

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63597; File No. SR-BX-2010-059)

December 22, 2010

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Amendment No. 1 to Proposed Rule Change to Create a Listing Market on the Exchange

On August 20, 2010, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to create a listing market on the Exchange. The proposed rule change was published for comment in the Federal Register on September 8, 2010.³ The Commission received three comments on the proposal.⁴ The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to December 7, 2010.⁵ On December 6, 2010, the Exchange filed Amendment No. 1 to the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. On December 7, 2010, the Commission instituted proceedings to determine whether to disapprove the proposed rule change,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 62818 (September 1, 2010), 75 FR 54665 ("Notice").

⁴ See Letters to Elizabeth M. Murphy, Secretary, Commission, from Tom A. Alberg, Managing Director and Founder, Madrona Venture Group, dated December 1, 2010; Michael R. Trocchio, Bingham McCutchen LLP, dated October 3, 2010; and William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, dated September 28, 2010. For a summary of these comments, see Securities Exchange Act Release No. 63448 (December 7, 2010), 75 FR 77036 (December 10, 2010) ("Order Instituting Proceedings").

⁵ See Securities Exchange Act Release No. 63105 (October 14, 2010), 75 FR 64772 (October 20, 2010).

as modified by Amendment No. 1.⁶ Although the Order Instituting Proceedings included a summary of Amendment No. 1, the Commission is publishing the full text of Amendment No. 1 for the benefit of interested persons who wish to comment on the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of Amendment No. 1 to the Proposed Rule Change

The Exchange proposes to create a listing market, which will be called "BX" [sic]⁷.

Following Commission approval, the Exchange will announce the operational date of the new market in an Equity Trader Alert and press release. The proposed rules will become effective on the operational date.

The text of the proposed rule change is available at <http://nasdaqomxbx.cchwallstreet.com>, at BX's principal office, and at the Commission's Public Reference Room.

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

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

1. Purpose

⁶ See Order Instituting Proceedings, *supra* note 4.

⁷ The Commission notes that BX has proposed, in this Amendment No. 1, to name the new listing market as "The BX Venture Market," rather than "BX."

In connection with the acquisition of the former Boston Stock Exchange by The NASDAQ OMX Group, Inc., the Exchange discontinued its listing marketplace and delisted all securities previously listed on the Exchange.⁸ Since January 2009, the Exchange has operated as a trading venue only, allowing market participants to trade securities listed on other national securities exchanges pursuant to unlisted trading privileges.

The Exchange is proposing to begin listing securities again, through the creation of a new listing market, to be called “The BX Venture Market.” The BX Venture Market will have minimal quantitative listing standards, but have qualitative requirements, which are, in many respects, similar to those required for listing on The NASDAQ Stock Market (“Nasdaq”) and other national securities exchanges.⁹ The Exchange believes that this market will provide an attractive alternative to companies being delisted from another national securities exchange for failure to meet quantitative listing standards (including price or other market value measures) and to smaller companies contemplating an initial exchange listing. The Exchange further believes that the proposed listing venue will provide a transparent, well-regulated marketplace for these companies and their investors.¹⁰ As is currently the case with respect to the trading occurring on the Exchange pursuant to unlisted trading privileges, FINRA will regulate market activity and

⁸ See Securities Exchange Act Release No. 59265 (January 16, 2009), 74 FR 4790 (January 27, 2009) (approving SR-BSE-2008-36 relating to the delisting of all securities from the Exchange in connection with the Exchange’s discontinuation of trading).

⁹ The Exchange notes that not all qualitative requirements imposed by other exchanges would be required. See Listing Requirements, *infra*, for a full discussion of the proposed quantitative and qualitative requirements for listing on BX.

¹⁰ The Exchange will propose in a separate rule filing changes to the BX Equities Platform to govern trading of, and reporting of transactions in, these listed securities and introducing and modifying market data products to permit dissemination of accurate quotation information and reporting of transactions.

staff of the Exchange will monitor real-time trading of securities listed on the BX Venture Market.

The Exchange will disseminate quotation and transaction information about securities listed on the BX Venture Market via several market data products to ensure broad dissemination of quotation and last sale information consistent with that provided by the network processors for national market system securities. This information will include a market center identifier and the Exchange will adopt a display requirement such that data vendors who receive data from the Exchange will have to identify when the BX Venture Market is the listing market for a security and clearly differentiate those securities from securities listed on Nasdaq or other exchanges or traded over-the-counter when displaying information to external users on their single security quotation screens.

The Exchange is also committed to ensuring that quotations and transaction information from BX are consolidated fully with similar information from over-the-counter quoting and trading that FINRA supervises, and is working with FINRA in that regard.

