

necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAmex-2011-32 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-NYSEAmex-2011-32. 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 Web site (<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 Web site 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Amex. 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-NYSEAmex-2011-32 and should be submitted on or before June 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-64437; File No. SR-BX-2010-059]**

**Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto To Create a Listing Market on the Exchange**

May 6, 2011.

On August 20, 2010, NASDAQ OMX BX, Inc. (the "Exchange" or "BX") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to create a listing market on the Exchange, called "The BX Venture Market" ("BX Venture Market"). The proposed rule change was published for comment in the **Federal Register** on September 8, 2010.<sup>3</sup> 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.<sup>4</sup> The Commission received three comments in response to the Notice.<sup>5</sup>

On December 6, 2010, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>6</sup> On December 7, 2010, the Commission instituted proceedings to determine whether to disapprove the proposed rule change, as modified by Amendment No. 1.<sup>7</sup> The Commission thereafter received eight comments on the proposal.<sup>8</sup> The Exchange submitted a response letter to the comments on February 17, 2011.<sup>9</sup> On March 3, 2011, the Commission issued a notice of designation of longer period for Commission action on proceedings to determine whether to disapprove the proposed rule change, as modified by Amendment No. 1.<sup>10</sup> On May 4, 2011, the Exchange submitted Amendment No. 2 to the proposed rule change, as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit

<sup>4</sup> See Securities Exchange Act Release No. 63105 (October 14, 2010), 75 FR 64772 (October 20, 2010).

<sup>5</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission, from William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, dated September 28, 2010 ("MSD Letter"); Michael R. Trocchio, Bingham McCutchen LLP, on behalf of Pink OTC Markets Inc., dated October 3, 2010 ("Pink OTC Markets Letter"); and Tom A. Alberg, Managing Director and Founder, Madrona Venture Group, dated December 1, 2010 ("Madrona Letter").

<sup>6</sup> See Securities Exchange Act Release No. 63597 (December 22, 2010), 75 FR 82098 (December 29, 2010).

<sup>7</sup> See Securities Exchange Act Release No. 63448 (December 7, 2010), 75 FR 77036 (December 10, 2010) ("Order Instituting Proceedings").

<sup>8</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission, from James J. Angel, Ph.D., CFA, dated January 14, 2011 ("Angel Letter"); K. Richard B. Niehoff, Chairman and CEO, United States OTC Markets, Inc., dated January 20, 2011 ("Niehoff Letter"); Mark G. Heesen, President, National Venture Capital Association, dated January 21, 2011 ("NVCA Letter"); Alan F. Eisenberg, Executive Vice President, Emerging Companies and Business Development, Biotechnology Industry Organization, dated January 24, 2011 ("BIO Letter"); Michael R. Trocchio, Bingham McCutchen LLP, on behalf of OTC Markets Group Inc., dated January 24, 2011 ("OTC Markets Group Letter"); Rey Ramsey, President and CEO, TechNet, dated January 24, 2011 ("TechNet Letter"); William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, dated January 26, 2011 ("MSD Letter II"); and James McCarthy, Co-Founder, the US Venture Exchange, dated April 19, 2011 ("McCarthy Letter").

<sup>9</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ OMX Group, dated February 17, 2011 ("BX Response Letter").

<sup>10</sup> See Securities Exchange Act Release No. 64028 (March 3, 2011), 76 FR 13010 (March 9, 2011).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

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

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

comments on Amendment No. 2 from interested persons and is approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of Amendment No. 2 to the Proposed Rule Change**

The Exchange proposes to create a listing market, which will be called "the BX Venture Market." 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**

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.<sup>11</sup> 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 will have qualitative requirements that are, in many respects, similar to those required for listing on The NASDAQ Stock Market ("NASDAQ") and other national securities exchanges.<sup>12</sup> The Exchange believes that the name BX Venture Market will appropriately convey the lower financial standards required for listing on this market and distinguish the BX Venture Market from other national securities exchanges. The term "venture" is already used to designate the junior market in Canada, the TSX Venture Market. Moreover, "venture" by definition broadly connotes an undertaking involving some uncertainty or risk in return for the hope of profit, rather than referring solely to companies that are backed by venture capital. It is thus a familiar term for a venue designed to 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), as well as 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.<sup>13</sup>

As discussed in more detail below, the Exchange will operate and regulate the BX Venture Market through regulatory contracts with FINRA and the NASDAQ Stock Market LLC, which will be in place prior to the Market becoming operational. While the Exchange will retain all legal responsibility for and control of the functions performed by these entities, it will leverage FINRA's expertise overseeing the over-the-counter markets, surveillance enhancements provided by the SMARTS Group,<sup>14</sup> and the deep experience of the NASDAQ Listing Qualifications Department to ensure high quality oversight for market activity and listed companies. Moreover, the Exchange has proposed rules to provide a clear signal to investors that a company is listed on the

BX Venture Market and to distinguish the BX Venture Market from NASDAQ and other national securities exchanges. These proposed rules also require a rigorous vetting procedure before a company may attain a listing, and heightened scrutiny thereafter of listed Companies. Finally, the Exchange will not launch the BX Venture Market before approval is obtained for an arrangement between the Exchange and FINRA to consolidate and disseminate best quotation and last sale data for BX Venture Market listed securities and that arrangement is operational.<sup>15</sup> All of these matters are discussed more fully below.

#### **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:

(a) The company must be registered under Section 12(b) of the Act<sup>16</sup> and current in its periodic filings with the Commission and, as a result, subject to the requirements of the Sarbanes-Oxley Act of 2002<sup>17</sup> (proposed Rule 5210(a) and 5210(e));

(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 Act<sup>18</sup> (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

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> SMARTS Group, a subsidiary of NASDAQ OMX, is a leading technology provider of market surveillance solutions to exchanges and regulators around the world.

<sup>15</sup> The Commission notes that its order in Section VI, *infra*, does not contain this condition.

<sup>16</sup> 15 U.S.C. 781(b).

<sup>17</sup> 15 U.S.C. 7201-7266.

<sup>18</sup> 17 CFR 240.10A-3.

<sup>11</sup> 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).

Board<sup>19</sup> (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);

(k) The listed securities must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Act<sup>20</sup> (proposed Rules 5210(c) and 5255);

(l) Public "shells" would not be allowed to list (proposed Rule 5103(b)); and

(m) The Exchange will conduct a public interest review of the company and significant persons associated with it (proposed Rules 5205(c) and 5104 and IM-5104-1). A company would not be eligible for listing if any executive officer, director, promoter, or control person was involved in any event described in Item 401(f)(2)-(8) of Regulation S-K that occurred during the prior five years (proposed Rule 5103(a)).

In addition, the BX Venture Market would apply the following quantitative listing standards, set out in proposed Rules 5505 and 5506 (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 not previously listed on a national securities exchange. 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 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.<sup>21</sup>

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. 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.<sup>22</sup> The Exchange also believes that the BX Venture Market will provide an opportunity for smaller, private, venture-backed companies to expand their capital financing opportunities and go public, and at the same time, encourage investment in early-stage companies by providing private equity and venture funders with an exit strategy. In addition, 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 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.

#### Investor Protection Provisions

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. Mindful of these risks and the Exchange's objective to preserve the quality of and public confidence in its market, the Exchange has adopted rules to preclude investor confusion about BX Venture Market listings. The Exchange will also subject companies and associated individuals to a rigorous review process before approving a listing, and apply heightened regulatory scrutiny to listed Companies.

*References to Listing.* To avoid investor confusion, the listing rules of the BX Venture Market specify that a BX Venture Market-listed company must refer to its listing as on the BX Venture Market, unless otherwise required by applicable rules or regulations. Staff will review any failure of a company to follow this requirement, and take appropriate action pursuant to the Rule 5800 Series. A company that represents itself as listed on the NASDAQ Stock Market or refers to itself as a NASDAQ listed company will be subject to immediate delisting pursuant to procedures in the Rule 5800 Series.<sup>23</sup> To enforce this prohibition, the Exchange will monitor the press releases issued by a BX Venture Market-listed company<sup>24</sup> 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 refer to it as the BX Venture Market and not as NASDAQ OMX BX. The Exchange will also prominently include information on its Web site describing the

<sup>23</sup> Proposed Rule 5250(b)(4).

