

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71375; File Nos. SR-BATS-2013-059; SR-BYX-2013-039)

January 23, 2014

Self-Regulatory Organizations; BATS Exchange, Inc.; BATS-Y Exchange, Inc.; Order Granting Approval of Proposed Rule Change in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC

I. Introduction

On November 25, 2013, BATS Exchange, Inc. (“BATS”) and BATS-Y Exchange, Inc. (“BYX” and, together with BATS, the “BATS Exchanges”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed rule changes in connection with the proposed business combination (“Combination”) of their parent company, BATS Global Markets, Inc., and Direct Edge Holdings LLC (“DE Holdings”), the indirect parent company of EDGX Exchange, Inc. (“EDGX”) and EDGA Exchange, Inc. (“EDGA” and, together with EDGX, the “DE Exchanges”) (the BATS Exchanges and the DE Exchanges are the “Exchanges”).<sup>4</sup> The proposed rule changes were published for comment in the Federal Register on December 12, 2013.<sup>5</sup> The Commission received no comments on the proposal.

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The DE Exchanges submitted corresponding proposed rule changes relating to the Combination. See Securities Exchange Act Release Nos. 71046 (December 11, 2013), 78 FR 76416 (December 17, 2013) (SR-EDGA-2013-34) and 71045 (December 11, 2013) 78 FR 76480 (December 17, 2013) (SR-EDGX-2013-43).

<sup>5</sup> See Securities Exchange Act Release Nos. 71023 (December 6, 2013), 78 FR 75607 (SR-BATS-2013-059) and 71024 (December 6, 2013), 78 FR 75585 (SR-BYX-2013-039) (“Notices”).

The Commission has reviewed carefully the proposed rule changes and finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>6</sup> In particular, the Commission finds that the proposed rule changes are consistent with Sections 6(b)(1) and (3) of the Act,<sup>7</sup> which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act, and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange, and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>8</sup> which requires that the rules of the exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

## II. Discussion

### A. Corporate Structure

#### 1. Current Structure

BATS Global Markets, Inc., a Delaware corporation, owns 100 percent of the equity interests of each BATS Exchange. BATS Global Markets, Inc. also owns 100 percent of the

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<sup>6</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(1) and (b)(3).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

equity interest in BATS Trading, Inc., a Delaware corporation (“BATS Trading”), that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each of the BATS Exchanges. Currently, BATS Global Markets, Inc. is beneficially owned primarily by a consortium of several unaffiliated firms, including Members<sup>9</sup> or affiliates of Members of the BATS Exchanges. No firm beneficially owns 20 percent or greater of BATS Global Markets, Inc., and the only firms beneficially owning ten percent or greater of BATS Global Markets, Inc. are: (1) GETCO Investments, LLC, an affiliate of KCG Holdings, Inc., (2) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (3) Strategic Investments I, Inc., an affiliate of Morgan Stanley.<sup>10</sup> Seven other firms each beneficially own five percent or greater, but less than ten percent of BATS Global Markets, Inc., while seven other firms as well as various individuals each beneficially own less than five percent of BATS Global Markets, Inc.

DE Holdings, a Delaware limited liability company, owns 100 percent of the equity interest in Direct Edge, Inc., a Delaware corporation (“DEI”). DEI, in turn, owns 100 percent of the equity interest in two registered national securities exchanges, EDGX and EDGA, each a Delaware corporation. In addition, DE Holdings owns 100 percent of the equity interest in Direct Edge ECN LLC d/b/a DE Route, a Delaware limited liability company and the routing broker-dealer for the DE Exchanges (“DE Route”).

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<sup>9</sup> With respect to each of the BATS Exchanges, the term “Member” is defined in Rule 1.5(n) of the BATS Exchanges’ Rules as “any registered broker or dealer that has been admitted to membership in the Exchange.”

<sup>10</sup> For purposes of this approval order (“Order”), references to the beneficial ownership of a “firm” refers to the aggregate beneficial ownership of the firm and its affiliated entities. See Notices, supra note 5, at 75608, n.6 and 75586, n.6.

As a limited liability company, ownership in DE Holdings is represented by units held by “LLC Members.” Certain of the DE Holdings LLC Members are Members<sup>11</sup> or affiliates of Members of the Exchange. The BATS Exchanges noted their understanding that the International Securities Exchange Holdings, Inc. (“ISE Holdings”) is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings. Other than ISE Holdings, the only firms beneficially owning ten percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater, but less than ten percent of DE Holdings. Five other firms as well as various individuals each beneficially own less than five percent of DE Holdings.

## 2. The Combination

In connection with the Combination, several new entities were formed. BATS Global Markets Holdings, Inc., a Delaware corporation, is currently a wholly owned subsidiary of BATS Global Markets, Inc., and is currently a shell company with no material assets or operations. BATS Global Markets Holdings, Inc., in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation (“Blue Merger Sub”), and Delta Merger Sub LLC, a Delaware limited liability company (“Delta Merger Sub”). Each of Blue Merger Sub and Delta Merger Sub are currently shell companies with no material assets or operations.

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<sup>11</sup> With respect to each of the DE Exchanges, the term “Member” is defined in Rule 1.5(n) of the DE Exchanges’ Rules as “any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange.”

As described in more detail below, at the closing of the Combination (“Closing”), BATS Global Markets, Inc. and DE Holdings will each become intermediate holding companies, held under a single new holding company upon the Closing. The new holding company, currently named “BATS Global Markets Holdings, Inc.,” will at that time change its name to “BATS Global Markets, Inc.” In addition, the current parent company of the BATS Exchanges, BATS Global Markets, Inc., will at that time change its name to “BATS Global Markets Holdings, Inc.” For ease of reference, this Order will refer to the current parent company of each BATS Exchange as “Current BGM” when referring to the entity prior to the Closing, and as “BGM Holdings” when referring to that entity after the Closing. The entity that will become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as “New BGM.”