The assignment of symbols for companies listed on the BX Venture Market will be governed by 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 [sic] 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 other national securities exchanges, which will

want to retain their symbols.¹¹ In approving the symbology Plan, the Commission distinguished securities listed on an exchange, which can trade with a symbol of from [sic] 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 [sic] Act. Issuers traded on over-the-counter equity venues (including the OTCBB and Pink Sheets) are not subject to such listing standards.”¹²

Listing Requirements

The BX Venture Market would list Common Stock, Preferred Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests, American Depositary Receipts (ADR), American Depositary Shares (ADS), Units, Rights and Warrants. To be listed on the BX Venture Market, companies will need to meet the following qualitative listing standards, each of which is equivalent to the comparable listing standard of Nasdaq or is derived from the federal securities laws:

¹¹ The Commission found that allowing all exchanges to utilize from one to five characters minimizes investor confusion when a company changes its listing from one venue to another. 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.”). The Commission also noted that the portability feature of the plan would promote “competition among listing markets, including potential new listing markets.” Id. at 67224 (emphasis added).

¹² Id. at 67225 (footnotes omitted). The Exchange notes that it will have listing standards approved by the Commission, including corporate governance requirements that comply with Rule 10A-3, and go far beyond those requirements.

- a) The company must be registered under Section 12(b) of the Act¹³ and current in its periodic filings with the Commission and, as a result, subject to the requirements of the Sarbanes-Oxley Act of 2002¹⁴ (proposed Rule 5210(a) [sic]¹⁵);
- b) The company must have a fully independent Audit Committee comprised of at least three members and comply with the requirements of SEC Rule 10A-3, promulgated under the Act¹⁶ (proposed Rule 5605(c));
- c) The company must have independent directors make compensation decisions for executive officers (proposed Rule 5605(d));
- d) The company will be prohibited from taking any corporate action with the effect of nullifying, restricting or disparately reducing the per share voting rights of holders of an outstanding class of the company's common stock registered pursuant to Section 12 of the Act (proposed Rule 5640);
- e) The company's auditor will be required to be registered with the Public Company Accounting Oversight Board¹⁷ (proposed Rules 5210(b) and 5250(c)(3));
- f) The company will be required to hold an annual shareholders' meeting and solicit proxies for each shareholders' meeting (proposed Rule 5620);
- g) The company will be required to obtain shareholder approval for the use of equity compensation (proposed Rule 5635);
- h) The company will be required to adopt a code of conduct, applicable to all directors, officers and employees (proposed Rule 5610);
- i) The company will be required to conduct an appropriate review and oversight of all related party transactions, to address potential conflict of interest situations (proposed Rule 5630);
- j) The company will be required to disclose material information through any Regulation FD compliant method (or combination of methods) (proposed Rule 5250(b) and IM-5250-1);

¹³ 15 U.S.C. 781(b).

¹⁴ 15 U.S.C. 7201 – 7266.

¹⁵ The Commission notes that the correct reference should be proposed Rule 5210(a) and 5210(e).

¹⁶ 17 CFR 240.10A-3.

¹⁷ See Section 102 of the Sarbanes-Oxley Act, 15 U.S.C. 7212.

- k) The listed securities must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Act¹⁸ (proposed Rules 5210(c) and 5255);
- l) Public “shells” would not be allowed to list (proposed Rule 5101); and
- m) The Exchange will conduct a public interest review of the company and significant persons associated with it (proposed Rule 5101 and IM-5101-1). A company would not be eligible for listing if any executive officer or director 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.

In addition, the BX Venture Market would apply the following quantitative listing standards, set out in proposed Rules 5505 (initial listing) and 5550 (continued listing), which are designed to assure a minimum level of trading consistent with a public market for the securities:

- a) 200,000 publicly held shares;
- b) 200 public shareholders, at least 100 of which must be round lot holders for initial listing, and 200 public shareholders for continued listing;
- c) A market value of listed securities of at least \$2 million for initial listing and \$1 million for continued listing;
- d) Two market makers; and
- e) A minimum initial listing price of \$0.25 per share for securities previously listed on a national securities exchange and \$1.00 per share for securities previously quoted in the over-the-counter market. For continued listing, securities will be required to maintain a minimum \$0.25 per share bid price.

Further, with respect to companies not previously listed on a national securities exchange, the BX Venture Market will also require for initial listing that the company have either \$1 million stockholders’ equity or \$5 million total assets, a one year operating history, and a plan to

¹⁸ 15 U.S.C. 78q-1.

maintain sufficient working capital for the company's planned business for at least twelve months after the first day of listing.

The Exchange would also require that rights and warrants will only be eligible for initial and continued listing if the underlying security is listed on the BX Venture Market or is a covered security, as described in Section 18(b) of the Securities Act of 1933.¹⁹

The proposed listing standards are designed to allow companies that are being delisted from another national securities exchange for failure to meet that exchange's quantitative listing requirements the opportunity to provide their investors with a better regulated, more transparent trading environment than may otherwise be available in the over-the-counter markets. In addition, the Exchange believes that allowing these companies to continue trading on a national securities exchange may enable some institutional investors to continue their ownership stake in the company, which could provide greater stability to the company's shareholder base and possibly avoid forced sales by such investors.²⁰ The Exchange also believes that companies currently traded over-the-counter could view this market as an aspirational step towards a listing on another national securities exchange. The Exchange believes that the agreement of such companies to comply with the Exchange's corporate governance standards and the application of the Exchange's public interest authority will provide additional protections to their investors than would be available in their present trading venue. Moreover, the Exchange believes that a listing on the BX Venture Market could help such companies raise capital, in turn promoting job creation within the United States. Finally, the Exchange believes that the BX Venture Market

¹⁹ 15 U.S.C. 77r(b).