<sup>24</sup> Pursuant to Proposed Rule 5250, which addresses disclosure obligations, a listed company that issues a press release in satisfaction of its disclosure obligations is required to disseminate the press release over a national newswire service acceptable to the Exchange.

<sup>19</sup> See Section 102 of the Sarbanes-Oxley Act, 15 U.S.C. 7212.

<sup>20</sup> 15 U.S.C. 78q-1.

<sup>21</sup> 15 U.S.C. 77r(b).

<sup>22</sup> 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.

differences between the BX Venture Market and other national securities exchanges, including NASDAQ.<sup>25</sup> For example, it will inform users that BX Venture Market-listed stocks are not “blue sky” exempt, are not NMS securities, and are not subject to the trade-through rule, and provide side-by-side comparisons of BX Venture Market and NASDAQ Stock Market features. Marketing materials for the BX Venture Market will also include a prominent disclaimer explaining that the BX Venture Market is separate from, and not a tier of, the NASDAQ Stock Market. Finally, as required by proposed Rule 5106 and discussed in more detail later in this filing, the Exchange will require data vendors to identify when the BX Venture Market is the listing market for a security with a unique market center identifier, so as to clearly differentiate those securities from securities listed on NASDAQ or other exchanges or traded over-the-counter.

**Automatic Bars to Listing.** Proposed Rule 5103 provides for certain automatic bars to listing. Under that Rule, the Exchange will not approve for listing or allow the continued listing of “shell” Companies.<sup>26</sup> 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. The Exchange will also decline to list any company, and will delist any listed company, that attempts to rely on an exemption from state securities registration which otherwise may be available under state law to Companies listed on the Exchange. Finally, the Exchange will not approve for listing or allow the continued listing of a company if any executive officer, director, promoter, or control person was involved in any event that occurred during the prior five years described under Item 401(f)(2)–(8) of Regulation S–K under the Act. Such 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.<sup>27</sup>

To enforce these automatic bars, and to identify other public interest concerns that, while not triggering an automatic bar, may call for the use of the Exchange’s discretionary authority to disapprove a listing, the Exchange will engage in a rigorous review of listing applications, which will include background checks of individuals associated with the company and the assistance of independent qualified third-party investigators.

**Application and Public Interest Review.** The listing application will require provision to the Exchange, and Staff review, of all reports and documents required to be filed with the Commission or other regulatory authority, as well as any other information or documentation, public or non-public, Staff determines is necessary for its review. Companies must also provide detailed descriptions and supporting documentation of all pending or prior inquiries, investigations, lawsuits, litigation, arbitration, hearings or any other legal or administrative proceedings involving the company, its executive officers, directors, promoters, and ten percent or greater shareholders of the company.<sup>28</sup> The company must, in addition, disclose any events described under Item 401(f) of Regulation S–K involving officers, directors, promoters, or control persons; describe all bridge financings, shelf registrations, Regulation S offerings or private placements consummated in the prior six months; and provide copies of any blue sky memoranda.

Staff will also review the company’s proxy disclosures to screen for events described pursuant to Item 401(f) of Regulation S–K under the Act. Moreover, it will conduct background checks of the company and affiliated individuals. This background investigation will be conducted by Staff members experienced in such reviews and will make use of public databases and other resources, such as Lexis-Nexis, the Web-CRD regulatory database, and web-based search engines, such as Google.<sup>29</sup> Finally, the Exchange will request review of a company by an independent qualified third-party investigative firm in appropriate circumstances, as discussed in more detail below.

Company does not do so, the Exchange would send a delisting notification to the Company.

<sup>28</sup> A ten year history of such inquiries, investigations, and proceedings involving the company will be required; there is no time limit on the history required for executive officers, directors, promoters, or controlling shareholders.

<sup>29</sup> Proposed Rule 5205(c)(1).

If the Exchange identifies a regulatory issue that triggers an automatic bar the application will be disapproved. If the Exchange identifies a regulatory event described pursuant to Item 401(f)(2)–(8) of Regulation S–K about an officer, director, promoter, or control person that occurred more than five years prior; or a history of regulatory misconduct by a person that is not an officer, director, promoter, or control person of the company but who has significant influence on or importance to the company, it will ordinarily exercise its discretionary authority to deny listing. However, if the Exchange determines that the information identified may not rise to the level requiring denial of the listing, or if it identifies any issue that raises potential public interest concerns about which it seeks additional information (such as, for example, media accounts of criminal allegations or improper business practices, or any indication of financial improprieties) it will refer the company to an independent qualified third party investigative firm for review. Any decision to list a company that has been referred to an independent investigative review based on the regulatory history of an associated individual that does not trigger an automatic bar, must be approved in writing by the Chief Regulatory Officer (“CRO”) of the Exchange. The CRO must also approve the listing of any company with an officer, director, promoter, or control person who has described a bankruptcy under Item 401(f)(1) of Regulation S–K. Finally, whenever Staff has identified a past violation or evasion of a corporate governance standard pursuant to its review of a formerly exchange-listed company’s past corporate governance activities, but decides not to exercise its discretionary authority to deny listing, the listing must be approved in writing by the CRO. Documentation of the CRO’s approvals will be maintained with the Exchange’s listing file for the company.

**Independent Investigative Assistance.** The Exchange will retain a qualified independent third party investigative firm to assist in its public interest review process. Staff will make random, regular referrals to such a firm of at least 10% of applicant companies that were not previously listed on a national securities exchange.<sup>30</sup> In addition, Staff

<sup>30</sup> Proposed Rule 5205(d). While the Exchange expects to refer between 10–20% of such applicant companies, this ratio could change upon evaluation of the findings provided by the investigative firms. The Exchange does not expect that random referrals of companies that have previously been listed on a national securities exchange will be necessary, but

Continued

<sup>25</sup> Rule 5106.

<sup>26</sup> Proposed Rule 5103(b) 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 a “shell company” as defined in Rule 12b–2 under the Act, 17 CFR 240.12b–2.

<sup>27</sup> If a listed Company discloses an event involving an executive officer, director, promoter, or control person described under Item 401(f)(2)–(8) of Regulation S–K, the Exchange would provide the Company with thirty days to remove the executive officer, director, promoter, or control person. If the

will utilize an investigative firm when it would be impractical to research a regulatory history occurring outside the United States. Finally, Staff will seek review of a company when its internal review has uncovered a regulatory issue or potential public interest concern that does not trigger an automatic bar and Staff has not made a determination to disapprove the application. While the scope of investigations will vary based on the reasons for review, they generally will focus on criminal history, government sanctions and watchlists, and will also include online and onsite checks of court records, searches of relevant state and country criminal databases, and searches of global risk compliance databases covering government prohibited and barred persons. In appropriate circumstances, such as where questions are raised related to the legitimacy or appropriateness of an applicant's business practices, customers, or suppliers, whether through whistle blower complaints or otherwise, the outside firm would be asked to make inquiries with respect to those matters.

These procedures and determinations shall be followed, as applicable, whenever a listed company names a new officer, director, promoter, or control person or describes an event pursuant to Item 401(f) of Regulation S-K under the Act, and whenever Staff, in the course of its on-going monitoring of listed Companies, identifies a potential public interest concern. These background procedures would also apply when a listed company combines or reverse-merges with a non-listed entity, resulting in a "change of control" transaction pursuant to Listing Rule 5110.<sup>31</sup>

#### *Oversight of Listings and Delistings*

Pursuant to an intercompany regulatory services agreement that will be in place before the BX Venture Market is operational, Staff in NASDAQ's Listing Qualifications Department will be responsible for processing listings, conducting on-going compliance monitoring of listed companies, and implementing delistings. Notwithstanding the

contractual arrangement, the Exchange retains ultimate legal responsibility for, and control of, these functions. The NASDAQ Listing Qualifications Department is presently comprised of 33 individuals, which include 13 continued listing analysts, four initial listing analysts, and an investigations group. This Staff is extremely experienced in regulatory analysis: the average person has over ten years of experience at NASDAQ and several have extensive backgrounds outside NASDAQ in investigating alleged violations of the Federal securities laws. The sophisticated technology used by this Department enables Staff to efficiently review public filings and identify and prioritize issues that may raise concerns under the listing standards, including public interest concerns. Among other things, this system is programmed to identify any quantitative deficiencies arising from the filings or from trading data, immediately notify the appropriate Staff, and keep an auditable record of how Staff treated the deficiency.