At the Closing, among other things, (1) Blue Merger Sub will merge with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM (to be renamed “BGM Holdings”) will be the surviving company (the “BATS Merger”); (2) Delta Merger Sub will merge with and into DE Holdings, whereupon the separate existence of Delta Merger Sub will cease and DE Holdings will be the surviving company (the “Direct Edge Merger”); (3) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and (4) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or

any LLC Member, each LLC Member's membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

As a result of the Combination, New BGM will own: (1) 100 percent of the equity interest in BGM Holdings (the entity previously referred to as Current BGM), and (2) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in the BATS Exchanges and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in the DE Exchanges. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

The ownership of New BGM, as the new top-level holding company for the combined businesses, will be divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater, but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.<sup>12</sup>

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<sup>12</sup> ISE Holdings, which will beneficially own greater than five percent, but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the New BGM Charter (as defined below), shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of

B. Proposed Rule Changes

Section 19(b) of the Act and Rule 19b-4 thereunder require a self-regulatory organization (“SRO”) to file proposed rule changes with the Commission. Although New BGM and Current BGM/BGM Holdings are not SROs, certain provisions of their proposed certificates of incorporation and bylaws, along with other corporate documents, are rules of the exchange, if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, and must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b-4 thereunder. Accordingly, each of the BATS Exchanges filed with the Commission the following documents, along with other corporate documents, in connection with the Combination: (1) resolutions of Current BGM’s board of directors (“Resolutions”) making certain determinations regarding New BGM and the impact of the Combination on the BATS Exchanges; (2) the proposed Amended and Restated Certificate of Incorporation of New BGM (“New BGM

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the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. See proposed New BGM Charter, Article FOURTH, para. (b)(ii). ISE Holdings’ shares of Class A Non-Voting Common Stock may convert to Voting Common Stock: (1) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (2) upon the termination of the Investor Rights Agreement; or (3) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. See proposed New BGM Charter, Article FOURTH, para. (c); and Investor Rights Agreement, Section 2.2(j).

Charter”);<sup>13</sup> (3) the Amended and Restated Bylaws of New BGM (the “New BGM Bylaws”);<sup>14</sup> (4) the proposed amendments to Current BGM’s Second Amended and Restated Certificate of Incorporation (the “Current BGM Charter,” and after such amendments, the “BGM Holdings Charter”);<sup>15</sup> (5) the proposed amendments to the Amended and Restated Bylaws of Current BGM (the “Current BGM Bylaws,” and after such amendments, the “BGM Holdings Bylaws”);<sup>16</sup> (6) the proposed amendments to the Second Amended and Restated By-Laws of the BATS Exchanges (each, and collectively, the “BATS Exchanges Bylaws”); (7) the proposed amendments to Rule 2.3 of each of the BATS Exchanges to reflect the affiliation between each BATS Exchange and two additional registered national securities exchanges; and (8) the

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<sup>13</sup> The BATS Exchanges noted that the New BGM Charter is modeled on, and substantially similar to the Current BGM Charter, except with respect to the following: (1) an increase in the number of authorized shares that New BGM will have authority to issue, which is the result of an increase in the number of stockholders that New BGM will have following the Closing; (2) the designation of Class A Non-Voting Common Stock and Class B Non-Voting Common Stock (the Current BGM Charter has only one class of Non-Voting Common Stock), the rights and preferences of which are identical to each other except for conversion rights; (3) minor differences in certain defined terms; and (4) several non-substantive differences and typographical corrections. See Notices, supra note 5, at 75611-75613 and 75589-90.

<sup>14</sup> The New BGM Bylaws are modeled on, and substantially similar to the Current BGM Bylaws, except with respect to the following: (1) the provision for two separate corporate officer positions, one known as the “Chief Executive Officer” and another known as “President,” instead of one position known as “The President and Chief Executive Officer;” (2) an increase in the size of the board of directors from 13 members to 15 members; (3) changes in terminology to reflect the new ownership structure; (4) minor differences in defined terms; and (5) several non-substantive differences and typographical corrections. See Notices, supra note 5, at 75613 and 75591.

<sup>15</sup> The BATS Exchanges note that the BGM Holdings Charter is modeled on, and substantially similar to, the current certificate of incorporation of DEI, which is similarly situated as an intermediate holding company between DE Holdings and the DE Exchanges. See Notices, supra note 5, at 75613 and 75591.

<sup>16</sup> The BATS Exchanges note that the BGM Holdings Bylaws are modeled on, and substantially similar to, the current bylaws of DEI, which is similarly situated as an intermediate holding company between DE Holdings and the DE Exchanges. See Notices, supra note 5, at 75613, 75615 and 75591, 75593.

proposed amendments to Rule 2.12 of each BATS Exchange to reflect the affiliation between the BATS Exchanges and the routing broker for EDGA and EDGX. Each of the BATS Exchanges also requested that the Commission approve the proposed indirect acquisition by an affiliate of each BATS Exchange of a Member of the BATS Exchanges and the resulting affiliation between the BATS Exchanges and the Member, as required under Rule 2.10 of each BATS Exchange.<sup>17</sup>

1. Voting and Ownership Limitations

The New BGM Charter includes restrictions on the ability to own and vote shares of capital stock of New BGM.<sup>18</sup> These limitations are designed to prevent any stockholder from exercising undue control over the operation of any of the BATS Exchanges or the DE

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<sup>17</sup> See Notices, supra note 5, at 75617 and 75595.

<sup>18</sup> These provisions are generally consistent with ownership and voting limits approved by the Commission for other SROs. See e.g., Securities Exchange Act Release Nos. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR-NYSE-2013-42, SR-NYSEMKT-2013-50 and SR-NYSEArca-2013-62) (order approving proposed transaction in which NYSE Euronext will become a wholly owned subsidiary of IntercontinentalExchange Group, Inc.) (“IntercontinentalExchange Group, Inc. Combination Order”); 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order approving registration application of BYX as a national securities exchange) (“BYX Approval Order”); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order approving registration application of EDGX Exchange, Inc. and EDGA Exchange, Inc.) (“EDGX and EDGA Approval Order”); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order approving registration of BATS as a national securities exchange) (“BATS Approval Order”); 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120) (order approving proposed combination between NYSE Group, Inc. and Euronext N.V.) (“NYSE-Euronext Merger Order”); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc.) (“NYSE Inc.-Archipelago Merger Order”); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (File No. SR-NSX-2006-03) (“NSX Demutualization Order”); 53128 (January 13, 2006), 71 FR 3550 (File No. 10-131) (order approving registration application of NASDAQ as a national securities exchange) (“NASDAQ Approval Order”); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26) (“CHX Demutualization Order”); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73) (“Phlx Demutualization Order”).