²⁰ Many institutional investors have investment policies that limit their ownership to securities listed on a national securities exchange, or that prohibit the ownership of securities that only are traded in the over-the-counter market.

will be a more attractive alternative to domestic companies that might otherwise have considered a listing on non-U.S. junior markets, which generally have lower listing requirements.

Nonetheless, the Exchange recognizes that the listing requirements for the BX Venture Market will be lower than those of the NASDAQ Stock Market and other national securities exchanges, and that the market will, therefore, attract smaller, less liquid companies, which may create higher risks for investors. As such, to avoid investor confusion, we will make every effort to distinguish the proposed BX Venture Market from the NASDAQ Stock Market, which is also owned by the NASDAQ OMX Group. In that regard, the listing rules of the BX Venture Market will specify that a BX Venture Market-listed company should refer to its listing as on the BX Venture Market, unless otherwise required by applicable rules or regulations, and that such company should never represent that it is listed on The NASDAQ Stock Market. To enforce this prohibition, the Exchange will monitor the press releases issued by a BX Venture Market-listed company and will annually review the company's web site to determine how the company is referring to its listing. Similarly, in describing this listing venue, the Exchange will generally refer to it as the BX Venture Market and not as NASDAQ OMX BX. The Exchange will also include information on its website describing the differences between the BX Venture Market and other national securities exchanges, including Nasdaq. Finally, as noted earlier, the Exchange will require data vendors to identify when the BX Venture Market is the listing market for a security and clearly differentiate those securities from securities listed on Nasdaq or other exchanges or traded over-the-counter when displaying information to external users on their single security quotation screens.

The BX Venture Market will not initially list a company if an executive officer or director 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.²¹ 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. Similarly, the Exchange will review proxy statements and other public filings of listed companies. If a listed company discloses a proceeding against an executive officer or director under Item 401(f)(2) – (8) of Regulation S-K, the Exchange would provide the company with thirty days to remove the executive officer or director. If the company does not do so, the Exchange would send a delisting notification to the company.

In addition, the Exchange will have the discretionary authority to deny listing to or delist any otherwise qualified security when necessary to preserve and strengthen the quality of and public confidence in its market. Proposed IM-5101-1 provides a non-exclusive description of circumstances where the Exchange may exercise that discretion, including when an individual associated with the company has a history of regulatory misconduct that does not implicate the automatic bar described above. This would arise, for example, where an executive officer or director has reported misconduct that occurred between five and ten years before the disclosure or misconduct not required to be disclosed under Item 401 of Regulation S-K. This would also arise when an individual who is not an executive officer or director, but who has significant influence on or importance to the company, has a history of regulatory misconduct. In that regard, the Exchange ordinarily would apply its discretionary authority to deny initial or continued listing to a company if a control person, such as a significant shareholder, has a

²¹ 17 CFR 229.401(f)(2) – (8).

regulatory history, which is required to be disclosed under Item 401(g) of Regulation S-K.²² In order to apply this authority, the Exchange intends to conduct background investigations of executive 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 executive officer or director is associated with a BX Venture Market-listed company, using public databases, such as Lexis-Nexis. The Exchange will also retain outside firms to assist in its review as needed, including investigative, accounting and law firms. In that regard, the Exchange expects that it would especially rely on outside firms when researching a regulatory history that may have occurred in jurisdictions outside of the United States, where the availability of information and language barriers could otherwise complicate such research. The Exchange's listing application will also solicit information about certain inquiries, investigations, lawsuits, litigation, arbitrations, hearings, or other legal or administrative proceedings against the Company and its executive officers, directors, and ten percent or greater shareholders.

The head of the Exchange's Listing Department, who will have no marketing responsibilities and will report to NASDAQ OMX's Chief Regulatory Officer, will be involved in all decisions concerning whether to permit or deny listing to a company based on a public interest concern and the Exchange's Chief Regulatory Officer will be required to approve the listing of any company that has disclosed information about an executive officer, director, or control person under Items 401(f)(2) – (8) or 401(g) of Regulation S-K that does not trigger the automatic bar described above.

²² The Exchange may, however, in rare circumstances, permit the listing of a company if, for example, the shareholder did not acquire its shares directly from the company and has no role in the management or operations of the company.

The Exchange will not approve for initial listing, or allow the continued listing, of shell companies.²³ This prohibition is based on concerns that the investors in shell companies are unaware of the ultimate business in which they are investing and that trading in such securities is more susceptible to market manipulation.

