

Joan C. Conley
Senior Vice President and Corporate Secretary
P: +1 301 978 8735
F: +1 301 978 5055
E: joan.conley@nasdaqomx.com

February 17, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: File No. SR-BX-2010-059; Release No. 34-62818

Dear Ms. Murphy:

This is in response to comments received in connection with the Securities and Exchange Commission's (the "SEC" or "Commission") review of rule filing SR-BX-2010-059 (the "Filing"), as amended. The Filing, submitted by NASDAQ OMX BX, Inc. (the "Exchange"), would create a new listing market to provide an alternative, transparent and well-regulated venue for companies either delisted from national security exchanges for failure to meet their quantitative standards or for smaller companies contemplating an initial exchange listing. Companies listed on this market, to be named the BX Venture Market, will meet stringent corporate governance requirements and their securities would trade on a state-of-the-art trading platform that serves several other markets operated by The NASDAQ OMX Group, Inc. Surveillance patterns used to monitor trading on the market will be tailored to the characteristics of smaller securities.

The Commission received a total of ten letters from eight commenters in response to publication of the Filing and the Commission's Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change.¹ Six of these eight commenters urge the Commission to approve the Filing. These letters in support of the Filing, include the views of The National Venture Capital Association (NVCA),² Madrona Venture Group,³ Professor James J. Angel,⁴

¹ Securities Exchange Act Release No. 63448 (December 7, 2010), 75 FR 77036 December 10, 2010).

² Letter from Mark G. Heesen, President, National Venture Capital Association, to Elizabeth M. Murphy, Commission, dated January 21, 2011.

³ Letter from Tom A. Alberg, Managing Director and Founder, Madrona Venture Group, to Elizabeth M. Murphy, Commission, dated December 1, 2010.

⁴ Letter from James J. Angel, Associate Professor of Finance, Georgetown University McDonough School of Business, to Elizabeth M. Murphy, Commission, dated January 14, 2011.

TechNet,⁵ the Biotechnology Industry Organization,⁶ and K. Richard B. Niehoff.⁷ They agree that the launch of the proposed Market will help companies raise capital and promote job creation; that the proposed qualitative requirements for listing impose an appropriate level of governance; and that a well-regulated, transparent market for smaller companies would provide an attractive alternative that does not now exist but is sorely needed.

Two other commenters, the Securities Division of the Commonwealth of Massachusetts⁸ and Pink OTC Markets, Inc.,⁹ raise some concerns about the proposed market. We address these concerns, in detail, below.

Reliance on State Registration Exemptions

The Commonwealth is concerned that a company listed on the BX Venture Market might make a securities offering in reliance upon an existing securities registration exemption for the Boston Stock Exchange.¹⁰ The Exchange's initial proposal, in anticipation of this concern, provided in the listing standards that any company seeking to rely on the Boston Stock Exchange exemption would be delisted. In response to the Commonwealth's comments, however, the Exchange has augmented the proposed standards to require additional disclosures to the Exchange such that a company will have to explicitly represent, when offering securities, that it is not relying on the Boston Stock Exchange exemption. In addition, companies will have to provide the Exchange with copies of any blue sky memoranda prepared by their counsel in connection with the offering of securities. Exchange staff will review these materials to determine whether the company is relying inappropriately on the Boston Stock Exchange exemption.

The proposed market will not change the current status of state and federal regulation of secondary trading markets. All companies listing on the BX Venture Market will be required to be registered with the Securities and Exchange Commission and be subject to the reporting requirements of the Securities Exchange Act of 1934. Section 18(b)(4)(A) of the Securities Act of 1933 ("the Securities Act") currently preempts state registration authority over secondary trading in such reporting securities, regardless of where the company trades. Section 18(b)(4)(B) of the Securities Act currently preempts state registration authority over broker's transactions

⁵ Letter from Rey Tamsey, President and CEO, TechNet, to Elizabeth M. Murphy, Commission, dated January 24, 2011.

⁶ Letter from Alan F. Eisenberg, Executive VP, Biotechnology Industry Organization (BIO), to Elizabeth M. Murphy, Commission, dated January 24, 2011.