Exchanges and to assure that the BATS Exchanges, the DE Exchanges, and the Commission are able to carry out their regulatory obligations under the Act.

Specifically, the proposed New BGM Charter includes restrictions on the ability to vote and own shares of stock of New BGM. Under the proposed New BGM Charter: (1) no person, either alone or together with its Related Persons,<sup>19</sup> at any time may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement (other than the Investor Rights Agreement), vote or cause the voting of shares of the capital stock of New BGM or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM,<sup>20</sup> and (2) no person, either alone or together with its Related Persons, enter into any agreement, plan or other arrangement (other than the Investor Rights Agreement) with any other Person,<sup>21</sup> either alone or together with its Related Persons, under circumstances that would result in the shares of capital stock of New BGM that are subject to such agreement, plan or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan or other arrangement would be to enable any Person, either alone or together with its Related Persons, to vote, possess the right to vote or cause the voting of shares of the capital stock of New BGM that would represent more than 20 percent of said voting power (the “New BGM Voting Restrictions”).<sup>22</sup>

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<sup>19</sup> See proposed New BGM Charter, Article FIFTH, para. (a)(ii) (defining “Related Person”). See Notices, *supra* note 5, at 75611 and 75589.

<sup>20</sup> See proposed New BGM Charter, Article FIFTH, para. (b)(i)(C).

<sup>21</sup> See *id.* at Article FIFTH, para. (a)(i) (defining “Person”).

<sup>22</sup> See *id.* at Article FIFTH, para. (b)(i)(C).

In addition, the New BGM Charter includes ownership restrictions that provide that: (1) no Person, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of capital stock of New BGM, and (2) no Member of any of the BATS Exchanges or the DE Exchanges, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of capital stock of New BGM (the “New BGM Ownership Restrictions”).<sup>23</sup>

If any stockholder purports to transfer to any person any shares that would violate the New BGM Voting Restrictions or New BGM Ownership Restrictions (“New BGM Voting and Ownership Restrictions”), then New BGM shall record on the books only that number of shares that would not violate that restriction and shall treat the remaining shares as owned by the purported transferor for all purposes.<sup>24</sup> If any stockholder of New BGM purports to vote, or grant any proxy or enter into any agreement, plan or other arrangement relating to the voting of shares that would violate the New BGM Voting and Ownership Restrictions, then New BGM shall not honor such vote, proxy, agreement, plan or other arrangement to the extent that such provisions would be violated, and any shares subject to that arrangement shall not be entitled to vote to the extent of such violation.<sup>25</sup>

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<sup>23</sup> See id. at Article FIFTH, paras. (b)(i)(A) and (B). The limitations imposed by the New BGM Ownership Restrictions and New BGM Voting Restrictions shall not apply in the case of any class of stock that does not have the right to vote in the election of members of the board of directors of New BGM or on other matters that may require the approval of the holders of voting shares of New BGM (other than matters affecting the rights, preferences or privileges of said class of stock). See id. at Article FIFTH, para. (b)(ii)(A).

<sup>24</sup> See id. at Article FIFTH, para. (d).

<sup>25</sup> Id. If any stockholder purports to sell, transfer, assign, convert, pledge, or own any shares in violation of the New BGM Voting and Ownership Restrictions, then New BGM

The New BGM Charter would provide that the New BGM Voting and Ownership Restrictions would apply only for so long as New BGM directly or indirectly controls a national securities exchange registered under Section 6 of the Act with the Commission.<sup>26</sup>

The New BGM board of directors may waive the New BGM Ownership Restrictions applicable to non-Member stockholders and the New BGM Voting Restrictions, if, in connection with taking such action, the board of directors adopts a resolution stating that the waiver:

- will not impair the ability of any exchange subsidiary to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder;
- is otherwise in the best interests of New BGM, its stockholders and its exchange subsidiaries; and
- will not impair the Commission’s ability to enforce the Act or the rules and regulations promulgated thereunder.<sup>27</sup>

Any such waiver would not be effective until approved by the Commission pursuant to Section 19 of the Act.<sup>28</sup> However, the New BGM board of directors cannot waive the voting and ownership limits above 20 percent for a Member of any of the BATS Exchanges or any of the

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shall have the right to, and shall promptly after confirming such violation and to the extent funds are legally available, redeem the shares transferred in violation of the restriction. See id. at Article FIFTH, para. (e).

<sup>26</sup> See id. at Article FIFTH, para. (b)(i).

<sup>27</sup> See id. at Article FIFTH, para. (b)(ii)(B). In making this determination, the BGM board of directors may impose on the Person in question and its Related Persons such conditions and restrictions that it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of the applicable exchange subsidiary. Id.

<sup>28</sup> See id. at Article FIFTH, para. (b)(ii)(B).

DE Exchanges and their Related Persons.<sup>29</sup> Further, the New BGM board of directors also cannot waive the voting and ownership limits above the 20% threshold if such person or its Related Persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act).<sup>30</sup>

Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>31</sup> A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.<sup>32</sup>

In addition, as proposed, BGM Holdings will be a wholly-owned subsidiary of New BGM and the BGM Holdings Charter identifies this ownership structure.<sup>33</sup> Any changes to the BGM Holdings Charter, including any change in the provision that identifies New BGM as the sole stockholder of BGM Holdings, must be filed with and approved by the Commission

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<sup>29</sup> See id. at Article FIFTH, paras. (b)(i)(B) and (b)(ii)(B).

