).

<sup>12</sup> 15 U.S.C. 78f(b)(5).



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. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-BSE-2003-19 and should be submitted by November 13, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 03-26746 Filed 10-22-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48646; File No. SR-NASD-2003-23]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Clarify the Applicability of the Nasdaq Corporate Governance Requirements During the Listing Review Process

October 16, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 26, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On October 10, 2003, NASD, through Nasdaq, submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to

solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to clarify the applicability of its corporate governance requirements during the listing review process.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### 4800. Procedures for Review of Nasdaq Listing Determinations

##### 4810. Purpose and General Provisions

(a)-(d) No change.

(e) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. *The Listing Council or the NASD Board, as part of its respective review, may also consider any action by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements had the issuer's securities been listed on Nasdaq at the time.* The issuer will be afforded notice of such consideration and an opportunity to respond. [In this regard,] *Furthermore, the issuer may be subject to additional or more stringent criteria for the initial or continued inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities inadvisable or unwarranted in the opinion of the Association, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.*

\* \* \* \* \*

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

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

and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The NASD Rule 4800 Series sets forth the procedures for the independent review of a staff determination prohibiting the listing of an issuer's securities. These rules provide that an issuer may appeal a staff determination to the Listing Qualifications Panel ("Panel"). Following a hearing, the Panel will issue a written decision that the issuer may appeal to the Listing and Hearing Review Council ("Listing Council"). Following its deliberations, the Listing Council will also issue a written decision. Although an issuer may not appeal a Listing Council decision to the NASD Board of Governors ("NASD Board"), the NASD Board may call a Listing Council decision for review.

Nasdaq rules further provide that while an appeal to the Panel will stay the delisting of an issuer's securities until a written decision is issued by the Panel, an appeal of a Panel decision to the Listing Council generally does not stay a delisting. Therefore, an issuer's securities generally will not be listed on Nasdaq during the time of the Listing Council's or the NASD Board's review of an appeal. Although NASD Rule 4810 currently provides that an issuer's failure to meet any quantitative standard or qualitative consideration may be considered at each level of the review process, Nasdaq proposes to clarify this rule by explicitly stating that the Listing Council and the NASD Board have the authority to consider any action undertaken by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements if the issuer had been listed on Nasdaq at that time.<sup>4</sup> Nasdaq believes that this clarification is important so that issuers in the review process are aware of the necessity of their continued compliance with Nasdaq's corporate governance requirements.<sup>5</sup>

<sup>4</sup> Nasdaq represents that before the Listing Council or the NASD Board considers any action by an issuer that would have constituted a violation of Nasdaq's corporate governance rules had it been listed, the issuer will be provided notice of such consideration and an opportunity to respond.

<sup>5</sup> Nasdaq represents that, of course, an issuer in the review process would also need to be in compliance with Nasdaq's quantitative requirements before it could be relisted as public investors rely on Nasdaq's listing standards and are

Continued

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 9, 2003 ("Amendment No. 1"). Amendment No. 1 replaces the original filing in its entirety.