⁷ Letter from K. Richard B. Niehoff, Chairman and CEO, United States OTC Markets, Inc., to Elizabeth M. Murphy, Commission, dated January 20, 2011.

⁸ Letters from William F. Galvin, Secretary of the Commonwealth of Massachusetts, to Elizabeth M. Murphy, Commission, dated September 28, 2010 and January 21, 2011.

⁹ Letters from Michael R. Trocchio, Bingham McCutchen LLP, on behalf of Pink OTC Markets Inc., to Elizabeth M. Murphy, Commission, dated October 3, 2010 and January 25, 2011.

¹⁰ Section 402(a)(8) of M.G. L. c 110A provides an exemption from the securities registration requirement for "any security that is listed or approved for listing upon notice of issuance on . . . the Boston Stock Exchange."

executed upon unsolicited customers' orders on any securities exchange or in the over-the-counter market. Thus, the proposal does not result in any change to the current status of state and federal regulation of secondary trading.

Investor Protection

The Commonwealth also suggests that the history of fraud related to penny stocks dictates "extreme caution...when any party proposes to establish a new market to trade penny stocks." We agree. For that reason we have built in significant protections for the BX Venture Market. We believe that the proposed listing rules, market surveillance plan, and related procedures, which will be applied by an experienced regulatory staff, will enable the Exchange to fully address any such concerns. In fact, we believe these protections, which are described in detail in the amended Filing, will create a far better environment for investors than currently exists in the over-the-counter markets, where these companies would otherwise trade.

The Exchange will leverage the decades of experience of NASDAQ OMX in regulating markets around the world by using the staff currently in NASDAQ's Listing Qualifications Department to manage its listings program. NASDAQ's Listing Qualifications' staff presently includes 17 listing analysts and an investigations group that conducts reviews designed to identify potential public interest concerns. This staff is extremely experienced in regulatory analysis, with the average person having over ten years of experience at NASDAQ. The sophisticated technology supporting this staff is programmed to assist in identifying listing deficiencies arising from public filings or trading data, immediately notify staff and keep an auditable record. To further assure appropriate oversight, the Exchange will require that the listings program must be supervised by an individual with substantial prior regulatory experience at a national securities exchange that today has an active listing program. At least one individual in the investigative group and the Chief Regulatory Officer will also be required to have had substantial prior regulatory experience with a national securities exchange or with a regulatory organization with responsibility for enforcing the federal securities laws.

The amended Filing and the Exchange's proposed practices add additional investor protections that further address the Commonwealth's investor protection concerns. For example, The BX Venture Market will not list a company if any officer, director, or control person of the company was involved in any event that occurred during the prior five years that is required to be disclosed under Item 401(f)(2) – (8) of Regulation S-K.¹¹ These events include criminal convictions and pending charges, violations of securities laws, and court or administrative actions barring or limiting the individual from certain security related activities. The Exchange also retains discretion to deny listing to any otherwise qualified security when necessary to preserve and strengthen the quality of and public confidence in its market. As explained in the amended Filing, the Exchange will use this discretion to deny listing to a company with an

¹¹ An exception could be made in the rare instance that the staff of the Listing Department determines that a substantial shareholder does not have the actual ability to exert control over the Company, notwithstanding the disclosure of that person as a control person for purposes of Item 401 of Regulation S-K, but only with the approval of the Exchange's Chief Regulatory Officer.

officer, director, or control person whose regulatory history does not rise to the level of an automatic bar. Any diversion from this norm must be approved by the Chief Regulatory Officer and would occur only after consideration of factors set forth in the rules.¹²

As detailed in the amended filing, the Exchange intends to conduct background investigations of officers and directors and other significant people associated with a company in connection with its review of applications for initial listing, as well as whenever a new officer or director is associated with a BX Venture Market-listed company. In that regard, the listing application will solicit information about certain inquiries, investigations, lawsuits, or proceedings against the Company and its executive officers, directors, and ten percent or greater shareholders. Staff experienced in conducting regulatory background reviews will review this information and, in addition, use public databases, such as Lexis-Nexis, the web-CRD regulatory database, and Google to further review these companies and individuals. In addition, the Exchange will, as discussed in the amended Filing, retain outside firms to assist in its review as needed, including investigative, accounting and law firms. The Exchange also plans to refer such matters to outside investigative firms on a random basis, as well as in instances where research in foreign jurisdictions by the Exchange is impractical. As a further cautionary measure, the Exchange will provide the Commission with regular reports describing the listing and surveillance activities of the Exchange. The Exchange believes that with these changes it will have a robust listing compliance program. The other commenters on the proposal agree that these proposed measures are adequate.¹³