The proposed rules require, moreover, that the listing process will at all times be supervised by at least one person with substantial prior experience supervising such a program at a national securities exchange with a currently active listing program. 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. In addition, the investigations group must be supervised by at least one person with substantial prior regulatory experience at another national securities exchange or with an organization, such as the SEC's Enforcement Division or FINRA, which has securities-related enforcement responsibilities. Finally, the Exchange's Chief Regulatory Officer will be required to have had substantial prior regulatory experience with a national securities exchange or equivalent experience.<sup>32</sup> This person will be required to approve the listing of any company where potential regulatory concerns have been identified, including cases where the company has disclosed information about an executive officer, director, promoter, or control person involving an event described under Item 401(f) of Regulation S-K that does not trigger the automatic bar described above.<sup>33</sup>

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.

#### *Quantitative Listing Standards*

The Exchange proposes that any company that meets the quantitative (e.g., financial) requirements for listing on NASDAQ will not be approved for listing 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 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, 2010, 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, 2010, as previously listed on another national securities exchange because the BX Venture Market would not have been available to such companies when they were delisted. A number of companies were delisted during 2010 as a result of difficulties arising from the financial crisis and this look-back will also allow these companies, which may have recovered but not yet meet the initial listing requirements of another exchange, to list on the BX Venture Market. 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

will reevaluate that assumption on an on-going basis.

<sup>31</sup> If a listed Company combines or reverse merges with a non-listed entity, resulting in a change of control, the post-merger company must apply for and meet all initial listing requirements before listing on the Exchange. Delisting proceedings will be initiated if an application for listing of the new entity has not been approved before consummation of the transaction. Rule 5110 includes a non-exclusive list of considerations to be used for determining whether a change of control has occurred.

<sup>32</sup> Proposed Rule 5102.

<sup>33</sup> Proposed IM 5104-1.

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.

For continued listing, a security will be required to maintain a minimum \$0.25 per share bid price.<sup>34</sup> 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.<sup>35</sup> A company could appeal that determination to a Hearings Panel, however such an appeal would not stay the suspension of the security.<sup>36</sup> 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 a one year operating history, a minimum of either \$1 million in

stockholders' equity or \$5 million in total assets, and demonstrate that it has a plan to maintain sufficient working capital for its 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.<sup>37</sup> As such, broker-dealers would be required to pre-approve their customers for 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,<sup>38</sup> 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 5103(c) would provide that the Exchange will take action to delist any company listed on the BX Venture Market that attempts to rely on such an exemption.<sup>39</sup> Companies will also agree not to rely on any such exemption as a provision of the BX Venture Market 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.<sup>40</sup> These steps will allow the Exchange to assure that the company is not inappropriately relying on such an exemption.

#### Qualitative Listing Standards

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 SEC Rule 10A-3.<sup>41</sup> 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.<sup>42</sup> The board would be precluded from finding a director independent based on certain relationships, including if that director

<sup>38</sup> 15 U.S.C. 77r.

<sup>39</sup> The Exchange notes that the Massachusetts Securities Division has requested comment on a proposed change to its regulations to eliminate its exemption from the registration requirement for securities listed on the BX Venture Market. See <http://www.sec.state.ma.us/sct/sctnewregs/newregsidx.htm#hearing>.

<sup>40</sup> Proposed Rule 5250(e)(7). The Exchange has proposed to add these requirements in response to comments submitted on the original proposal.

<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> Proposed Rule 4120(a)(12).

<sup>36</sup> Proposed Rule 5815(a)(1)(C).

<sup>37</sup> 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 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).

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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> The Exchange believes that this requirement will limit the potential for self-dealing in connection with any related party transactions.

The Exchange would also require that independent directors make compensation decisions concerning the chief executive officer and other executive officers.<sup>46</sup> Independent directors would be required to meet on a regular basis in executive sessions.<sup>47</sup> 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 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.<sup>48</sup> Moreover, nothing in the Commission's rules or the Act mandate these requirements.<sup>49</sup> 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 purpose, 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 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 purpose, 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.<sup>50</sup> 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 pursuant to which stock may be acquired by officers, directors, employees, or consultants.<sup>51</sup> 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

<sup>43</sup> *Id.*

<sup>44</sup> Proposed Rule 5605(c)(1).

<sup>45</sup> Proposed Rule 5630.

<sup>46</sup> 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. See Listing Standards for Compensation Committees, Release No. 33-9199 (April 6, 2011) (76 FR 18966).

<sup>47</sup> Proposed Rule 5605(b).

<sup>48</sup> 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).

<sup>49</sup> 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.

<sup>50</sup> Proposed Rule 5610.

<sup>51</sup> Proposed Rule 5635.

beneficial listing.<sup>52</sup> Nonetheless, the Exchange will require listed Companies to provide notice of any 5% change in its shares outstanding and any capital raising transactions,<sup>53</sup> 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.

#### Appeal Process

Companies denied initial listing or delisted by the Exchange would be afforded an appeal 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.<sup>54</sup> 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.<sup>55</sup> Other of the continued listing requirements would provide for automatic compliance periods, including the market maker, market value of listed securities, and audit committee requirements, and a determination that an officer, director, promoter, or control person of a company was involved in any event that occurred during the prior five years described in Item 401(f)(2)–(8) of Regulation S–K under the Act.<sup>56</sup> 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, or if a company represents itself as listed on the NASDAQ Stock Market or refers to itself as a NASDAQ listed-company, or attempts to rely on an exemption from state securities registration that otherwise may be available under state law to companies listed on the Exchange, the Listing Qualifications Staff will issue an immediate delisting letter to the company.<sup>57</sup> Any other deficiency would result in the Listing Qualifications Staff issuing a Public Reprimand Letter or a delisting notification.<sup>58</sup> Hearings Panels

composed of individuals not affiliated with the Exchange would be permitted to grant additional, but limited time to companies that received a delisting notification, or to reverse a denial of 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.<sup>59</sup> 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.

#### Oversight of Market Activity

The Exchange represents that it will have in place before the BX Venture Market is operational a contractual arrangement with FINRA to regulate market activity on the BX Venture Market, as it does today for NASDAQ. FINRA's oversight will include review of trading that takes place on the over-the-counter market in securities listed on the BX Venture Market. Based on its breadth of experience overseeing the over-the-counter markets and advanced technology, FINRA will implement electronic surveillance patterns designed to detect a wide range of potential issues, including, for example, insider trading, front-running, fraud, auto-execution manipulation, mid-point cross manipulation, wash sales, layering, open/close marking, and Reg SHO clearing fails. FINRA intends to revise a number of its existing automated surveillance patterns to incorporate NASDAQ OMX BX trading activity and over-the-counter trading activity in issues eligible for trading on The BX Venture Market, and will develop and implement specific automated surveillance patterns to address any rule and functionality changes resulting from The BX Venture Market initiative. FINRA will enhance its review process by calibrating

surveillance patterns to detect potential issues that may arise particularly in low priced, less liquid stocks. In addition, the Exchange and FINRA will leverage the expertise of SMARTS Group, a leading technology provider of market surveillance solutions to exchanges and regulators around the world,<sup>60</sup> in creating 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 firms 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 review will include any other activities required to effectively regulate the Market.

The Exchange represents that an agreement with FINRA for these activities will be in place before the BX Venture Market begins operations. Notwithstanding the contractual arrangement with FINRA, the Exchange retains ultimate legal responsibility for and control of all regulatory functions for the Exchange.

The Exchange will monitor real-time trading of securities listed on the BX Venture Market, and plans to implement a broad suite of realtime surveillance patterns and functional analysis tools based on the most up-to-date technology solution, SMARTS.

The Exchange will provide a monthly report to the Directors of the Division of Trading and Markets and the Office of Compliance, Inspections and Examinations describing any significant developments on the BX Venture Market, including companies added or removed from the market during that period. In addition, the Exchange's Chief Regulatory Officer will provide quarterly reports to the Directors of the Division of Trading and Markets and the Office of Compliance, Inspections and Examinations describing the regulatory activities of the Exchange and FINRA during the prior quarter. The Exchange will also provide copies of the Listing Department's procedures manuals and surveillance procedures used by FINRA and the Exchange to the Commission's Office of Compliance, Inspections and Examinations. Finally, before the BX Venture Market is operational, the Exchange will represent, in a letter to the Staff in the Commission's Office of Compliance Inspections and Examinations, that it and FINRA have adequate regulatory procedures and programs in place to effectively regulate the BX Venture Market and its listing

<sup>52</sup> 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.