BX listings and delistings will be processed by the same staff currently in Nasdaq's Listing Qualifications Department, which presently includes 13 continued listing analysts and four initial listing analysts. This staff is extremely experienced in regulatory analysis, with the average person having over ten years of experience at Nasdaq. Should the workload resulting from the new BX Venture Market prove sufficiently high, the Exchange and Nasdaq have each committed to hiring additional staff, as necessary. In that regard, the staffing within Listing Qualifications is now, and will continue to be, reviewed regularly by Nasdaq's Chief Regulatory Officer and Regulatory Oversight Committee and will also be reviewed by the Exchange's Regulatory Oversight Committee.

The Exchange proposes that any company that meets the quantitative (e.g., financial) requirements for listing on Nasdaq will not be allowed to initially list on the BX Venture Market. This will assure that such companies only become listed on the exchange with higher listing standards.

Given that the Exchange expects to list companies that do not meet the quantitative listing requirements of the primary existing national securities exchanges, it is expected that BX Venture Market-listed companies will include smaller companies and companies facing business or other challenges. Thus, the proposed quantitative standards for the BX Venture Market were

²³ Proposed Rule 5101 sets forth a number of factors that the Exchange will consider in determining whether a Company is a shell, including whether the Company is considered

deliberately structured to be lower than those of the other primary exchanges. In that regard, the minimum price requirement for listing on the BX Venture Market will be \$0.25 per share for a security previously listed on another national securities exchange and \$1.00 per share for a security previously quoted in the over-the-counter market or listing in connection with its initial public offering. Until September 30, 2011, the Exchange would consider any company that was listed on another national securities exchange at any time since January 1, 2008, to be eligible to list with a \$0.25 per share price. 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 to list with a \$0.25 per share price, 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.

a “shell company” as defined in Rule 12b-2 under the Act, 17 CFR 240.12b-2.

For continued listing, a security will be required to maintain a minimum \$0.25 per share bid price.²⁴ If the security does not maintain a minimum \$0.25 per share bid price for 20 consecutive trading days, Exchange staff would issue a Staff Delisting Determination and the security would be suspended from trading on the BX Venture Market.²⁵ A company could appeal that determination to a Hearings Panel, however such an appeal would not stay the suspension of the security.²⁶ During the Hearings Panel process, the security could regain compliance by achieving a \$0.25 per share minimum bid price while trading on another venue, such as the over-the-counter market, for ten consecutive days. However, if the company has received three or more Staff Delisting Determinations for failure to comply with minimum price requirement in the prior 12 months, the company could only regain compliance by achieving a closing bid price of \$0.25 per share or more for at least 20 consecutive trading days. The Exchange believes that this higher requirement for companies that were previously non-compliant is appropriate to reduce the likelihood of future instances of non-compliance and the concomitant investor confusion concerning the ability of the company to remain listed. If the Hearings Panel determines that the security has satisfied the applicable standard to regain compliance, the trading halt would be terminated and the security would resume trading on the Exchange.

To be eligible for initial listing, a company not previously listed on a national securities exchange must have at least one year operating history, a minimum of either \$1 million in

²⁴ The Exchange notes there is also no price requirement for initial or continued listing on the National Stock Exchange or for continued listing on NYSE Amex and therefore that the proposed continued listing requirement exceeds the requirement of those exchanges.

²⁵ Proposed Rule 4120(a)(12).

²⁶ Proposed Rule 5815(a)(1)(C).

stockholders' equity or \$5 million in total assets, and demonstrate that it has a plan to maintain sufficient working capital for its planned business for at least twelve months after the first day of listing. The Exchange believes that these requirements will help assure that a company that was not previously subject to exchange regulation nonetheless has a credible and sustainable business.

The Exchange believes that the proposed public float, holder and market maker requirements, together with the minimum market value of listed securities requirement, will assure sufficient liquidity in listed securities. In that regard, the Exchange notes that the shareholder and publicly held shares requirements are comparable to, or higher than, requirements for listing a preferred stock or secondary class of common stock on the Nasdaq Capital Market, which require 100 round lot shareholders and 200,000 publicly held shares. The Exchange is not aware of any difficulties in the trading in securities meeting these requirements. Further, requiring two market makers will assure competing quotations for potential buyers and sellers of the securities listed on the BX Venture Market. Finally, the Exchange believes that the minimum market value of listed securities requirement will help assure that the company issuing the securities is of a sufficient size to generate interest from investors and market participants. While these proposed standards may be lower than those of other exchanges, investors will be protected by the fact that securities listed on the BX Venture Market would be considered penny stocks under Exchange Act Rule 3a51-1, unless they qualify for an exemption from the definition of a penny stock.²⁷ As such, broker-dealers would be required to pre-approve their customers for