The Commonwealth recently submitted a second comment letter which makes clear that it is simply opposed, regardless of the level of regulation, to any listing facility on which penny stocks can be traded. The Exchange notes that listed securities will not be exempt from the Penny Stock Rules, and that not all companies to be traded on the BX Venture Market will be penny stocks. The Exchange believes that its regulatory program, as outlined, as well as FINRA's, provides appropriate and adequate oversight. We also note that Congress could have, but did not, elect to proscribe the establishment of a listed market for these securities when it enacted the Penny Stock Reform Act of 1990. Quite to the contrary, Congress specifically found that "it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to improve significantly the information available to brokers, dealers, investors, and regulators with respect to quotations for and transactions in

¹² Proposed IM-5101-1 requires analysis of, among other things, the nature and severity of the conduct, whether restitution has been made, whether the investing public was involved, and the totality of the individual's relationship to the company.

¹³ See, e.g., Niehoff: "With regard to issuer oversight, this commentator acknowledges that BX, the SMARTS Group and the NASDAQ Stock Market LLC, together and independently, has the wherewithal to provide the surveillance, vetting, listing and marketplace control functions that are proposed in the Filing and or can be provided pursuant to additional Commission imposed listing requirements in order to operate the BX Venture listing marketplace."

penny stocks” and mandated that the Commission facilitate the creation of an automated quotation system for penny stocks on a national securities exchange or association.¹⁴

Brand Confusion

The Commonwealth, Niehoff, and Pink OTC comment letters expressed concern that the proposed market may “inappropriately borrow” the prestige of NASDAQ. The Exchange, however, has taken pains to craft rules and procedures that will ensure that the new market has its own, separate identity that will not be confused with NASDAQ. The change of the market’s name from “BX” to “the BX Venture Market” was made to clearly signal the “junior” status of the listing venue and we believe it is sufficiently different that there is little chance of investors confusing this market with NASDAQ (or the old Boston Stock Exchange). The proposed rules specify that listed companies should refer to their listing as on The BX Venture Market, unless otherwise required by applicable rules or regulations, and that they must not represent that they are listed on NASDAQ. To enforce the prohibition, the amended proposed rules require the Exchange to monitor press releases issued by listed companies and annually review each listed company’s website to determine how it is referring to its listing. A company that intentionally or repeatedly violates these strictures will be delisted.

When the Exchange itself refers to the new listing venue in advertising, marketing, or regulatory communications, it will refer to the BX Venture Market, not NASDAQ OMX BX. The Exchange will not, contrary to the assumptions of Pink OTC, use a common website for the BX Venture Market and NASDAQ. The BX Venture Market will have its own website, clearly designated as such, intended for the use of investors and listed and prospect companies that will include information describing the differences between the BX Venture Market and other national securities exchanges, including the fact that BX Venture stocks are not “blue sky” exempt, or subject to the trade-through rule.¹⁵

The Exchange will also distribute a unique data identifier in the “Market Center” field to identify BX Venture securities and distinguish them from traditional listing markets and the over-the-counter market. This identifier, “B,” will be used on the new BX data feed and the BX Venture Market Daily List product. The Exchange will contractually obligate market data distributors to use this unique identifier when displaying quotation and last sale information to users. Market data recipients already use the Market Center identifier to understand where a security is listed, and in turn translate these identifiers to their own market center nomenclature for the benefit of investors, who are accustomed to determining the listing market in this way. Thus the approach will be easy to implement and will be clearly understood by investors. The Exchange believes that this approach will be far more effective than other alternative techniques it has considered, which will be costly, time-consuming, and confusing to investors.

¹⁴ Section 17B(b) of the Securities Exchange Act, 15 USC 78q-2.

¹⁵ Pink OTC also raised questions surrounding the Exchange’s intellectual property. While the Exchange will take steps to protect its intellectual property, those steps are outside the scope of this review.