<sup>53</sup> Proposed Rules 5250(e)(1) and (e)(7).

<sup>54</sup> Nasdaq Listing Rules 5800–5899.

<sup>55</sup> Proposed Rule 5810(c)(2).

<sup>56</sup> Proposed Rule 5810(c)(3).

<sup>57</sup> Proposed Rule 5810(c)(1).

<sup>58</sup> Proposed Rule 5810(c).

<sup>59</sup> Section 6.1 of the By-Laws on NASDAQ OMX BX, Inc.

<sup>60</sup> SMARTS Group is a subsidiary of NASDAQ OMX.

program, and adequate procedures and programs in place to effectively process trades and maintain the confidentiality, integrity, and availability of the Exchange's systems.

#### Market Data

The Exchange has committed to broad dissemination of quotation and last sale information about BX Venture Market listed securities to ensure that public investors and all market participants have all the information needed to make informed investing and trading decisions. Information about securities listed on the BX Venture Market will be disseminated via several mechanisms. First, BX Venture Market listed securities will have real-time consolidated market data for both quotes and trades consistent with that provided by the network processors for national market system securities. The Exchange notes that operation of the BX Venture Market will be conditioned by the Commission upon approval and operation of an arrangement by the Exchange and FINRA to consolidate and disseminate the best quotation and last sale data for BX Venture Market listed securities that is made available by BX and FINRA.<sup>61</sup> The consolidated market data for BX Venture Market listed securities will be made available at no charge for the foreseeable future.<sup>62</sup> Second, the Exchange will disseminate real-time last sale data, tick-by-tick details, and best bid and offer quotations and trade data from the BX execution system.<sup>63</sup>

Market data regarding BX Venture Market listed securities will be disseminated in a manner that facilitates adoption and use of the new data provided, in that the Exchange will ensure ease and efficiency for market data vendors and potential recipients. Specifically, consolidated data will leverage the widespread distribution network and administrative operations that the Exchange already employs including existing market data contracts, connectivity ports, transmission lines, network operations, data message specifications, billing and auditing. By leveraging existing data technology and administration, data regarding BX Venture Market listed securities will become instantly

available through hundreds of market data distributors reaching an audience of millions of potential users via multiple distribution channels.

Further, the Exchange is committed to ensuring that BX Venture Market securities are clearly distinguished, and distinguishable, from securities listed on the traditional exchanges on those data products and to end-users of the data. To that end, all market data for BX Venture Market securities will include a unique data identifier in the "Market Center" field to distinguish the security from those listed on other exchanges and the over-the-counter markets. This Market Center identifier is already utilized by the Exchange and network processors on every consolidated and proprietary data feed supplied by the network processors and by NASDAQ and other national securities exchanges. The Market Center identifier is utilized by the network processors to demarcate, for example, NASDAQ ("Q"), NYSE ("N"), Amex ("A"), Arca ("P"), and OTC stocks. BX Venture Market listed securities would be identified with its own unique Market Center identifier "B" on any new BX consolidated data feeds and in the BX Venture Market Daily List data product.<sup>64</sup> The Daily List data product will be adopted through an amendment to Rule 7022 in a separate filing with the Commission.

The Exchange will require market data distributors, through distribution agreements and by amendments to its global data policy document to prominently identify the BX Venture Market as the listing market, and, where the display of text is not consistent with the display methodology or user needs of the distributor, to use the Market Center identifier "B" to prominently display the listing market with quotation and last sale information for BX Venture Market-listed securities. Every market data vendor that distributes BX Venture Market data to users must sign a data distribution agreement. These agreements bind the data vendor to abide by the terms and conditions of data purchase and usage, including conditions governing data display within the global data policy document. The requirement to prominently display the listing market will be a legal obligation backed by contractual sanctions including

termination of the distribution agreement. These agreements have been used effectively in the past to require the display of key data elements to customers. The Exchange represents that these agreements will be in place before the BX Venture Market begins operations, and that the Market Center identifier will be distributed and required to be displayed upon the launch of the market.

Market data distributors and data users, including retail investors, are already familiar with this approach. Data distributors such as Bloomberg and Thompson Reuters, Internet portals such as Google and Yahoo, mutual fund complexes and brokers such as Vanguard, Schwab, and E\*Trade, all currently use Market Center identifiers to understand where a security is listed and display that information on their Web sites and portals, typically next to the company name. For example, on Yahoo's Web site, "NasdaqGS" is currently displayed next to the name of all companies listed on The NASDAQ Global Select Market; that display would read, for BX Venture Market companies, "BX Venture" or "BX Venture Market." The requirement that the Market Center identifier for BX Venture Market listed securities be prominently displayed by all of these market participants will mean that investors viewing a quotation or last sale report will be able to clearly distinguish a stock listed on the BX Venture Market from those listed on NASDAQ or other markets.

The Exchange will, in connection with the launch of the BX Venture Market, proactively review the displays of prominent data distributors and require immediate compliance if they fail to meet the requirements of the market data agreements. Following the launch of the BX Venture Market, the Exchange will conduct periodic audits of all market data vendors to ensure compliance. If a market data vendor does not satisfy the Exchange's display requirements, the Exchange will take action against the vendor, up to and including terminating the vendor's ability to receive data from the Exchange. The Exchange is committed to working with market participants and the Commission to evaluate, on an ongoing basis, whether this display requirement is effective in distinguishing BX Venture Market-listed securities from other national exchange-listed securities in order to reduce investor confusion.

#### Symbology

The assignment of symbols for companies listed on the BX Venture

<sup>61</sup> The Commission notes that its order in Section VI, *infra*, does not contain this condition.

<sup>62</sup> The Exchange will, as always, be required to file a proposed rule change in order to assess a fee for this data in the future.

<sup>63</sup> BX Last Sale provides real-time last sale data from the BX execution systems. BX TotalView provides tick-by-tick details for all displayable orders in the BX Execution systems, and BX Basic provides best bid and offer quotations and trade data from the BX execution system.

<sup>64</sup> At the request of Commission staff, the Exchange assessed the feasibility of adopting a multi-character market center identifier, and it concluded that this proposal is infeasible. Single-character market center identifiers are hard-coded into a worldwide network of market data distributors and cannot be modified. The Exchange also investigated without success adopting other options including root symbol modifiers and lengthy security symbols.

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 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.<sup>65</sup> In approving the symbology Plan, the Commission distinguished securities listed on an exchange, which can trade with a symbol of 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.”<sup>66</sup>

Although all BX Venture Market listed companies are subject to listing standards approved by the Commission, and must meet corporate governance requirements similar to those required for listing on other national securities exchanges, the Exchange will require Companies not previously listed on a national securities exchange to adopt a four or five character ticker symbol as a prerequisite to listing on the BX Venture Market. Companies that list on the BX Venture Market following a delisting from another national securities exchange and that traded on that exchange with a one, two, or three character ticker symbol, will be

permitted to retain their ticker symbol when listing on the BX Venture Market, provided that the company must, prior to listing on the BX Venture Market, issue a press release announcing its delisting from the other exchange and comply with the disclosure requirements of Item 3.01 of Form 8-K.<sup>67</sup>

#### 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 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.<sup>68</sup> 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 it will avoid a double charge of a company that has 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. Companies eligible for a credit would of course undergo the same rigorous initial listing application process to which all companies seeking a listing on the Exchange are subject.

<sup>67</sup> Proposed Rule 5210(j).

<sup>68</sup> 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.

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 and are designed to recoup the costs of making changes to the Exchange's systems and distributing those changes to market data users.

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.<sup>69</sup> 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 Web site 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 Series applicable to securities that will not be eligible to be listed on the BX Venture Market, such as Portfolio Depository Receipts, Index Fund Shares,

<sup>69</sup> 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.

<sup>65</sup> 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).

<sup>66</sup> *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.