²⁷ 17 CFR 240.3a51-1. The Exchange is not seeking an exemption from the penny stock rules for securities listed on BX, however a security may be excluded from the definition of a penny stock as a result of the security having a price in excess of \$5 or its issuer having net tangible assets in excess of \$2 million (if the issuer has been in continuous

trading in penny stocks and investors will obtain the disclosures required to be made by broker-dealers in connection with penny stock transactions, providing them with trade and market information prior to effecting a transaction. Further, there will be no “blue sky” exemption available under Section 18 of the Securities Act of 1933,²⁸ so companies will be required to satisfy state law registration requirements and other state laws that regulate the sale and offering of securities. Because some state laws and regulations may provide an exemption from certain registration or “blue sky” requirements for companies listed on the former Boston Stock Exchange, based on the higher listing standards previously applied by that Exchange, proposed Rule 5001 would provide that the Exchange will take action to delist any company listed on BX that attempts to rely on such an exemption. Companies will also agree not to rely on any such exemption as a provision of the BX Listing Agreement. Listed companies will be required to represent to the Exchange that they are not relying on any such exemption in connection with any securities offering and will be required to provide the Exchange with copies of any “blue sky memoranda” prepared in connection with the issuance of shares.²⁹ These steps will allow the Exchange to assure that the company is not inappropriately relying on such an exemption.

The BX Venture Market corporate governance requirements are generally comparable to those of the other exchanges. The Exchange would require that a listed company have an audit committee comprised of at least three independent directors that also meet the requirements of

operation for at least three years) or \$5 million (if the issuer has been in continuous operation for less than three years) or average revenue of at least \$6 million for the last three years. Rule 3a51-1(d) and (g), 17 CFR 240.3a51-1(d) and (g).

²⁸ 15 U.S.C. 77r.

²⁹ Proposed Rule 5250(e)(7). The Exchange has proposed to add these requirements in response to comments submitted on the original proposal.

SEC Rule 10A-3.³⁰ For a director to be considered an independent director, the company's board would have to determine that the individual does not have a relationship which, in the board's opinion, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.³¹ The board would be precluded from finding a director independent based on certain relationships, including if that director is currently an employee of the company or was employed by the company during the prior three years (including as an executive officer), accepted certain compensation or payments from the company during the prior three years, or had a family member with certain affiliations with the company.³²

The audit committee would be required to have a charter setting out its responsibilities, including the committee's purpose of overseeing the accounting and financial reporting processes of the company and the audits of the company's financial statements and the responsibilities and authority necessary to comply with SEC Rule 10A-3.³³ The audit committee, or another independent body of the board, will also be required to conduct an appropriate review and oversight of any related party transaction.³⁴ The Exchange believes that this requirement will limit the potential for self-dealing in connection with any related party transactions.

³⁰ 17 CFR 240.10A-3. See proposed Rule 5605(c)(2). Companies may be eligible for a phase-in or cure period with respect to certain of these requirements.

³¹ Proposed Rule 5605(a)(2) and IM-5605-1. The proposed definition of an independent director is identical to Nasdaq's definition of an independent director.

³² Id.

³³ Proposed Rule 5605(c)(1).

³⁴ Proposed Rule 5630.

The Exchange would also require that independent directors make compensation decisions concerning the chief executive officer and other executive officers.³⁵ Independent directors would be required to meet on a regular basis in executive sessions.³⁶ These requirements for audit committees, compensation decisions, and executive sessions are identical to those of Nasdaq and substantially similar to those of the other national securities exchanges and the Exchange believes they will serve to empower the independent directors of its listed companies.

While the Exchange would require that a listed company have at least three independent directors to satisfy the audit committee requirement described above, it would not require that a majority of the company's board of directors be independent or an independent nomination committee because the Exchange believes those requirements could impose significant additional costs on these smaller companies and therefore discourage companies from pursuing an otherwise beneficial listing. In that regard, given the significant responsibilities imposed on audit and compensation committee members, directors who serve on these committees are sometimes reluctant to serve on other committees. As such, if the BX Venture Market were to also require an independent nominations committee, companies may have to increase the size of their boards

³⁵ Proposed Rule 5605(d) and IM-5605-6. A company can satisfy this requirement by having their independent directors make these decisions in executive session, or by having independent directors sit on a compensation committee. If the company chooses to use a compensation committee and the committee is comprised of at least three members, one director who is not independent as defined in Rule 5605(a)(2) and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee under exceptional and limited circumstances, provided the company makes appropriate disclosure. Of course the Exchange will adopt rules required by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act following the necessary SEC rulemaking related to that provision.

³⁶ Proposed Rule 5605(b).

and add additional independent directors. Similarly, requiring that independent directors comprise a majority of a company's board could also require companies to add additional independent directors. In each case, the need to add independent directors would impose additional costs on the company.³⁷ Moreover, nothing in the Commission's rules or the Act mandate these requirements.³⁸ However, the Exchange believes that the requirement for executive sessions of the independent directors will provide a forum for the independent directors to consider whether the governance structure of the company is appropriate and raise any concerns, notwithstanding the lack of a majority independence and nominations committee requirement.