<sup>30</sup> See id. at Article FIFTH, para.(b)(iii).

<sup>31</sup> See, e.g., IntercontinentalExchange Group, Inc. Combination Order; BYX Approval Order; EDGX and EDGA Approval Order; BATS Approval Order; NYSE-Euronext Merger Order; NYSE Inc.-Archipelago Merger Order; NSX Demutualization Order; NASDAQ Approval Order; CHX Demutualization Order; Phlx Demutualization Order, supra note 18.

<sup>32</sup> See, e.g., id.

<sup>33</sup> See proposed BGM Holdings Charter, Article SEVENTH, para. 4 (“The sole stockholder of the Corporation [BGM Holdings] is BATS Global Markets [New BGM].”).

pursuant to Section 19 of the Act.<sup>34</sup> Similarly, as proposed, each of the BATS Exchanges will be a wholly-owned subsidiary of BGM Holdings and the Bylaws of the BATS Exchanges identify this ownership structure.<sup>35</sup> Any changes to the BGM Holdings Charter, including any change in the provision that identifies New BGM as the sole stockholder of BGM Holdings, must be filed with and approved by the Commission pursuant to Section 19 of the Act.<sup>36</sup> Similarly, any changes to the BATS Exchange Bylaws, including any change in the provision that identifies BGM Holdings as the sole stockholder of each BATS Exchange, must be filed with and approved by the Commission pursuant to Section 19 of the Act.<sup>37</sup> Further, pursuant to the BATS Exchange Bylaws, BGM Holdings may not transfer or assign, in whole or in part, its ownership interest in each BATS Exchange.<sup>38</sup>

The Commission believes that these provisions are consistent with the Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

## 2. Jurisdiction; Books and Records; Due Regard

As described above, following the Closing, New BGM will be the sole stockholder of BGM Holdings and BGM Holdings will be the sole stockholder of the BATS Exchanges. Although New BGM and BGM Holdings will not carry out any regulatory functions, their activities with respect to the operation of the BATS Exchanges must be consistent with, and must

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<sup>34</sup> See id. at Article SEVENTH, para.3; 15 U.S.C. 78s(b).

<sup>35</sup> See proposed BATS Exchange Bylaws, Article I(cc).

<sup>36</sup> See 15 U.S.C. 78s(b).

<sup>37</sup> See id.

<sup>38</sup> See proposed BATS Exchange Bylaws, Article IV, Section 7.

not interfere with, the self-regulatory obligations of each BATS Exchange. The New BGM Charter, New BGM Bylaws, BGM Holdings Charter and BGM Holdings Bylaws therefore include certain provisions that are designed to maintain the independence of the BATS Exchanges,<sup>39</sup> self-regulatory functions, enable the BATS Exchanges to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b)<sup>40</sup> and 19(g)<sup>41</sup> of the Act, and facilitate the ability of the BATS Exchanges and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>42</sup>

For example, under the New BGM Bylaws and the BGM Holdings Bylaws, for so long as New BGM or BGM Holdings, as the case may be, directly or indirectly, controls either or both of the BATS Exchanges, the board of directors, officers, employees and agents of each of New BGM and BGM Holdings, must give due regard to the preservation of independence of the self-regulatory functions of the BATS Exchanges, as well as to its obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by either of the boards of directors of the BATS Exchanges relating to its regulatory functions (including disciplinary matters), or which would interfere with the ability of such exchange to carry out its responsibilities under the Act.<sup>43</sup> The New BGM Bylaws and the BGM

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<sup>39</sup> The provisions in the BGM Holdings Charter and BGM Holdings Bylaws apply to “Exchange Subsidiaries,” which is defined as any direct or indirect subsidiary of New BGM that is registered with the Commission as a national securities exchange as provided in Section 6 of the Act. The BATS Exchanges, as well as the DE Exchanges, will be Exchange Subsidiaries upon the Closing of the Combination.

<sup>40</sup> 15 U.S.C. 78f(b).

<sup>41</sup> 15 U.S.C. 78s(g).

<sup>42</sup> See e.g., proposed New BGM Bylaws Article XIV, Section 14.01 and proposed BGM Holdings Bylaws, Article VII, Section 7.1.

<sup>43</sup> See proposed New BGM Bylaws, Article XIV, Section 14.01 and proposed BGM Holdings Bylaws, Article VII, Section 7.1.

Holdings Bylaws would further require that New BGM or BGM Holdings, as the case may be, comply with the U.S. federal securities laws and rules and regulations thereunder and shall cooperate with the Commission and each of the BATS Exchanges, pursuant to and to the extent of their respective regulatory authority.<sup>44</sup> In addition, the New BGM Bylaws and the BGM Holdings Bylaws, provide that the officers, directors, employees and agents of New BGM and BGM Holdings, as the case may be, by virtue of the acceptance of their position, shall be deemed to agree to: (1) comply with the U.S. federal securities laws and the rules and regulations thereunder; and (2) to cooperate with the Commission and the BATS Exchanges in respect of the Commission's oversight responsibilities regarding the BATS Exchanges and the self-regulatory functions and responsibilities of the BATS Exchanges, and New BGM and BGM Holdings will take reasonable steps to cause its officers, directors, employees and agents to so cooperate.<sup>45</sup> Furthermore, New BGM, BGM Holdings and their respective officers, directors, employees and agents will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each BATS Exchange, as applicable, for purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder arising out of, or relating to, the activities of such exchange.<sup>46</sup>

The New BGM Bylaws and the BGM Holdings Bylaws provide that New BGM, BGM Holdings and their respective officers, directors, employees and agents must submit to the

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<sup>44</sup> See proposed New BGM Bylaws, Article XIV, Section 14.04 and BGM Holdings Bylaws, Article VII, Section 7.2.

<sup>45</sup> Id.

<sup>46</sup> See proposed New BGM Bylaws, Article XIV, Section 14.05 and proposed BGM Holdings Bylaws, Article VII, Section 7.3.