Trust Issued 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.<sup>70</sup> In this manner, the Exchange satisfies the requirement of Section 6(b)(9) of the Act,<sup>71</sup> 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,<sup>72</sup> in general and with Section 6(b)(5) of the Act,<sup>73</sup> 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 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.

Finally, the Exchange believes the fees proposed in this filing are consistent with Section 6 of the Act,<sup>74</sup> in general, and with Section 6(b)(4) of the Act,<sup>75</sup> in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The application and listing fees are substantially lower than comparable fees on The NASDAQ Stock Market and other national securities exchanges, commensurate with the smaller size and resources of the companies the BX Venture Market will attract. The application review fee and annual fees will allow the Exchange to recover some of the costs associated with the initial review of the company's application and monitoring of the company, including staff time and the systems supporting the review and monitoring. The fee schedule provides for a credit to offset an annual fee paid to NASDAQ for any company that lists on the BX Venture Market after a delisting from NASDAQ during the same calendar year. The Exchange believes this is a reasonable allocation of fees under the Act because it would be inequitable to charge a company a second fee in the same year to support services similar to those it had already paid for previously.

Fees are proposed for certain one-time events, such as substitution listings, recordkeeping changes, and written or oral hearings. These fees, which are the same as those charged on NASDAQ, offset some of the Exchange's costs associated with facilitating these events.

Fees charged for a formal, written interpretation of the application of the Exchange's rules to a specific transaction or event similarly serve to recoup the cost of staff's time in providing the interpretation. The Exchange believes these fees are reasonable and fairly allocated. Staff will orally discuss the application of the Exchange's rules without any charge, and the Exchange provides written summaries of interpretations, the answers to frequently asked questions, and other guidance on its publicly available Web site. If, however, a company voluntarily requests a written interpretation tailored its unique facts, it is reasonable to recoup some cost of Staff's time for that process.

## 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. Discussion

After careful review of the proposal and consideration of the comment letters,<sup>76</sup> the Commission finds that the proposed rule change to establish a new listing market on the Exchange is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6 of the Act.<sup>77</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>78</sup> which, among other things, requires that rules of a national securities exchange to 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, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or

<sup>70</sup> Nasdaq Rule 5210(h) and NYSE Amex Listed Company Guide Section 126.

<sup>71</sup> 15 U.S.C. 78f(b)(9).

<sup>72</sup> 15 U.S.C. 78f.

<sup>73</sup> 15 U.S.C. 78f(b)(5).

<sup>74</sup> 15 U.S.C. 78f.

<sup>75</sup> 15 U.S.C. 78f(b)(4).

<sup>76</sup> The Commission received eleven comment letters on the proposal. Of the comment letters received, five supported the proposal (Madrona Letter; Angel Letter; NVCA Letter; TechNet Letter; and BIO Letter), one generally supported the proposal but expressed several concerns (Niehoff Letter), and five opposed the proposal (MSD Letter; Pink OTC Markets Letter; OTC Markets Group Letter; MSD Letter II; and McCarthy Letter).

<sup>77</sup> 15 U.S.C. 78f.

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

dealers.<sup>79</sup> In addition, the Commission finds that the proposed fees are consistent with Section 6(b)(4) of the Act,<sup>80</sup> which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

#### A. Benefits of the BX Venture Market

As noted above, the Exchange believes that the BX Venture Market will provide a transparent, well-regulated marketplace for companies being delisted from another national securities exchange for failure to meet quantitative listing standards and for smaller companies contemplating an initial exchange listing.<sup>81</sup> In addition, the Exchange notes that the BX Venture Market could make it easier for smaller, private, venture-backed companies and companies that currently trade in the over-the-counter market to raise capital, thereby, according to the Exchange, promoting job creation.<sup>82</sup>

In the Order Instituting Proceedings, the Commission asked whether commenters agree with the Exchange's contention that a BX listing could help companies raise capital and thus promote job creation within the United States. Five commenters supported this statement,<sup>83</sup> while one commenter disagreed.<sup>84</sup> Commenters in support asserted that, because of the lower listing standards of the BX Venture Market, this market will be particularly valuable to smaller and emerging companies that wish to make a public offering but are unable to meet the quantitative listing standards of other national securities exchanges.<sup>85</sup> A few commenters also expressed their belief that the BX Venture Market would attract companies and capital that might otherwise be drawn to foreign markets.<sup>86</sup> Three commenters opined

that the BX Venture Market would attract companies that would otherwise transfer to, or remain on, the Pink Sheets or the OTC Bulletin Board, where there is less regulation and transparency.<sup>87</sup> The commenter who disagreed with the Exchange's statement believed that the over-the-counter market currently provides a robust solution for companies that are unable to meet the listing standards of a national securities exchange, and that the BX Venture Market seeks to occupy a niche that is already well-served by the over-the-counter market.<sup>88</sup>

The Commission believes the BX Venture Market could offer a number of benefits to smaller issuers and those who seek to invest in them. The BX Venture Market would provide small companies with an alternative to being quoted on the over-the-counter market by offering these companies the opportunity to list their securities on an exchange, in an environment that offers the potential of enhanced liquidity, transparency and oversight. Moreover, providing an alternative to the over-the-counter market could also facilitate competition for the quotation/listing of securities of smaller issuers.<sup>89</sup> The availability of an exchange listing, and the prospect of more efficient secondary market trading in the securities of smaller issuers, could facilitate their ability to raise capital and invest in the growth of their businesses.

As discussed more fully below,<sup>90</sup> the Commission believes the Exchange has appropriately addressed the potential risks associated with the listing of smaller issuers on an exchange by, among other things, providing for more rigorous vetting of listing applicants, enhanced surveillance of trading in BX-listed securities, and clear disclosure to investors that BX-listed securities differ from other exchange-listed securities.

markets have yielded positive acceptance and economic results for U.S. issuers that have sought foreign marketplaces for their listings).

<sup>87</sup> See TechNet Letter, *supra* note 8 at 1. See also NVCA Letter, *supra* note 8 at 3 and Angel Letter, *supra* note 8 at 10. One commenter specifically stated that the "Commission should quickly approve experiments like [the BX Venture Market] in the small-cap sector because of the crisis in capital formation indicated by the dramatic drop in the number of exchange-listed U.S. companies." Angel Letter, *supra* note 8 at 1.

<sup>88</sup> See OTC Markets Group Letter, *supra* note 8 at 2.

<sup>89</sup> The Commission notes that such companies could determine not to pursue a listing on the BX Venture Market if they determine that the over-the-counter market better serves their needs. In addition, the Commission notes that securities of small companies could continue to be traded over-the-counter, even if listed on the BX Venture Market.

<sup>90</sup> See Section III.C, *infra*.

#### B. Listing Standards

The Commission believes that, among other things, listing standards must be designed to assure that only bona fide companies with substantial public float, investor base, and trading interest will be listed. The development and enforcement of adequate listing standards governing the initial and continued listing of securities on an exchange are activities of critical importance to the financial markets and the investing public.<sup>91</sup> Listing standards serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have, or in the case of an initial public offering will have, sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.<sup>92</sup> Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market.<sup>93</sup> Once a security has been approved for initial listing, continued listing standards allow an exchange to monitor the status and trading characteristics of that security to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained, and so that only companies suitable for listing remain listed on a national securities exchange.

While the BX Venture Market would have quantitative listing standards that are lower than those of any other national securities exchange with an active listings program, the Commission notes that the Exchange proposes to adopt a number of enhanced vetting, surveillance/examination, and disclosure requirements.<sup>94</sup> As discussed in more detail below, the Commission views these enhanced requirements as being a necessary and integral part of the BX Venture Market proposal.<sup>95</sup> Accordingly, for the reasons discussed below, the Commission finds that the BX Venture Market listing standards, when viewed in conjunction with the Exchange's enhanced vetting, surveillance/examination, and disclosure requirements, are consistent with the Act.

<sup>91</sup> See, e.g., Securities Exchange Act Release No. 61912 (April 15, 2010), 75 FR 21094, 21094 (April 22, 2010) (SR-NYSE-2010-15).

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See Section III.C, *infra*.

<sup>95</sup> See *id.*

<sup>79</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>80</sup> 15 U.S.C. 78f(b)(4).

<sup>81</sup> See Amendment No. 2.