Companies listing on the BX Venture Market will be permitted to phase in compliance with the audit committee and compensation committee requirements following their listing. With respect to the audit committee requirements, a company listing in connection with its initial public offering would be required to have one independent director on the committee 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. For this purposes, a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions in SEC Rule 10A-3(b)(1)(iv)(A), namely that the company was not, immediately prior

³⁷ The 2008-2009 Director Compensation Report prepared by the National Association of Corporate Directors (available from <http://www.nacdonline.org/>) found that the median total direct compensation per director was \$78,060 for smaller companies (defined as companies with annual revenues of \$50 to \$500 million).

³⁸ See, e.g., Item 407(a) of Regulation S-K, which requires disclosure of non-independent directors who serve on nomination committees, implicitly allowing such service.

to the effective date of its registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.

With respect to the compensation committee requirement, a company listing in connection with its initial public offering, upon emerging from bankruptcy, or that otherwise was not subject to a substantially similar requirement prior to listing (such as a company only traded in the over-the-counter market) would be required to have one independent director on the committee at the time of listing; a majority of independent members within 90 days of listing; and all independent members within one year of listing. For this purposes, a company will be considered to be listing in conjunction with an initial public offering if immediately prior to listing it does not have a class of common stock registered under the Act.

A company that transfers to the BX Venture Market from another national securities exchange with a substantially similar requirement will be immediately subject to the audit and compensation committee requirements, provided that the company will be afforded the balance of any grace period afforded by the other market.

The Exchange will require companies to adopt a code of conduct applicable to all directors, officers and employees.³⁹ Any waivers of the code for directors or executive officers must be approved by the board and disclosed. The Exchange believes that this requirement will help promote the ethical behavior of individuals associated with companies listed on the BX Venture Market.

In addition, the Exchange will require shareholder approval when a company adopts or materially amends a stock option or purchase plan or other equity compensation arrangement

³⁹ Proposed Rule 5610.

pursuant to which stock may be acquired by officers, directors, employees, or consultants.⁴⁰ The Exchange would not require shareholder approval for other share issuances, however, given that the companies expected to list on the Exchange may have a greater need to issue shares more frequently or more quickly, due to their expected smaller size and the business challenges they may be facing. As such, the Exchange believes that the cost and delay associated with seeking approval for share issuances would discourage companies from pursuing an otherwise beneficial listing.⁴¹ Nonetheless, the Exchange will require listed Companies to provide notice of any 5% change in its shares outstanding⁴² and the Exchange Staff will review such issuances for public interest concerns, such as issuances significantly below the market price or for the benefit of related parties.

Review Process

Companies denied initial or continued listing would be afforded a review process similar to that contained in the existing Rule 4800 Series of the Exchange's rules, which was modeled on the process available to companies listed on Nasdaq.⁴³ The Exchange's Listing Qualifications staff only will be able to allow time-limited exceptions for certain deficiencies from the continued listing standards, such as the failure to file periodic reports, certain of the corporate governance requirements and any quantitative deficiency which does not contain a compliance period.⁴⁴ Other of the continued listing requirements would provide for automatic compliance

⁴⁰ Proposed Rule 5635.

⁴¹ In this regard, the proposed rules are comparable to the rules of the National Stock Exchange, which require shareholder approval for equity compensation issuances but not for other share issuances. See National Stock Exchange Rule 15.6.

⁴² Proposed Rule 5250(e)(1).

⁴³ Nasdaq Listing Rules 5800-5899.

⁴⁴ Proposed Rule 5810(c)(2).

periods, including the market maker, market value of publicly held shares and audit committee requirements.⁴⁵ If the company fails to timely solicit proxies or hold its annual meeting or fails to meet the minimum price requirement, or if staff has public interest concerns in connection with the company, Listing Qualifications staff will issue an immediate delisting letter to the company.⁴⁶ Any other deficiency would result in the Listing Qualifications staff issuing a Public Reprimand Letter or a delisting notification.⁴⁷ Hearings Panels composed of individuals not affiliated with the Exchange would be permitted to grant additional time to companies that received a delisting notification, or that were denied initial listing. A company could appeal a decision of the Hearings Panel to the Listing and Hearing Review Council, which is a committee appointed by the Exchange's Board to act for the Board with respect to listing decisions.⁴⁸ The Listing and Hearing Review Council decision would be final, unless it is called for a discretionary review by the Exchange Board. The compliance periods and discretion to allow a non-compliant company to remain listed are generally shorter on the BX Venture Exchange than would be allowed an equivalent company listed on Nasdaq. For example, a Hearings Panel would only be permitted to grant 90 calendar days for a company to regain compliance with a listing standard, instead of the 180 calendar days available on Nasdaq. Similarly, a company that falls below the market value of listed securities requirement would be provided a 90 calendar day compliance period, instead of the 180 days available to a Nasdaq company.

⁴⁵ Proposed Rule 5810(c)(3).

⁴⁶ Proposed Rule 5810(c)(1).

⁴⁷ Proposed Rule 5810(c).

⁴⁸ Section 6.1 of the By-Laws on NASDAQ OMX BX, Inc.