Commission's jurisdiction with respect to activities relating to any of the BATS Exchanges,<sup>47</sup> and, for so long as New BGM controls, directly or indirectly, such BATS Exchange, New BGM agrees to provide the Commission and each BATS Exchange with access to its books and records that are related to the operation or administration of each BATS Exchange.<sup>48</sup> In addition, to the extent they are related to the operation or administration of the BATS Exchanges, the books, records, premises, officers, directors, agents, and employees of New BGM and BGM Holdings shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the respective BATS Exchange for purposes of, and subject to oversight pursuant to, the Act.<sup>49</sup> The New BGM Bylaws and the BGM Holdings Bylaws further provide that all books and records of New BGM and BGM Holdings shall be maintained at a location within the United States.<sup>50</sup>

The New BGM Bylaws and BGM Holdings Bylaws also provide that all books and records of each BATS Exchange reflecting confidential information pertaining to the self-regulatory function of the BATS Exchanges (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM or BGM Holdings, as the case may be, shall not be made available other than to those officers, directors, employees and agents of New BGM or BGM Holdings, as the case may be, that have a reasonable need to know the contents thereof, and shall be retained in confidence by

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<sup>47</sup> See id.

<sup>48</sup> See proposed New BGM Bylaws, Article XIV, Section 14.03 and proposed BGM Holdings Bylaws, Article V, Section 5.8.

<sup>49</sup> Id.

<sup>50</sup> See proposed New BGM Bylaws, Article XIV, Section 14.03 and proposed BGM Holdings Bylaws, Article V, Section 5.8(b). See also proposed BATS Exchange Bylaws, Article XI, Section 3.

New BGM or BGM Holdings, the members of their respective board of directors, its officers, employees and agents, and not used for any non-regulatory purposes.<sup>51</sup> The New BGM Bylaws and BGM Holdings Bylaws, however, specify that the New BGM Bylaws and BGM Holdings Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or the BATS Exchanges to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New BGM or BGM Holdings, as the case may be, to disclose such confidential information to the Commission or the BATS Exchanges.<sup>52</sup>

The New BGM Charter and the BGM Holdings Charter provide that, for so long as New BGM or BGM Holdings, as the case may be, controls, directly or indirectly, a registered national securities exchange, before any amendment to or repeal of any provision of the proposed New BGM Charter or the BGM Holdings Charter, as the case may be, may be effective, those changes must be submitted to the board of directors of each of the BATS Exchanges, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act,<sup>53</sup> such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>54</sup> Each BATS Exchange represents that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

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<sup>51</sup> See proposed New BGM Bylaws, Article XIV, Section 14.02. See also proposed BGM Holdings Bylaws, Article V, Section 5.8(a).

<sup>52</sup> See id.

<sup>53</sup> 15 U.S.C. 78s(b).

<sup>54</sup> See proposed New BGM Charter, Article TWELFTH and proposed BGM Holdings Charter, Article SEVENTH, para. 3.

The Commission finds that these provisions are consistent with the Act, and that they are intended to assist each BATS Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act. The Commission also notes that, even in the absence of these provisions, under Section 20(a) of the Act,<sup>55</sup> any person with a controlling interest in any of the BATS Exchanges shall be jointly and severally liable with and to the same extent that each BATS Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>56</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act<sup>57</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

### 3. Change in Control

Upon the Closing of the Combination, New BGM will become the sole owner of Current BGM (which, as noted above, will be referred to as “BGM Holdings” upon the Closing and thereafter). The Current BGM Charter includes certain restrictions on the ability to vote and own shares of stock of Current BGM. Specifically, the Current BGM Charter provides that: (1)

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<sup>55</sup> 15 U.S.C. 78t(a).

<sup>56</sup> 15 U.S.C. 78t(e).

<sup>57</sup> 15 U.S.C. 78u-3.

no Person,<sup>58</sup> either alone or together with its Related Persons,<sup>59</sup> may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of its capital stock, and no Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of its capital stock (“Current BGM Ownership Limitation”), and (2) subject to certain exceptions, no Person, either alone or together with its Related Persons, at any time, may, directly, indirectly or pursuant to any of various arrangements, vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of its then issued and outstanding capital stock (“Current BGM Voting Limitation”).<sup>60</sup>

The Current BGM Charter also provides that the Current BGM Ownership Limitation and the Current BGM Voting Limitation may be waived (except with respect to Members and their Related Persons) pursuant to a resolution duly adopted by the board of directors of Current BGM if, in connection with taking such action, the board of directors states in such resolution that it is the determination of the board of directors that the waiver: (1) will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder; (2) is otherwise in the best interests of Current BGM, its stockholders, and the BATS Exchanges; (3) will not impair the

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<sup>58</sup> See Current BGM Charter, Article FIFTH, para. (a)(i) (defining “Person”).

<sup>59</sup> See *id.* at Article FIFTH, para. (a)(ii) (defining “Related Persons”). See Notices, *supra* note 5, at 75609 and 75587.

<sup>60</sup> See Current BGM Charter, Article FIFTH, para. (b).

ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and (4) shall not be effective until it is filed with and approved by the Commission.<sup>61</sup>

In connection with the Combination, the Current BGM Charter will be amended and restated to: (1) remove the Current BGM Ownership Limitation and the Current BGM Voting Limitation and (2) specify that the sole stockholder of Current BGM (which will be renamed BGM Holdings) will be New BGM. In addition, as noted below, the New BGM Charter, which will become effective contemporaneously with the Closing, will contain ownership and voting limitation provisions that are substantively the same as the Current BGM Ownership Limitation and the Current BGM Voting Limitation.

Because the Current BGM Charter will be amended to eliminate the Current BGM Ownership Limitation and the Current BGM Voting Limitation contemporaneously with the Combination, New BGM's acquisition of ownership and voting rights in BGM Holdings upon Closing would not cause New BGM to contravene the Current BGM Ownership Limitation or the Current BGM Voting Limitation. Therefore, in this instance, although New BGM will possess ownership and voting rights in excess of the Current BGM Ownership Limitation and the Current BGM Voting Limitation, no waiver of these provisions is necessary.