<sup>82</sup> *Id.*

<sup>83</sup> See Madrona Letter, *supra* note 5 at 1–2; TechNet Letter, *supra* note 8 at 1; BIO Letter, *supra* note 8 at 2; NVCA Letter, *supra* note 8 at 2–3; and Angel Letter, *supra* note 8 at 3–4. See also Niehoff Letter, *supra* note 8 at 3.

<sup>84</sup> See OTC Markets Group Letter, *supra* note 8.

<sup>85</sup> See Madrona Letter, *supra* note 5 at 1; TechNet Letter, *supra* note 8 at 1; BIO Letter, *supra* note 8 at 1–2; and NVCA Letter, *supra* note 8 at 1–2.

<sup>86</sup> See Madrona Letter, *supra* note 5 at 2. See also Angel Letter, *supra* note 8 at 8 (stating that companies voluntarily "go dark" and that the SEC has made it easier for foreign issuers to deregister from U.S. markets) and Niehoff Letter, *supra* note 8 at 3 (stating that foreign second and third tier

## 1. Quantitative Standards

In the Order Instituting Proceedings, the Commission asked whether the proposed initial and continued listing standards and the delisting process for the BX listing market are sufficiently designed to prevent the listing of stocks that are of a type that historically have been prone to fraudulent schemes. One commenter stated that the BX Venture Market will be a listing market for penny stocks because of the proposed minimum bid price requirements.<sup>96</sup> In its response, the Exchange noted that its listed penny stocks will not be exempt from the Commission's penny stock rules,<sup>97</sup> and stated its belief that its regulatory program will provide appropriate and adequate oversight.<sup>98</sup> Another commenter also expressed concern regarding the level of certain quantitative listing standards of the BX Venture Market.<sup>99</sup>

The Commission believes that the proposed quantitative listing standards, while lower than those of any other national securities exchange with an active listings program, are reasonably designed to help ensure that a fair and orderly market be maintained. As proposed, the minimum bid price per share for the initial listing of securities not previously listed on a national securities exchange is \$1.00,<sup>100</sup> while the minimum bid price for securities previously listed on a national securities exchange is \$0.25.<sup>101</sup> For purposes of the initial bid price requirement, a company will be considered to have been previously listed on another national securities exchange if it was listed on such an exchange at any time during the three months before its listing on the BX Venture Market, or in the case of a company that applies to list prior to September 30, 2011, if it was listed on another national securities exchange at any time between January 1, 2010 and September 30, 2011.<sup>102</sup>

With respect to the definition of "previously listed on a national securities exchange," one commenter stated that "[w]e do not understand why the Exchange suggests a three year and nine month look-back for initially determining whether a security was previously listed on another exchange, and only a three-month look-back when making such a determination after

September 30, 2011."<sup>103</sup> The Commission notes that, subsequent to this comment, the Exchange shortened the look-back period, which will now begin on January 1, 2010. The Exchange believes that this look-back period is appropriate because the BX Venture Market would not have been available to such companies when they were delisted.<sup>104</sup> Further, the Exchange stated that it is appropriate to continue this treatment until September 30, 2011 because it will give such companies an adequate opportunity to learn about the BX Venture Market, complete their applications, and have their applications processed by the Exchange.<sup>105</sup> Additionally, the Exchange stated that the three-month look-back as period after September 30, 2011 is appropriate because it will allow a company sufficient time to apply for listing on the BX Venture Market and have its application processed.<sup>106</sup>

For continued listing, all securities will be required to maintain a minimum bid price of at least \$0.25 per share.<sup>107</sup> With respect to the bid price requirement for continued listing on the Exchange, the Commission notes that 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 to inform the company that its securities are immediately subject to suspension and delisting from the Exchange.<sup>108</sup> While a company could appeal that determination to a Hearings Panel,<sup>109</sup> such an appeal would not stay the suspension of the security.<sup>110</sup> The Hearings Panel may determine that the company has regained compliance if the security maintains a closing bid price of \$0.25 per share or more for at least 10 consecutive trading days on the over-the-counter market, prior to the Hearings Panel's Decision.<sup>111</sup> In addition, companies that have previously failed to comply with the

minimum bid price requirement would have stricter requirements for achieving compliance. Specifically, for a company that has received three or more Staff Delisting Determinations for failure to comply with the minimum bid price requirement in the prior 12 months, the Hearings Panel would determine that the company has regained compliance only if the security maintains a closing bid price of \$0.25 per share or more for at least 20 consecutive trading days prior to the Hearings Panel's decision.<sup>112</sup> The Commission 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 potential investor confusion concerning the ability of the company to remain listed.

The Commission also notes that, according to the Exchange, the securities listed on the BX Venture Market would be considered penny stocks under Rule 3a51-1 under the Act, unless they qualify for one of the exceptions from the definition of a penny stock as set forth in Rule 3a51-1.<sup>113</sup> As such, broker-dealers would be required to pre-approve their customers for 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.<sup>114</sup> Further, there will be no "blue sky" exemption available under Section 18 of the Securities Act of 1933 for BX Venture Market-listed securities,<sup>115</sup> 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, BX Rule 5103(c) would provide that the Exchange will not list, and will delist any BX Venture Market-

<sup>103</sup> OTC Markets Letter, *supra* note 8 at 8.

<sup>104</sup> See Amendment No. 2. The Exchange also stated that a number of companies were delisted in 2010 as a result of the financial crisis, and this look-back will allow these companies, which may have recovered but not yet meet the initial listing requirements of another exchange, to list on the BX Venture Market. *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See* BX Rule 5550(d).

<sup>108</sup> *See* BX Rule 5810(c)(1).

<sup>109</sup> The Hearings Panel is an independent panel made up of at least two persons who are not employees or otherwise affiliated with the Exchange or its affiliates, and who have been authorized by the Exchange's Board of Directors. *See* BX Rule 5805(d).

<sup>110</sup> *See* BX Rule 5815(a)(1)(C).

<sup>111</sup> *See* BX Rule 5815(c)(1)(F).

<sup>112</sup> *See id.*

<sup>113</sup> 17 CFR 240.3a51-1. The Exchange noted that it is not seeking an exemption from the penny stock rules for securities listed on the BX Venture Market: However, a security is not a penny stock if it has a price in excess of \$5 or if its issuer has net tangible assets in excess of \$2 million (if the issuer has been in continuous 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. *See* Amendment No. 2 (citing Rule 3a51-1(d) and (g), 17 CFR 240.3a51-1(d) and (g)).

<sup>114</sup> *See* Amendment No. 2.

<sup>115</sup> 15 U.S.C. 77r.

<sup>96</sup> *See* MSD Letter, *supra* note 5 at 2. *See also* MSD Letter II, *supra* note 8 at 1-2.

<sup>97</sup> *See* 15 U.S.C. 78o(h) and 17 CFR 240.15g-1-100.

<sup>98</sup> *See* BX Response Letter, *supra* note 9 at 4.

<sup>99</sup> *See* McCarthy Letter, *supra* note 8 at 2.

<sup>100</sup> *See* BX Rule 5505(a)(5).

<sup>101</sup> *See* BX Rule 5506(a)(4).

<sup>102</sup> *See* BX Rule 5506(b).

listed company that attempts to rely on such an exemption. Finally, as discussed in more detail below,<sup>116</sup> the Commission notes that the Exchange will have in place enhanced vetting, due diligence, and surveillance procedures designed to limit the initial or continued listing of companies that may be more prone to manipulation or fraud.

Furthermore, the Commission notes that the BX Venture Market would be an alternative to the over-the-counter market and could provide important benefits to small companies who otherwise would not qualify for an exchange listing. In particular, the Exchange's proposed listing standards would be higher than the requirements for quoting on the OTC Bulletin Board, which does not have any listing requirements per se,<sup>117</sup> but only requires companies to remain current in their filings with the Commission or other applicable regulatory authorities. For example, as the Exchange notes, the agreement of BX-listed companies to comply with the Exchange's corporate governance standards and the application of the Exchange's public interest authority could provide additional protections to investors than the protections available at their present trading venue.<sup>118</sup> The Commission also notes that trading in BX-listed securities would be subject to regulation by the Exchange through its trading rules and surveillance authority.

