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October 3, 2010

VIA ELECTRONIC SUBMISSION

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Secretary Murphy:

We are writing on behalf of our client, Pink OTC Markets Inc. ("Pink OTC"), in response to the NASDAQ OMX BX, Inc.'s (the "Exchange") filing of a proposed rule change (the "BX Rule Filing") as announced in the Notice of Filing of Proposed BX Rule Filing to Create a Listing Market on the Exchange.¹

The Exchange, through the BX Rule Filing, seeks to create a new listing market, to be called "BX" ("BX"), which will list securities ("BX Listed Securities") that do not meet the quantitative requirements of the NASDAQ Stock Market ("NASDAQ") and other national securities exchanges. The stated purpose of the BX is to provide an alternative listing market for issuers that are delisted from NASDAQ or other national securities exchanges and smaller companies not previously listed on such exchanges.² Among other things, the BX Rule Filing would establish the quantitative and qualitative requirements for BX Listed Securities to be approved for listing and trading on the BX. The BX Rule Filing does not address how quotations for BX Listed Securities displayed on BX and transactions in BX Listed Securities effected on BX will be disseminated. The BX Rule Filing does indicate that the Exchange intends to make a separate rule filing relative to the dissemination of quotations in BX Listed Securities displayed on, and transactions in BX Listed Securities effected on, BX.³ The Rule Filing further indicates that the Exchange believes that BX Listed Securities will not be classified as national market system ("NMS") securities, that BX Listed Securities will trade both on BX and over-the-counter ("OTC"),⁴ and that OTC transactions in BX Listed Securities will be

¹ See Securities Exchange Act Release No. 62818 (Sept. 1, 2010), 75 FR 54665 (Sept. 8, 2010) (the "Notice").

² *Id.*

³ See *id.*, note 5.

⁴ See *id.* at 54665-66.

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reported through FINRA's Over-the-Counter Reporting Facility (the "OTCRF").⁵ We are commenting on the proposed listing requirements for BX Listed Securities, the dissemination of quotation and transaction information for BX Listed Securities, and related issues.

I. Dissemination of Quotation and Transaction Data

We believe the dissemination of quotations and transaction reports in BX Listed Securities is a key aspect of the operation of the proposed BX listing market. Therefore, although we understand that the Exchange intends to make further rule filings relative to the dissemination of market data at a later date, we feel it is appropriate to provide comments on this issue at this time.

The Exchange has recognized that, because the proposed BX listing requirements are lower than those of NASDAQ and other national securities exchanges, it is important that investors not be confused regarding the nature of BX-listed companies ("BX Companies"). The BX Rule Filing specifies that, because of the quantitative and qualitative differences between NASDAQ securities and BX Listed Securities, BX Companies will not be permitted to represent that they are listed on NASDAQ, and the Exchange will refrain from referencing NASDAQ in reference to the BX listing venue.⁶ Although we agree with these limitations, we also believe it is important that market data relative to BX Listed Securities be disseminated in a manner that makes clear that BX Listed Securities are not NMS securities nor do they meet the normally higher listing standards for exchange-listed securities, including NASDAQ.

First, we believe that ticker symbols for BX Listed Securities should differentiate such securities from other securities that meet the higher listing standards typically associated with listing on a national securities exchange. We suggest that the ticker symbols for BX Listed Securities be required to be four or five letters long because long-standing industry convention is that securities whose symbols have three or fewer letters are NYSE and NYSE AMEX securities, subject to higher listing standards than BX proposes to have. If BX Listed Securities are permitted to have three or fewer letters in their symbols, it would give investors the false impression that such securities have met the listing standards of either the NYSE or NYSE AMEX. Furthermore, although unrelated to the issue of investor confusion, permitting BX Listed Securities' symbols to have three

⁵ *See id.* at 54666, note 7.

⁶ *Id.* at 54666; *see also* proposed IM-5101-2 ("To avoid investor confusion, Companies listed on the Exchange should refer to themselves as being listed on the 'BX' market, unless otherwise required by applicable rules or regulations, and should not in any way, whether in press releases, public statements or otherwise, represent that they are listed on The NASDAQ Stock Market. A company that repeatedly or intentionally violates this guidance may be subject to delisting, pursuant to the Rule 5800 Series.").

or fewer letters would preclude those securities from trading on FINRA's Over the Counter Bulletin Board ("OTCBB") and Pink OTC's system because such systems are programmatically limited to trading four and five letter symbols. Although this is not an investor confusion problem, enabling BX Listed Securities to trade in multiple venues will lead to increased liquidity, transparency and pricing efficiency.