Listing Standards

We disagree with Pink OTC's assessment that use of "phase-in" periods for independent audit and compensation committee directors will diminish the impact of the rules.¹⁶ These proposed phase-in periods are identical to the rules of every national securities exchange¹⁷ and were specifically permitted by the Commission's rulemaking related to audit committees.¹⁸ The phase-in provision recognizes the difficulties in recruiting independent directors, particularly in the nascent stages of corporate life. The NVCA commented, for example, that representatives of venture capitalists that have heavily invested in these early stage companies and whose "interest are directly aligned with those of other shareholders – to see the company succeed" often sit on their board to provide guidance, instill values and cultural practices, and monitor their investment. It opined that requiring additional independent directors at this stage would impose an "unnecessary cost" on the company and its shareholders.¹⁹

Moreover, we find certain of Pink OTC's comments to be disingenuous. Pink OTC does not operate a national securities exchange, yet it has adopted what it calls "listing requirements," and charges companies "listing fees" for marketplace services that it describes as "formerly available only on a U.S. exchange."²⁰ Pink OTC represents that it offers to companies previously listed on an exchange "the services the company and their investors have come to expect from a listed market."²¹ Despite holding itself out as the equivalent of an exchange, Pink OTC is not registered as a national securities exchange or a national securities association, is not subject to

¹⁶ The proposed rule allows a company to list on BX in connection with an IPO with one independent director on its audit committee, so long as the committee has a majority of independent members within 90 days of the registration statement's effective date, and fully independent within one year of registration. The same phase-in rules are applied with respect to independent membership of compensation committees for companies listing in connection with an IPO, emerging from bankruptcy, or not previously subject to independent director requirements.

¹⁷ See, e.g., NASDAQ Rule 5615(b) and NYSE Listed Company Manual Section 303A.00.

¹⁸ SEC Rule 10A-3(b)(1)(iv)(A).

¹⁹ Pink OTC also seeks an explanation for the proposed definition of a company previously listed on another exchange in Rule 5506(b), which provides a look-back until September 30, 2011. As explained in the filing, the Exchange believes it appropriate to consider a company delisted since January 1, 2008, as previously quoted on another national securities exchange because the BX Venture Market would not have been available to such companies when they were delisted. The Exchange believes it is reasonable to look back to January 1, 2008, when the financial markets began facing difficulties, which resulted in an unusually large number of companies being delisted. Furthermore, the Exchange believes it is appropriate to continue this treatment until September 30, 2011, to assure that such companies have an adequate opportunity to learn about the BX Venture Market and sufficient time to complete their application and have that application processed by the Exchange. After September 30, 2011, a company will be considered to have been previously listed on a national securities exchange, and therefore eligible only if it was listed on such an exchange at any time during the three months prior to its listing on the BX Venture Market. The Exchange believes that this three month period will allow the company sufficient time to apply for listing on the BX Venture Market and have its application processed.

²⁰ <http://www.otcqx.com/qx/otcqx/overview> (February 14, 2011).

²¹ Id.

the SEC's oversight and rule making process, and is not held to the standards of Section 6 of the Exchange Act, including issuer protections that the Commission has required of national securities exchanges. As such, it is difficult to credit Pink OTC's comments about investor confusion surrounding lower tier markets.

Further, despite Pink OTC's expressed belief in the importance of independent-director requirements, it has not chosen to adopt a single independence requirement in its "listing rules," even for the "premier" OTCQX tier. Pink OTC quoted companies need not have an independent audit committee, an independent compensation committee, or even a single independent director.²²

Finally, we point out that several comment letters in support of the BX Venture Market indicated the strong preference of venture capitalists to invest in companies that trade on a regulated market rather than on "the largely unregulated Pink Sheets or the over-the-counter-Bulletin Board, where there are no listing requirements, no public interest review, limited liquidity and limited transparency."²³ Commenters responding to the Commission's question on this point note that the proposal for the BX Venture Market, which draws on the experience of NASDAQ OMX and its other subsidiaries, will better protect investors than the existing OTC alternatives.²⁴

Stock Symbols

The Pink OTC comment letters also raised concerns related to the stock symbols that will be used on the BX Venture Market. The Exchange is a party to the existing National Market System Plan for the Selection and Reservation of Securities Symbols, which is the exclusive means of allocating and using trading symbols. Pursuant to that plan, securities listed on the BX Venture Market, like every other national securities exchange today, are eligible to have a trading symbol of from one to five characters. This eligibility is important because the BX Venture Market is intended to afford a listing venue for companies formerly listed on NASDAQ or other national securities exchanges, which will want to retain their symbols. As the Commission found in approving the symbology plan, allowing all exchanges to utilize from one to five characters

²² There is also no requirement in the OTCQX rules for shareholder approval.