## 2. Qualitative Listing Standards

In the Order Instituting Proceedings, the Commission asked whether the proposed corporate governance standards for the BX listing market are sufficiently designed to assure an appropriate level of corporate governance. One commenter expressed support for the proposed corporate governance rules for BX-listed companies and stated that requiring small and emerging companies to have majority independent boards would be inappropriate and impose unnecessary costs upon these companies and their shareholders.<sup>119</sup> This commenter also expressed support for not requiring shareholder approvals for capital raising activities and stated that small companies frequently need to raise money without the expense and delay associated with a shareholder vote in

order to thrive and react to opportunities.<sup>120</sup>

The Commission believes that the proposed qualitative listing requirements strike a reasonable balance between protecting the interests of investors and recognizing that smaller and emerging companies, with fewer resources, are likely to list on the BX Venture Market. The Commission notes that, although the Exchange would not require that a majority of the company's board of directors be independent or an independent nomination committee, the Exchange's listing rules impose independence requirements designed to help assure that certain key decisions of smaller companies are made by independent directors. Specifically, the BX Rules provide the independent directors with significant responsibilities, as well as an opportunity to meet separately from other directors. For example, independent directors must have regularly scheduled meetings at which only independent directors are present ("executive sessions").<sup>121</sup> In addition, the audit committee must be fully independent,<sup>122</sup> and compensation of the executive officers of the company must be determined, or recommended to the board for determination, either by independent directors constituting a majority of the board's independent directors in a vote in which only independent directors participate, or a compensation committee comprised solely of independent directors.<sup>123</sup> These provisions are designed to help lessen the potential of independent directors being dominated or overly influenced by other directors.

One commenter objected to the proposed rules that allow BX Venture Market-listed companies to phase-in compliance with independent audit committee and compensation committee requirements.<sup>124</sup> The commenter stated

<sup>120</sup> See *id.* at 2–3.

<sup>121</sup> See BX Rule 5605(b).

<sup>122</sup> See BX Rule 5605(c)(2). In addition, BX Rule 5605(c)(2) requires that each member of the audit committee must meet the criteria for independence set forth in Rule 10A–3(b)(1) under the Act (subject to the exemptions provided in Rule 10A–3(c) under the Act). See *id.* BX Rule 5605(c)(2)(B), which is identical to Nasdaq Capital Market Rule 5605(c)(2)(B), provides an exception to this independence requirement under exceptional and limited circumstances.

<sup>123</sup> See BX Rule 5605(d). The chief executive officer may not be present during the voting or deliberations on the chief executive officer's compensation. See *id.* BX Rule 5605(d)(3), which is identical to Nasdaq Capital Market Rule 5605(d)(3), provides an exception to this independence requirement under exceptional and limited circumstances.

<sup>124</sup> See Pink OTC Markets Letter, *supra* note 5 at 5–6 and OTC Markets Group Letter, *supra* note 8 at 6.

that BX-listed companies should be required to comply immediately with the proposed independent director requirements for the audit and compensation committees and that the Exchange's failure to require full compliance with these requirements prior to listing will likely result in some investors purchasing securities of companies that have inadequate audit standards or corporate governance practices.<sup>125</sup> In response, the Exchange stated that the proposed phase-in periods are identical to the rules of other national securities exchanges<sup>126</sup> and were permitted by the Commission's rulemaking regarding audit committees.<sup>127</sup> The Exchange also explained that the proposed phase-in provisions acknowledge the difficulty emerging companies have in recruiting independent directors.<sup>128</sup>

The Commission notes that the phase-in provisions for audit and compensation committees are substantially similar to those of Nasdaq and other national securities exchanges<sup>129</sup> and acknowledges the difficulty emerging companies have in recruiting independent directors. In addition, the Commission notes that, while the Exchange will require shareholder approval when a company adopts or materially amends a stock option or purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants,<sup>130</sup> the Exchange would not require shareholder approval for other share issuances. The Exchange believes 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.<sup>131</sup> However, the Commission notes that the Exchange will require listed Companies to provide notice of any 5% change in its shares outstanding and any capital raising transactions,<sup>132</sup> and the Exchange Staff

<sup>125</sup> See OTC Markets Group Letter, *supra* note 8 at 6.

<sup>126</sup> See BX Response Letter, *supra* note 9 at 6 (citing Nasdaq Rule 5615(b) and NYSE Listed Company Manual Section 303A.00).

<sup>127</sup> See *id.* (referring to Rule 10A–3(b)(1)(iv)(A), 17 CFR 240.10A–3(b)(1)(iv)(A)).

<sup>128</sup> See *id.*

<sup>129</sup> See e.g., Nasdaq Rule 5615(b) and NYSE Listed Company Manual Section 303A.00.

<sup>130</sup> See BX Rule 5635.

<sup>131</sup> See Amendment No. 2. The Exchange states that 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.

<sup>132</sup> See BX Rule 5250(e)(1) and (7).

<sup>116</sup> See Section III.C, *infra*.

<sup>117</sup> The OTC Bulletin Board is not a registered national securities exchange and is therefore not subject to the requirements of Section 6 or Section 19 of the Act.

<sup>118</sup> See Amendment No. 2.

<sup>119</sup> See NVCA Letter, *supra* note 8 at 2.

will review such issuances for public interest concerns, including issuances significantly below the market price or for the benefit of related parties.<sup>133</sup>

### *C. Enhanced Vetting, Surveillance/Examinations, and Disclosure*

#### 1. Vetting of Prospective Issuers

The Commission believes that the Exchange's proposed vetting and due diligence process of prospective issuers are reasonably designed to reduce the risk of listing companies that might be more prone to fraud and manipulation and that might erode investor confidence in the market. The Commission notes that the Exchange will employ the staff in Nasdaq's Listing Qualifications Department to apply and enforce its listing standards pursuant to a regulatory contract<sup>134</sup> and that the rules of the BX Venture Market require capable, experienced persons to supervise the staff in Nasdaq's Listing Qualifications Department.<sup>135</sup> BX Rules further require that the Exchange's Chief Regulatory Officer have substantial prior regulatory experience with a national securities exchange or equivalent experience.<sup>136</sup>

In connection with the initial listing process, the BX Rules would require applicant companies to disclose, among other things, current and past actions and proceedings involving the company, current executive officers, directors, promoters, and ten percent or greater shareholders,<sup>137</sup> any events described under Item 401(f) of Regulation S-K involving officers, directors, promoters and control persons, and to furnish additional documentation.<sup>138</sup> The Exchange will not approve for initial listing, or allow the continued listing, of a company if an executive officer, director, promoter, or control person of the company was involved in any event described under

Item 401(f)(2)–(8) of Regulation S-K<sup>139</sup> that occurred during the prior five years (“the automatic bar”).<sup>140</sup> The Exchange also will not approve for initial listing, or allow the continued listing, of shell companies.<sup>141</sup> Moreover, even if the company satisfies the Exchange's listing requirements, the Exchange will still have the discretionary authority to deny listing to or to delist a security when necessary to preserve and strengthen the quality of and public confidence in its market.<sup>142</sup> The Commission notes that the Exchange can use its discretionary authority only to deny listing, apply additional or more stringent criteria for initial or continued listing, or suspend or delist securities.<sup>143</sup>

The Commission emphasizes that the Exchange does not have the discretionary authority to approve the initial listing of securities that do not meet the enumerated listing standards, or to maintain the listing of securities that stay below the continued listing standards.<sup>144</sup> If the Exchange exercises discretion to permit the listing of a company after it has discovered that an executive officer, director, promoter, or control person of the company was involved in an event described under Item 401(f) of Regulation S-K that does not rise to the level of an automatic bar (such as if the event occurred more than five years prior), or a past corporate governance issue of the company,<sup>145</sup> the decision to list such a company must be approved in writing by the Exchange's Chief Regulatory Officer.<sup>146</sup>

The Commission notes that one commenter noted the importance of screening prospective listed companies in light of the failure of the former American Stock Exchange Emerging Company Marketplace.<sup>147</sup> This

commenter then suggested that the Exchange should conduct background checks and other similar review of potential listing companies and not be permitted to merely rely on the documents presented by an issuer during the listing process.<sup>148</sup> As discussed below, the Exchange will review documents other than those presented by an issuer during the listing process. Specifically, the Exchange would review the applicant company's public filings and proxy disclosures, and conduct background investigations of its executive officers, directors, promoters, and control persons using publicly available databases and other public resources, such as Lexis-Nexis and the Web-CRD regulatory database, and web-based search engines.<sup>149</sup> Moreover, the Exchange will engage independent qualified third party investigative firms when it uncovers a regulatory issue or potential public interest concern that does not trigger an automatic bar to listing and the Exchange has determined to not exercise its discretionary authority to deny the listing, or when it would be impractical for the Exchange to research a regulatory history that occurred outside of the United States.<sup>150</sup> For example, if the Exchange becomes aware of media accounts of criminal allegations or improper business practices, or indication of financial impropriety, the Exchange will engage an independent qualified third party investigative firm.<sup>151</sup> The Exchange also will make random, regular referrals of at least 10% of the applicants that were not previously listed on a national securities exchange to the independent qualified third party investigative firm.<sup>152</sup> Any decision to list a company that has been referred to third party review must be approved in writing by the Exchange's Chief Regulatory Officer.<sup>153</sup>

In sum, the Commission believes that the proposed vetting and due diligence measures are reasonably designed to reduce the risk of fraudulent and

<sup>133</sup> See Amendment No. 2.