Second, assuming the Exchange is correct that BX Listed Securities will not be designated as NMS securities, we believe quotations and transaction reports for BX Listed Securities should not be disseminated under any NMS plan nor commingled with NMS data by an NMS plan processor (such as NASDAQ in its capacity as the exclusive processor for the NASDAQ UTP Plan). Permitting quotations and transaction reports for BX Listed Securities to be disseminated under an NMS plan or commingled with NMS data could potentially contribute to confusion between NASDAQ and/or other NMS securities and BX Listed Securities. Not only would it potentially confuse investors, but we also believe it is not permissible under the Federal securities laws for market data relative to non-NMS securities such as BX Listed Securities to be distributed under an NMS plan or commingled with NMS data.

In particular, we do not believe it would be appropriate for market data relative to BX Listed Securities, whether such data originates on the BX or in the OTC markets, to be distributed under the NASDAQ UTP Plan by NASDAQ in its capacity as the exclusive processor for the NASDAQ UTP Plan. The NASDAQ UTP Plan already disseminates market data for non-NMS, non-NASDAQ, OTC equity securities in contravention of Section 11A of the Exchange Act and the express wording on the Nasdaq UTP Plan.⁷ As more fully discussed in our June Comment Letter, NASDAQ, in its capacity as processor for the NASDAQ UTP Plan, should not be disseminating market data for non-NMS, non-NASDAQ, OTC equity securities commingled with NASDAQ market data because 1) the NASDAQ UTP Plan's express terms do not permit the processor to disseminate market data relative to any non-NASDAQ securities, and 2) Section 11A does not permit for an NMS plan to disseminate market data relative to non-NMS securities. For the same reasons, NASDAQ should not be permitted to disseminate BX Listed Securities market data commingled with the NASDAQ market data it disseminates under the NASDAQ UTP Plan.

⁷ For more information regarding our view that the NASDAQ UTP Plan operates in a manner inconsistent with Section 11A and the terms of the NASDAQ UTP Plan with respect to its dissemination of market data for OTC securities, please see our comment letter dated June 3, 2010 ("June Comment Letter") concerning Amendment Number 21 to the "Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis" (Securities Exchange Act Release No. 62021 (Apr. 30, 2010), 75 FR 27010 (May 13, 2010)). The June Comment Letter is available at <http://www.sec.gov/comments/s7-24-89/s72489-26.pdf>

We agree with the Exchange's stated expectation that BX Listed Securities will trade OTC, including through Pink OTC's quotation systems. If the BX Rule Filing is approved, Pink OTC expects to work with the Exchange to integrate the BX quotation feed into Pink OTC's quotation montage.⁸ Pink OTC also would be willing to cooperate with the Exchange to create a consolidated quote for non-NMS securities, including BX Listed Securities, in a manner consistent with the way quotations for equity securities are consolidated and distributed in Canada.⁹

II. Investor Protection

A. Investor Confusion

As recognized by the Exchange, there is a likelihood that investors and others will believe securities listed on the "NASDAQ OMX BX" exchange are NASDAQ securities that have met higher listing standards than the BX employs. Beyond the name of the Exchange, other factors that may also lead to confusion include the use of a common website, BX advertisements that reference NASDAQ, and a single sales force for listings on BX and NASDAQ. We urge the Commission and the Exchange to take any necessary and reasonable precautionary steps beyond those already proposed to prevent investor confusion.

In connection with ensuring that investors understand that BX is not the same as NASDAQ, we note that the Exchange does not appear to have taken any steps to trademark or otherwise protect intellectual property such as the names "BX market," "BX exchange," or any other similar name with which BX Companies will be required to

⁸ Approval and operation of the BX could also have the additional benefit of meeting the requirements of Section 17B of the Exchange Act (requiring the Commission, through a self-regulatory organization, to facilitate the widespread dissemination of reliable and accurate market data with respect to penny stocks through one or more automated quotation systems).

⁹ The Canadian model separates the physical/technological aspect of consolidating market data from the licensing aspect and requires that persons receiving the consolidated data have a license from each marketplace operator whose data is included in the consolidated data. It also allows for multiple consolidators to offer a consolidated feed in a competitive environment. Further information is available at:

<http://www.thetradenews.com/asset-classes/equities/3264>

http://www.tmx.com/en/data/tmx_ip/index.html

<http://www.tmx.com/en/pdf/CDFProductSheet.pdf>

publicly identify themselves.¹⁰ We believe that in light of the Exchange's desire to assure that BX Companies will be able to associate themselves with BX, it should seek protection for the BX brand in order to avoid its use by others.

B. Listing Standards

We very much support initiatives that will incentivize issuers to improve their corporate governance processes and see the BX as a useful experiment that may induce smaller issuers to improve such practices as part of seeking a listing on the BX. Nevertheless, we do not believe that certain of the listing standards proposed by the Exchange should be phased-in in a manner that permits issuers to be listed before they meet all listing requirements.