Nevertheless, because the Combination will result in a change of ownership of Current BGM (in that New BGM will become the sole stockholder of Current BGM, which will be renamed BGM Holdings), the BATS Exchanges and the board of directors of Current BGM represented that it was appropriate for the board of directors of Current BGM to adopt the

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<sup>61</sup> See Current BGM Charter, Article FIFTH, para. (b)(ii)(B). In granting such a waiver, the Current BGM board of directors has the discretion to impose on the person and its Related Persons, such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each BATS Exchange. Id.

Resolutions, which set forth certain determinations with respect to New BGM and the Combination similar to those that would have been necessary to waive the Current BGM Ownership Limitation and Current BGM Voting Limitation.

Specifically, the board of directors of Current BGM made the following determinations: (1) the acquisition of the proposed ownership by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, is otherwise in the best interests of Current BGM, its stockholders and the BATS Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; (2) the acquisition or exercise of the proposed voting rights by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of the Current BGM, its stockholders and the BATS Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; (3) neither New BGM, nor any of its Related Persons, is subject to “statutory disqualification” within the meaning of Section 3(a)(39) of the Act;<sup>62</sup> and (4) neither New BGM, nor any of its Related Persons (excluding BATS Trading, a Member whose affiliation with the BATS Exchanges has been approved/permitted by

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<sup>62</sup> 15 U.S.C. 78c(a)(39).

the Commission pursuant to Rule 2.11 and Rule 2.12 of each Exchange),<sup>63</sup> is a Member.<sup>64</sup>

The Commission believes that it is consistent with the Act to allow New BGM to wholly-own and vote all of the outstanding common stock of Current BGM (to be renamed BGM Holdings). The Commission notes that, as the new top-level holding company for the combined businesses, New BGM will have ownership divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings.<sup>65</sup> According to the BATS Exchanges, of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own 10 percent or greater.<sup>66</sup> The Commission also notes that, while the Current BGM Ownership Limitation and Current BGM Voting Limitation will no longer be in the Current BGM Charter, the BGM Holdings Charter will specify that BGM Holdings' sole stockholder will be New BGM, and the New BGM Charter will contain substantively identical ownership and voting limitation provisions.<sup>67</sup> Further, as discussed above, New BGM has included in its corporate documents certain

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<sup>63</sup> As noted below, BATS Trading is a routing broker-dealer and a Member that is affiliated with each BATS Exchange, pursuant to Rules 2.11 and 2.12 of each BATS Exchange, and a direct subsidiary of Current BGM. The same structure will continue to be in place following the Closing and BATS Trading will remain a direct subsidiary of BGM Holdings.

<sup>64</sup> The Resolutions also contain a determination that the execution and delivery of the Merger Agreement by New BGM constituted notice of New BGM's intention to acquire ownership and voting rights in excess of the BGM Ownership Limitation and BGM Voting Limitation, respectively, in writing and not less than 45 days before the Closing. See Current BGM Charter, Article FIFTH, para. (b)(iv).

<sup>65</sup> See Notices, supra note 5, at 75609 and 75587.

<sup>66</sup> See id.

<sup>67</sup> See proposed BGM Holdings Charter, Article SEVENTH, para. 4; proposed New BGM Charter, Article FIFTH.

provisions designed to maintain the independence of each BATS Exchange’s regulatory functions from New BGM and BGM Holdings.<sup>68</sup> Accordingly, the Commission does not believe that the Combination will impair the ability of either BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder.

4. Board Composition; Committees

a. Board Composition

The board of directors of each BATS Exchange will continue to be the governing body of their respective BATS Exchange and possess all of the powers necessary for the management of the business and affairs of their respective BATS Exchanges and the execution of their respective responsibilities as SROs. In connection with the Combination, each BATS Exchange proposed several changes to their respective BATS Exchange Bylaws.

First, each BATS Exchange proposes to amend Section 2(b) of Article III of their respective BATS Exchange Bylaws to explicitly state that the Chief Executive Officer of the BATS Exchange will be considered an Industry Director.<sup>69</sup> The BATS Exchange Bylaws require that the Board of Directors be composed of one Director who is the Chief Executive Officer of the BATS Exchange, and a sufficient number of Non-Industry Directors (including Independent Directors), Industry Directors and Member Representative Directors such that: (1) the number of Non-Industry Directors, including at least one Independent Director, equals or

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<sup>68</sup> See proposed New BGM Bylaws, Article XIV and proposed BGM Holdings Bylaws, Article VII.

<sup>69</sup> See proposed BATS Exchanges’ Bylaws, Article III, Section 2(b).

exceeds the sum of the number of Industry Directors and Member Representative Directors,<sup>70</sup> and (2) the number of Member Representative Directors equals at least 20 percent of the board of directors (the “Exchange Board Composition Requirements”).<sup>71</sup> The definition of “Industry Director” includes a Director that has an employment relationship with the Exchange.<sup>72</sup> Consequently, the Chief Executive Officer of each BATS Exchange will always meet the definition of “Industry Director.” Consistent with this definition, and in order to effectuate the Exchange Board Composition Requirements, each BATS Exchange considers the Chief Executive Officer to be an Industry Director.<sup>73</sup> Consistent with this interpretation, each BATS Exchange proposes to amend Section 2(b) of Article III of their respective BATS Exchange Bylaws to explicitly clarify that the Chief Executive Officer shall be considered an Industry Director.

Second, each of the BATS Exchange Bylaws provide that each of the Non-Industry Directors and Industry Directors are divided into one of three classes to serve staggered three-year terms.<sup>74</sup> Unlike other Industry Directors, rather than serving a three-year term, the Chief Executive Officer of each BATS Exchange serves on the board of directors of such BATS Exchange until he or she ceases to be Chief Executive Officer.<sup>75</sup> Each BATS Exchange is

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<sup>70</sup> See id. at Article I, paras. (i) and (s) (defining “Director” and “Member Representative Director.”).

<sup>71</sup> See id.

<sup>72</sup> See id. at Article I, para. (o)(vi).