²³ TechNet Letter; See also, NVCA: "venture capitalists do not want to see their portfolio companies trade in the OTCBB or Pink Sheets because they are largely unregulated and illiquid"; Angel: "The proposed exchange has higher standards than the OCTBB, so the Commission should have no qualms whatsoever in approving the BX Venture Exchange. Investors will be better served."

²⁴ Niehoff letter: "this commentator acknowledges that BX, the SMARTS Group and the NASDAQ Stock Market LLC, together and independently, has the wherewithal to provide the surveillance, vetting, listing and marketplace control functions that are proposed in the Filing and or can be provided pursuant to additional Commission imposed listing requirements in order to operate the BX Venture listing marketplace"; Technet letter: "We are encouraged by the serious controls and regulatory scrutiny for this market that have been proposed by the owner of the BX Venture market, NASDAQ OMX. . . . The Market will stand as a well-regulated listing alternative for [to the] largely unregulated Pink Sheets or Over-the-Counter-Bulletin Board, where there are no listing requirements, no public interest review, limited liquidity, and limited transparency."

minimizes investor confusion when a company changes its listing from one venue to another.²⁵ In approving that plan, the Commission noted that the portability feature of the plan would promote “competition among listing markets, including potential new listing markets.”²⁶ The Commission also distinguished securities listed on an exchange, which can trade with a symbol of from one to five characters, from those trading over the counter, which can trade only with a four or five character symbol, noting that “[e]xchange listing standards are approved by the Commission and must include corporate governance requirements that comply with Rule 10A-3 under the Exchange Act. Issuers traded on over-the-counter equity venues (including the OTCBB and Pink Sheets) are not subject to such listing standards.”²⁷

Pink OTC reiterated in its second comment letter its concerns that a one, two, or three letter symbol on BX Venture Market securities will wrongly convey that a security is an exchange-listed, NMS security, and stated that a symbol of at least 4 letters would put investors on notice that the security does not meet the listing standards of other exchanges. We disagree. Companies such as Apple (AAPL), Microsoft (MSFT), and Google (GOOG) trade with 4 letter symbols and investors are used to companies on exchanges having trading symbols from 1 to 5 letters. Rather, investors know they have to look elsewhere to determine where a security is listed. That is why we believe the Exchange’s proposal to adopt a requirement that data vendors display the listing market is a far more effective means of communicating the listing market to investors since they will, regardless of the issuer’s trading symbol or the manner the investor retrieves the quotation information, identify the BX Venture Market as the listing market, and clearly differentiate BX Venture Market securities from those listed on NASDAQ or other exchanges or traded over the counter.

Professor Angel also addressed stock symbols and highlighted the confusion he has experienced due to changed ticker symbols as a retail investor and empirical researcher. While he noted that there could be short term technology issues for some brokerage firms to trade BX Venture Market securities with short tickers on the OTC market, he noted, and we agree, that this should not delay approval of the BX Venture Market.²⁸

Trade Reporting

Finally, the Pink OTC comment letter raised concerns related to trade reporting in BX Venture Market-listed securities. Pink OTC commented that quotations and transaction reports for BX-

²⁵ Securities Exchange Act Release No. 58904 (November 6, 2008), 73 FR 67218 at 67227 (November 13, 2008) (“The Commission finds that allowing the automatic portability of a symbol in the event that an issuer transfers its listing to another exchange will further the purposes of the Act and should reduce investor confusion by allowing the symbol already associated with the issuer to continue to be used by the issuer on the new exchange.”)

²⁶ Id. at 67224.

²⁷ Id. at 67225 (footnotes omitted).