The BX Rule Filing states that many of the qualitative requirements for BX Listed Securities will be substantially similar to those of other national exchanges.¹¹ Among the qualitative listing standards proposed by the BX Rule Filing are the requirements that the audit committees and the compensation committees for BX Companies be composed of independent directors.¹² Unlike the NASDAQ listing standards, to which the BX Rule Filing compares the BX's qualitative standards¹³ and which require the audit and compensation committees to consist entirely of independent directors at the moment companies are listed on NASDAQ,¹⁴ the BX Rule Filing permits certain companies to phase-in compliance with these requirements.¹⁵ Specifically, the BX Rule Filing states that with respect to the composition of the audit committee, any company which is being listed on the BX in connection with an initial public offering (an "IPO")¹⁶ is permitted to phase-in compliance with the independent director requirement. Similarly, with respect to the composition of the compensation committee, any company which is being listed on the BX in connection with an IPO,¹⁷ as well as in connection with its emergence from bankruptcy or where the company was not previously subjected to independent director

¹⁰ A search of the U.S. Patent and Trademark Office's Trademark Electronic Search System indicated that the Exchange has secured the trademark "NASDAQ OMX BX," and abandoned attempts to trademark "NASDAQ BX," but did not otherwise show that the Exchange has applied to protect any other marks related to the BX.

¹¹ See 75 FR at 75668.

¹² See *id.*

¹³ See *id.* at 75666.

¹⁴ See NASDAQ IM-5605-3 and IM-5605-6.

¹⁵ See 75 FR at 75668.

¹⁶ Note that the BX Rule Filing proposes different definitions of "initial public offering" depending upon the type of committee for which the independent-director requirement is being phased in. See 75 FR at 75668-69.

¹⁷ See *id.*

requirements, would be permitted to phase-in compliance with the independent director requirement.¹⁸ In the case of either phase-in requirement, the relevant period for compliance with the independent director requirement is as follows: eligible companies are permitted to have the committees include one independent director at the time of listing; a majority of independent members within 90 days of the date of effectiveness of the company's registration statement; and all independent members within one year of the date of effectiveness of the company's registration statement.¹⁹

Pink OTC believes that the independent-director requirements for the audit and compensation committees are such important requirements that they should not be compromised by allowing companies to be listed on the BX without having met the maximum extent of such requirements. The Exchange states in the BX Rule Filing that the purpose of the BX is to provide investors in BX Companies "with a better regulated, more transparent trading environment than may otherwise be available in the over-the-counter markets." Pink OTC believes that the phasing-in of these requirements for any of the BX Companies operates contrary to the goal of "provid[ing] additional protections to their investors than would be available in their present trading venue," and that accordingly there should be no phase-in of the independent director requirement. In fact, it is more appropriate in the interests of protecting investors that the audit and compensation committees consist entirely of independent directors well before listing on the BX. Without requiring high corporate governance standards of listed companies well before entry to the BX marketplace, there is no way for such standards to have a positive effect.

Furthermore, if the Commission approves the BX Rule Filing, the Commission must be assured that the Exchange is enforcing its listing standards and that the Exchange conducts appropriate levels of due diligence in investigating companies, their owners, and management before a listing is granted. One of the primary problems that led to the failure of the former Emerging Company Marketplace ("ECM")²⁰ appears to have been the poor screening of listed companies that led to well-publicized scandals relating to several ECM companies which in turn led to a lack of investor confidence.²¹ For example, one ECM company, Printron, had a CEO who had been sued twice by the Commission for securities law violations but did not reveal this information to the NYSE AMEX.²² To prevent a recurrence of such events relative to BX Companies, we suggest

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The ECM was operated from 1992 through 1995 by the NYSE AMEX (at that time, the American Stock Exchange) for companies that did not meet the normal NYSE AMEX listing standards.

²¹ See Reena Aggarwal and James J. Angel, "The Rise and Fall of the Amex Emerging Company Marketplace," *Jour. Fin. Econ.*, Volume 52, Issue 2, at 257 (May 1999).

²² *Id.*

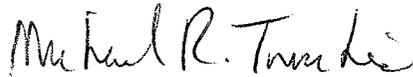
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that the Commission consider requiring that the Exchange conduct background checks and other similar reviews of potential listing companies and not permit the Exchange merely to rely on the documents presented by an issuer during the listing process.

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We appreciate the Commission and its staff's consideration of these comments. We would be happy to discuss these comments further if the Commission or its staff wish to do so.

Sincerely yours,



Michael R. Trocchio