Oversight

FINRA will regulate market activity on the BX Venture Market, as it does today for Nasdaq. Based on its breadth of experience overseeing the over-the-counter markets, FINRA will also enhance its review process by calibrating its surveillance patterns to detect potential issues that may arise particularly in low priced stocks. FINRA's review will include trading which takes place on the over-the-counter market in securities listed on the BX Venture Market. In addition, SMARTS Group, which is a world-leading technology provider of market surveillance solutions to exchanges and regulators around the world,⁴⁹ will create a new suite of quoting and trading patterns to detect suspicious activity in low priced and less widely traded securities. Further, FINRA will review the activity of member firms quoting on the BX Venture Market when conducting their reviews of these firms. This review will include "focused exams" concentrated on sales practices and firm oversight.

The Exchange will provide a monthly report to the SEC staff describing any significant developments on the BX Venture Exchange, including companies added or removed from the market during that period. In addition, the Exchange's Chief Regulatory Officer will provide quarterly reports describing the listing and surveillance activities of the Exchange during the prior quarter. The Exchange will also provide copies of the Listing Department's procedures manuals to the Commission's Office of Compliance, Inspections and Examinations.

Fees

Companies would be required to submit an application review fee of \$7,500 with their application for listing on the BX Venture Market, and would be required to pay a \$15,000 annual

⁴⁹ SMARTS Group is a subsidiary of NASDAQ OMX.

fee for the first class listed on the Exchange and \$5,000 for each additional class. The annual fee would be pro-rated for a company's first year of their listing. The application review fee will allow the Exchange to recover some of the costs associated with the initial review of the company's application, including staff time and the systems supporting the initial review process. The annual fee would similarly offset the staff and system costs of continued monitoring of the company. The proposed application and annual fees are substantially less than those charged by other national securities exchanges.⁵⁰ Companies that were previously listed on Nasdaq would receive a credit, which can only be used to offset the annual fee, for any annual fees paid to Nasdaq during the same calendar year that they initially list on the BX Venture Market, for the months following their delisting from Nasdaq. The Exchange believes this credit is a reasonable allocation of fees under the Act because the Exchange and Nasdaq have the same ultimate parent, The NASDAQ OMX Group, Inc., and the company will have paid Nasdaq a non-refundable fee to provide similar services as those that will be provided by the Exchange under its annual fee. As such, the Exchange believes it would be inequitable to charge the company a second fee in the same year to support the provision of those services.

Fees would also be assessed for certain one-time events, such as a \$7,500 fee for substitution listing events, a \$2,500 fee for record-keeping changes, and a \$4,000 or \$5,000 fee for a written or oral hearing, respectively. These fees are identical to those charged on Nasdaq.

⁵⁰ For example, the initial listing fees for listing common stock on the NASDAQ Capital Market range from \$50,000 to \$75,000 and the annual fees are \$27,500; the initial listing fees for listing common stock on NYSE Amex range from \$50,000 to \$70,000 and the annual fees range from \$27,500 to \$40,000; the initial listing fees for listing common stock on the New York Stock Exchange range from \$150,000 to \$250,000 and the annual fees range from \$38,000 to \$500,000. See Nasdaq Rule 5920(a)(1) and (c)(1)(A), NYSE Amex Listed Company Guide Sections 140 and 141, and NYSE Listed Company Manual 902.03.

Under Proposed Rule 5602, a company considering a specific action or transaction can request an interpretation from the Exchange, and in return, the Exchange will prepare a responsive letter as to how the rules apply to the proposed action or transaction. No company is required to request an interpretation, and staff will orally discuss the application of the Exchange's rules with companies without any additional charge. However, if the company seeks a written response, the Exchange proposes to charge a \$15,000 fee to recoup the cost of staff's time in reviewing and responding to the request.⁵¹ The Exchange believes that the fee is appropriate, as the written response is applicable only to the company that requests it. The Exchange also believes that the written interpretive process, and the associated fee, will provide an additional public benefit in that staff will prepare anonymous summaries of interpretations, as well as frequently asked questions based on requests received from companies, including those withdrawn before a written response is issued. These summaries and questions will be posted on the Exchange's website so that the general public, practitioners, and other companies can better understand how the Exchange applies its rules and policies. In this way, the overall need to request such interpretations is minimized, thus reducing burdens on companies and staff alike.

Other Changes

As part of the proposed rule change, the Exchange is deleting portions of the Rule 4000 Series related to the listing and trading of securities eligible to be listed on the BX Venture Market and correcting cross-references to those deleted sections. The Exchange is maintaining those provisions of the Rule 4000 applicable to securities that will not be eligible to be listed on the BX Venture Market, such as Portfolio Depository Receipts, Index Fund Shares, Trust Issued

⁵¹ No fee would be charged in connection with requests involving a company's initial listing application given that the company will pay an application fee.

Receipts, Securities Linked to the Performance of Indexes and Commodities, and Managed Fund Shares, to enable the continued trading of such securities on the Exchange pursuant to unlisted trading privileges.