<sup>73</sup> According to the BATS Exchanges, any other treatment might result in the total number of persons affiliated with the securities industry exceeding the number of Non-Industry Directors – a result that would contravene the Board Composition Requirements. See Notices, supra note 5, at 75615 and 75593.

<sup>74</sup> See proposed BATS Exchange Bylaws, Article III, Section 3(b).

<sup>75</sup> See id. at Article III, Section 3(a).

therefore proposing to amend Section 3(b) of Article III of their respective BATS Exchange Bylaws to explicitly clarify that the reference to each Industry Director serving a staggered three-year term excludes the Chief Executive Officer.

Finally, each of the BATS Exchanges is proposing to amend Sections 4(a), 4(c), and 4(e) of Article III of the BATS Exchange Bylaws to permit the Director nomination and election process (including the Member Representative Director nomination and election process conducted by the Member Nominating Committee) to be conducted through either an annual or special meeting of the stockholders, rather than exclusively through an annual meeting of the stockholders. According to each of the BATS Exchanges, this change is designed to allow the BATS Exchange additional flexibility to fill vacancies that arise more quickly throughout the year, rather than have to wait until the BATS Exchanges' annual director election process.<sup>76</sup>

The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.<sup>77</sup> Further, public, non-industry representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the BATS Exchanges boards of directors to address issues in a non-discriminatory fashion and foster

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<sup>76</sup> See Notices, *supra* note 5, at 75616 and 75594.

<sup>77</sup> See, e.g., Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (citing Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998)).

the integrity of BATS Exchanges.<sup>78</sup> The Commission believes that the proposed modifications relating to the Board of each of the BATS Exchanges satisfies the requirements in Section 6(b)(3) of the Act,<sup>79</sup> which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer.<sup>80</sup>

b. BATS Exchange Committees

The BATS Exchanges are proposing two changes that relate to the BATS Exchanges committees. The BATS Exchanges are proposing to amend Section 2(a) of Article V of the BATS Exchange Bylaws to clarify that the Chairman, with the approval of the board of directors, not only appoints the members of all board committees, but also appoints the chair of each committee.

Second, the BATS Exchanges are proposing to amend Section 6(c) of Article V of the BATS Exchange Bylaws to delineate the Regulatory Oversight Committee's ("ROC's") responsibilities. The ROC's responsibilities include the following: (1) those with regard to each of the BATS Exchanges' facilities, as defined in Section 3(a)(2) of the Act;<sup>81</sup> (2) assessing the BATS Exchanges' regulatory performance; (3) assisting the Board and committees of the Board in reviewing the regulatory plan and the overall effectiveness of the BATS Exchanges' regulatory functions; and (4) in consultation with the Chief Executive Officer of the BATS

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<sup>78</sup> See Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77).

<sup>79</sup> 15 U.S.C. 78f(b)(3).

<sup>80</sup> The Exchange Bylaws will continue to require that the number of Non-Industry Directors on the Exchange Board must equal or exceed the sum of the Industry and Member Representative Directors, and the Exchange Board must include at least one Independent Director. See proposed BATS Exchange Bylaws, Article III, Section 2(b)(i).

<sup>81</sup> 15 U.S.C. 78c(a)(2).

Exchanges, establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer of the BATS Exchanges.

The Commission believes that the proposed changes are designed to make more transparent how the committee chairs are appointed and what responsibilities are assigned to the ROC.

#### 5. Affiliation between BATS Exchanges and DE Exchanges

Rule 2.3 of each of the BATS Exchanges generally provides that in order to be eligible for membership in BATS or BYX, a registered broker or dealer is required to be a member of at least one other national securities association or national securities exchange. Membership in the BATS Exchanges affiliated national securities exchange (either BATS or BYX as the case may be) is not sufficient for purposes of membership eligibility.<sup>82</sup> As discussed above, as a result of the Combination, the BATS Exchanges will become affiliated with the DE Exchanges. The BATS Exchange continue to believe that it is appropriate to limit membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the BATS Exchanges. Therefore, the BATS Exchanges proposed to amend Rule 2.3 to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than BATS, BYX, EDGA, or EDGX.

The Commission notes that the proposed changes to Rule 2.3 of each of the BATS Exchanges extends the membership eligibility criteria in a way that is consistent with the current rule, taking into account the BATS Exchanges new affiliation with the DE Exchanges after the Closing.

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<sup>82</sup> See Rule 2.3 of each of the BATS Exchanges.

## 6. Affiliation with DE Route

As discussed above, as a result of the Combination, New BGM will, indirectly, wholly own the BATS Exchanges, the DE Exchanges, BATS Trading and DE Route. DE Route is a registered broker-dealer and a member of Financial Industry Regulation Authority. DE Route is also a member of each of the BATS Exchanges and the DE Exchanges.<sup>83</sup>

Rule 2.10 of each BATS Exchange generally provides that, without the prior approval of the Commission, (i) each BATS Exchange or any entity with which each BATS Exchange is affiliated (as defined in Rule 12b-2 under the Act<sup>84</sup>), may not directly or indirectly acquire or maintain an ownership interest in a Member of each BATS Exchange, and (ii) a Member of each BATS Exchange may not be or become an affiliate of the BATS Exchange, or an affiliate of any affiliate of the BATS Exchanges. The BATS Exchanges note that the purpose of Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the BATS Exchanges or their affiliates having an ownership interest in a Member, particularly with respect to the Exchanges' obligation under Section 19(g) of the Act<sup>85</sup> to enforce its Members' compliance with the Act, the Commission's rules thereunder, and BATS Exchanges' Rules.<sup>86</sup>

DE Route is currently a Member of each BATS Exchange. The BATS Exchanges proposed to become affiliated with DE Route, and that DE Route provide certain routing services to the BATS Exchanges. Specifically, the BATS Exchanges proposed to receive through DE Route orders routed inbound to the BATS Exchanges from each of the DE Exchanges, both of which will also be affiliates of the BATS Exchanges as a result of the Combination.

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<sup>83</sup> See Notices, supra note 5, at 75609 and 75586-87.