²⁸ We do not agree with Professor Angel that BX Venture Market securities should be limited to four or five characters for a transition period. Firms can quote and trade securities on either NASDAQ OMX BX or in the over the counter market until their technology is updated and, as Professor Angel notes, listed companies that believe this hurts their liquidity can elect to change their symbol.

listed securities should not be “disseminated under any NMS plan nor commingled with NMS data by an NMS plan processor.”²⁹ It claims that this could “potentially contribute to confusion between NASDAQ and/or other NMS securities and BX Listed Securities”,³⁰ as well as being impermissible under the federal securities laws.³¹ As clearly articulated in the Exchange’s proposed rule change, the Exchange acknowledges that BX-listed securities will *not* be classified as national market system securities.³² Therefore, they will not be subject to a national market system plan and quotations and transaction information regarding BX-listed securities will not be required to be reported to a national market system plan consolidator. However, the Exchange is committed to ensuring that quotations and transaction information for listed securities occurring on The BX Venture Market, which will be distributed over several of the Exchange’s data products, are consolidated fully with the same information from OTC quoting and trading that FINRA supervises.

Pink OTC’s concerns in this area are likely related to its strong opposition to FINRA’s proposal to require its members to submit all their quotations in OTC equity securities to a new, FINRA-controlled, Quotation Consolidation Facility (“QCF”) contemporaneous with such members’ display of quotations in any interdealer quotation system that permits updates on a real-time basis (the “QCF Proposal”).³³ It believes that the QCF Proposal, if approved, would diminish Pink OTC’s role as a collector and distributor of OTC quotes and thereby greatly reduce its revenues. Pink OTC’s comments simply amplify its position as already stated in its comment letter opposing the QCF Proposal,³⁴ in an effort to extend its argument to assert that quotations and transaction reports for BX-listed securities should be integrated into its quotation montage.

The Exchange’s primary concern, and one echoed by Mr. Niehoff, is to provide a single point of contact for investors to obtain all market information concerning BX Venture Market-listed securities, rather than to preserve the business prospects and revenues of Pink OTC. Additionally, the Exchange believes the substance of Pink OTC’s concerns have already been addressed by FINRA in its response to comments.³⁵ However, given the uncertainty surrounding the approval of the QCF Proposal and the evolving discussions surrounding related issues, the Exchange and FINRA are developing a short-term consolidation strategy to ensure broad dissemination of consolidated NBBO and last sale trade data that will enhance price discovery, provide investors (and other data consumers) with a “one stop shop” for core data, foster inter-

²⁹ Supra note 2 at p. 3.

³⁰ Id.

³¹ Id.

³² See Filing at p. 3.

³³ See Securities Exchange Act Release No. 60999 (November 13, 2009), 74 FR 61183 (November 23, 2009) (SR-FINRA-2009-077).

³⁴ Letter from Neal E. Sullivan, Bingham McCutchen LLP, on behalf of Pink OTC Markets Inc., to Elizabeth M. Murphy, Commission, dated May 5, 2010 (regarding Securities Exchange Act Release No. 60999; File No. SR-FINRA-2009-077).

³⁵ Letter from Stephanie M. Dumont, FINRA, to Elizabeth M. Murphy, Commission, dated March 18, 2010 (regarding Securities Exchange Act Release No. 60999; File No. SR-FINRA-2009-077).

Ms. Elizabeth M. Murphy

February 17, 2011

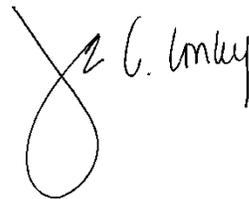
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market competition, and facilitate regulation. If the QCF Proposal is ultimately approved by the Commission, the Exchange would certainly consider using the QCF as the consolidator for Exchange and OTC data in BX Venture Market-listed securities. However, we are also considering other alternatives with FINRA. Professor Angel's comment supports just such a market-based alternative to a national market system plan. In any event, we believe the Commission can approve the amended Filing with a condition that there be an arrangement for consolidated data before the market begins operations.

* * * * *

We thank you for your time and attention to our proposal. If you would like to discuss any of these matters further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Linsky". The signature is stylized, with a large loop at the bottom and a flourish extending upwards and to the right.