The Exchange is deleting Rule 4430, which provided listing criteria for limited partnership rollup transactions using language that was substantially similar to language contained in FINRA Rule 2310. Instead, the Exchange addresses these issues in proposed Rule 5210(h). This rule adopts the same approach taken by Nasdaq and NYSE AMEX by incorporating the FINRA rule by reference.⁵² In this manner, the Exchange satisfies the requirement of Section 6(b)(9) of the Exchange Act,⁵³ which requires that the rules of a national securities exchange prohibit certain limited partnership rollup transactions.

The Exchange is also moving the additional requirements applicable to the listing of securities issued by NASDAQ OMX or its affiliates from Rule 4370 to Rule 5701.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵⁴ in general and with Sections 6(b)(5) of the Act,⁵⁵ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a

⁵² Nasdaq Rule 5210(h) and NYSE Amex Listed Company Guide Section 126.

⁵³ 15 U.S.C. 78f(b)(9).

⁵⁴ 15 U.S.C. 78f.

⁵⁵ 15 U.S.C. 78f(b)(5).

national market system, and, in general, to protect investors and the public interest. The proposed new listing venue will advance these goals by allowing qualified issuers to list on a transparent, well-regulated marketplace with increased transparency about the trading of these securities, thereby protecting investors and the public interest and helping to prevent fraudulent and manipulative acts and practices.

In addition, the Exchange believes that the proposed market is consistent with Section 17B of the Act, which codifies Congress' findings 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 penny stocks and that a fully implemented automated quotation system for penny stocks would meet the information needs of investors and market participants and would add visibility and regulatory and surveillance data to that market. Section 17B further instructs the Commission to facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks, as the Exchange will for securities listed on the BX Venture Market, through one or more automated quotation systems operated by a registered securities association or a national securities exchange, providing reliable pricing information and reporting of transactions.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received.

III. Procedure: Request for Written Comments

In the Order Instituting Proceedings, the Commission requested that interested persons provide written submissions of their views, data and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invited the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. The Commission also stated that, although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁶

As noted in the Order Instituting Proceedings, interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by January 24, 2011.⁵⁷ Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 8, 2011.⁵⁸

⁵⁶ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding -- either oral or notice and opportunity for written comments -- is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

⁵⁷ See Order Instituting Proceedings, supra note 4.

⁵⁸ See id.

In the Order Instituting Proceedings, the Commission asked that commenters address the merit of BX's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.⁵⁹ The Commission also specifically asked for comment on the following:

- Do commenters agree with BX's belief that the proposed BX listing market will provide a transparent, well-regulated marketplace for companies with smaller market capitalization contemplating an initial exchange listing and companies delisted from another national securities exchange for failure to meet quantitative listing standards? Why or why not?
- Is the proposed vetting and due diligence process of prospective issuers on the BX listing market sufficient to prevent companies that might erode investor confidence (due to potential fraud) in the market from listing? Why or why not?
- Given that BX-listed companies are likely to be smaller than listed companies on other exchanges, should BX undertake any additional measures (including additional surveillances) to reduce the risk of fraudulent and manipulative behavior with respect to the listing and/or trading of BX-listed securities? Why or why not?
- Do commenters believe there is any likelihood of investor confusion regarding the BX listing market? Would investors be inclined to believe that a BX-listed company is listed on Nasdaq? Are the Exchange's proposed actions to reduce or avoid investor confusion sufficient? Why or why not? If not, what additional measures should the Exchange undertake?

⁵⁹ See id.

- Do the proposed initial and continued listing standards for the BX listing market assure sufficient liquidity in listed securities? Why or why not? Are there other listing criteria that commenters would suggest to better assure sufficient liquidity in listed securities?
- Are the proposed initial and continued listing standards for the BX listing market sufficiently designed to reduce the risk that an individual or small group of shareholders will be in a position to manipulate the listed security? Why or why not?
- Are the proposed initial and continued listing standards and the delisting process for the BX listing market sufficiently designed to prevent stocks that are of a type that historically have been prone to fraudulent schemes from being listed? Why or why not?
- Do commenters believe that the proposed delisting and appeals procedures and timeframes are sufficient and appropriate? Are the timeframes too long or too short? Why or why not?
- Are the proposed corporate governance standards for the BX listing market sufficiently designed to assure an appropriate level of corporate governance? Why or why not?
- Do commenters agree with the Exchange's belief that a BX listing could help companies raise capital and thus promote job creation within the United States? Why or why not?
- Has BX sufficiently addressed how quotations and transactions reports relating to BX-listed securities will be disseminated? Will this result in fragmentation of pricing information relating to these securities? Will this undermine the ability of investors to receive best execution? Why or why not?

Comments may continue to be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BX-2010-059 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-BX-2010-059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the

Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-BX-2010-059 and should be submitted on or before January 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁰

Florence E. Harmon
Deputy Secretary

⁶⁰ 17 CFR 200.30-3(a)(12).