<sup>84</sup> 17 CFR 240.12b-2.

<sup>85</sup> 15 U.S.C. 78s(g).

<sup>86</sup> See Notices, supra note 5, at 75617 and 75595.

Accordingly, the BATS Exchanges have asked the Commission to approve an exception to Rule 2.10 that will permit the affiliation between each of the BATS Exchange and their Member, DE Route.

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange, particularly where a member is routing orders to such affiliated exchange,<sup>87</sup> each BATS Exchange previously implemented limitations and conditions to the affiliation between each BATS Exchange and BATS Trading, also an affiliated member, to permit each BATS Exchange to accept inbound orders that BATS Trading routes in its capacity as a facility of an affiliated exchange (BYX).<sup>88</sup> Again recognizing the Commission's concerns, the BATS Exchanges have now proposed that DE Route operate as an affiliated inbound router subject to substantially similar limitations and conditions.<sup>89</sup>

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<sup>87</sup> See e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006). See also Securities Exchange Act Release No. 57648 (April 11, 2008), (April 17, 2008).

<sup>88</sup> See Rule 2.12 of each of the BATS Exchanges. See also Securities Exchange Act Release No. 62901, (September 13, 2010), 75 FR 57097 (September 17, 2010). Such limitations and conditions were originally implemented on a pilot basis. The Commission later approved a proposal to make them permanent. See Securities Exchange Act Release No. 66808 (April 13, 2012), 77 FR 23294 (April 18, 2012). BYX implemented similar limitations and conditions first on a pilot basis, but which were later approved on a permanent basis. See Securities Exchange Act Release Nos. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (approving registration application of BYX and approving conditions and limitations which allowed BYX to receive inbound routes of orders by BATS Trading in its capacity as an order routing facility of BATS on a twelve month pilot) and 66807 (April 13, 2012) 77 FR 23300 (April 18, 2012) (SR-BYX-2012-006) (approving conditions and limitations on a permanent basis).

<sup>89</sup> See Notices, supra note 5, at 75616-17 and 75595.

Specifically, the BATS Exchanges proposed that DE Route, operating as a facility of the DE Exchanges, provide routing services from each of the DE Exchanges to each BATS Exchange, subject to the following conditions and limitations set forth in the proposed Rule 2.12 of each BATS Exchange:<sup>90</sup>

- Each BATS Exchange would enter into (1) a plan pursuant to Rule 17d-2 under the Exchange Act with a non-affiliated SRO to relieve each BATS Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between each BATS Exchange and the non-affiliated SRO, and (2) a regulatory services contract with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique rule of each BATS Exchange.
- The regulatory services contract would require the BATS Exchanges to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively “Exceptions”) in which DE Route is identified as a participant that has potentially violated the rules of the BATS Exchanges or Commission rules, and would require that the non-affiliated SRO provide a report, at least quarterly, to the BATS Exchanges quantifying all Exceptions in which DE Route is identified as a participant that has potentially violated the rules of the BATS Exchanges or the Commission.

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<sup>90</sup> See Rule 2.12 of each of the BATS Exchanges; see also supra note 5, at 75616-17 and 75595. Additionally, Rule 2.12(b) will require that DE Route operates as an outbound router on behalf of each of the DE Exchanges in accordance with the rules of each DE Exchange.

- Each BATS Exchange, on behalf of the holding company indirectly owning the BATS Exchanges and DE Route, would establish and maintain procedures and internal controls reasonably designed to ensure that DE Route does not develop or implement changes to its system on the basis of non-public information regarding planned changes to each BATS Exchange's systems, obtained as a result of its affiliation with the BATS Exchanges, until such information is available generally to similarly situated users of the BATS Exchanges in connection with the provision of inbound order routing to the BATS Exchanges.
- Each BATS Exchange may furnish to DE Route the same information on the same terms that the BATS Exchanges make available in the normal course of business to any other user.

Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit DE Route to be affiliated with the BATS Exchanges and to provide inbound routing to the BATS Exchanges, subject to the conditions described above.

The BATS Exchanges have proposed four conditions applicable to DE Route's inbound routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO oversight of DE

Route,<sup>91</sup> combined with the non-affiliated SRO's monitoring of DE Route's compliance with the equity trading rules and quarterly reporting to each BATS Exchange, will help to protect the independence of each BATS Exchange's regulatory responsibilities with respect to DE Route. The Commission also believes that the requirement that each BATS Exchange establish and maintain procedures and internal controls reasonably designed to ensure that DE Route does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the BATS Exchanges, until such information is available generally to similarly situated members of the BATS Exchanges, is reasonably designed to ensure that DE Route cannot misuse any information advantage it may have because of its affiliation with the BATS Exchanges.

Further, the Commission notes that the proposed conditions for the operation of DE Route as an affiliated inbound router on behalf of each BATS Exchange are consistent with conditions the Commission has approved for other exchanges.<sup>92</sup> The Commission therefore finds the proposed operation of DE Route as an affiliated inbound router of the BATS Exchanges is consistent with the Act.

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<sup>91</sup> The oversight will be accomplished through the Rule 17d-2 agreement and the regulatory contract.

<sup>92</sup> See, e.g., Securities Exchange Act Release Nos. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (order approving the exchange registration of BATS Y-Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (order approving the exchange registration of the DE Exchanges); and 65456 (September 30, 2011), 76 FR 62118 (October 6, 2011) (order approving a proposal by NYSE Arca, Inc. ("NYSE Arca") to make permanent the pilot program that permits NYSE Arca to accept inbound orders routed by its affiliated broker-dealer).

They are also consistent with the conditions and limitations on inbound routing to the Exchange by its affiliate BATS Trading. See supra note 88 and accompanying text.

III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>93</sup> that the proposed rule changes (SR-BATS-2013-059 and SR-BYX-2013-039) are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>94</sup>

Elizabeth M. Murphy  
Secretary

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<sup>93</sup> 15 U.S.C. 78s(b)(2).

<sup>94</sup> 17 CFR 200.30-3(a)(12).