<sup>134</sup> See BX Rule 5102. In addition to review of companies seeking an initial listing, the Listing Qualifications Department will also monitor compliance with all listing standards on an on-going basis through the regular review of public filings, Form 8-K disclosures, press releases, market data, and closing bid price. See *id.*

<sup>135</sup> See *id.* Notwithstanding the contractual agreement with Nasdaq, the Exchange stated that it retains ultimate legal responsibility for, and control of, these functions. See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See BX Rule 5205(b). BX Rules provide that an applicant company must provide descriptions and supporting documentations of all pending or prior actions and proceedings involving current executive officers, directors, promoters, and ten percent or greater shareholders of the company, and all actions and proceedings commenced within the past 10 years involving the company, its predecessors and subsidiaries. See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> These events include criminal convictions and pending charges, violations of securities laws, and court or administrative actions barring or suspending a person from engaging in certain securities-related activities.

<sup>140</sup> See BX Rule 5103(a).

<sup>141</sup> See BX Rule 5103(b).

<sup>142</sup> See BX Rule 5104.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> The Exchange's review for past corporate governance issues may include activities taking place while the company is listed on the Exchange or an exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed company is no longer listed on the Exchange or such an exchange. See BX Rule IM-5104-3. The Exchange may take appropriate action if it determines that there have been violations or evasions of such corporate governance standards. See *id.*

<sup>146</sup> See BX Rule IM-5104-1 and 3.

<sup>147</sup> See Pink OTC Markets Letter, *supra* note 5 at 6-7 (referring to the American Stock Exchange Emerging Company Marketplace that the American Stock Exchange operated from 1992 to 1995). See also OTC Markets Letter, *supra* note 8 at 3.

<sup>148</sup> See Pink OTC Markets Letter, *supra* note 5 at 6-7.

<sup>149</sup> See BX Rule 5205(c). The Exchange also will conduct background investigations, as applicable, whenever a new executive officer, director, promoter, or control person becomes associated with a BX Venture Market-listed company; whenever a BX Venture Market-listed company makes a disclosure of an event described under Item 401(f) of Regulation S-K; and whenever the staff in the Listing Qualifications Department, in the course of its on-going monitoring of listed companies, identifies a potential public interest concern. See BX Rule 5205(e).

<sup>150</sup> See BX Rule 5205(c) and (d).

<sup>151</sup> See BX Rule 5205(c).

<sup>152</sup> See BX Rule 5205(d).

<sup>153</sup> See BX Rule 5205(c).

manipulative behavior with respect to the listing and/or trading of BX-listed securities.

## 2. Surveillance/Examination

The Commission believes that strong and effective surveillance and examination programs are vital, particularly with respect to BX Venture Market-listed securities, which are subject to listing standards that are lower than those of any national securities exchange with an active listings program. Under the proposal, the Exchange will monitor real-time trading of securities listed on the BX Venture Market.<sup>154</sup> The Exchange would contract with FINRA to regulate market activity of BX-listed securities (*e.g.*, to implement surveillance patterns to detect possible insider trading, front-running, fraud, auto-execution manipulation, mid-point cross manipulation, wash sales, layering, open/close marking, and Reg SHO clearing fails),<sup>155</sup> but the Exchange would retain ultimate legal responsibility for, and control of, all regulatory functions for the Exchange.<sup>156</sup> The Commission expects the Exchange to ensure that it and FINRA have effective regulatory programs relating to BX Venture Market-listed securities before the BX Venture Market begins operations. Also, the Exchange committed to represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations, before the operation of the Exchange, that it and FINRA have adequate regulatory procedures and programs in place to effectively regulate the BX Venture Market and its listing program, and adequate procedures and programs in place to effectively process trades and maintain the confidentiality, integrity, and availability of the Exchange's systems.<sup>157</sup>

The Commission notes that one commenter stated that there have been significant problems in the penny stock market, including boiler room sales practices by brokerages and market manipulation (including the spreading of false rumors) by stock promoters and brokerages that hold a block of a given stock.<sup>158</sup> This commenter is also concerned that new technology has

given stock manipulators powerful tools to distort the market and swindle retail investors.<sup>159</sup> As such, this commenter stated that extreme caution is warranted when any party proposes to establish a new market to trade penny stocks.<sup>160</sup> The commenter also expressed concern that the proposed BX rules will not prevent penny stock promoters or boiler room brokerages from asserting that securities they are offering and selling are exempt from state registration because they are listed on the Boston Stock Exchange.<sup>161</sup> In addition, this commenter stated that twelve states have registration exemptions for securities listed on the Boston Stock Exchange, which were predicated on the protections provided by the higher listing standards of that exchange.<sup>162</sup> The Commission acknowledges these comments and notes that BX stated that its regulatory program will have: (i) Surveillance patterns revised to incorporate trading activity of BX Venture Market-listed securities on the Exchange and on the over-the-counter market; (ii) specific automated surveillance patterns to address any rule and functionality changes resulting from the BX Venture Market initiative; and (iii) calibrated surveillance patterns to detect potential issues that may arise particularly in low-priced, less liquid stocks.<sup>163</sup> Moreover, the regulatory program will include review of the activity of firms on the BX Venture Market.<sup>164</sup> The review will include "focused exams" concentrated on sales practices and firm oversight, as well as any other activities required to effectively regulate the market.<sup>165</sup> As stated above, the Exchange represented that a regulatory program for these activities will be in place before the BX Venture Market begins operations.<sup>166</sup> Further, the Commission notes, in addition to Commission oversight and oversight by the Exchange and FINRA, under Section 18 of the Securities Act of 1933, "the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions with respect to fraud or deceit,

or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."<sup>167</sup>

The Exchange also committed to providing a monthly report to the Directors of the Division of Trading and Markets and Office of Compliance Inspections and Examinations describing any significant developments on the BX Venture Market, including companies added to or removed from the market during that period.<sup>168</sup> In addition, the Exchange's Chief Regulatory Officer will provide quarterly reports to the Directors of the Division of Trading and Markets and Office of Compliance Inspections and Examinations describing the regulatory activities of the Exchange and FINRA during the prior quarter.<sup>169</sup> The Exchange also stated that it will provide copies of the Listing Department's procedures manuals and surveillance procedures used by FINRA and the Exchange to the Commission's Office of Compliance Inspections and Examinations.<sup>170</sup>

## 3. Disclosure of BX-listed Securities

The Commission believes that it is important to reduce the likelihood of investor confusion regarding the BX Venture Market. Three commenters expressed concern that investors would confuse BX Venture Market-listed securities with Nasdaq-listed securities.<sup>171</sup> One commenter believed that ticker symbols for BX Venture Market-listed securities should differentiate such securities from other securities that meet the higher listing standards typically associated with listing on a national securities exchange.<sup>172</sup> This commenter suggested that BX-listed securities should only use four or five character ticker symbols because shorter symbols are typically used by exchanges with higher listing standards than the BX Venture Market.<sup>173</sup> Further, this commenter stated that if BX-listed securities are permitted to use symbols with three or fewer characters, those securities would be precluded from trading in the over-the-counter market because the OTCBB and Pink's OTC systems are programmatically limited to trading four

<sup>159</sup> See MSD Letter II, *supra* note 8 at 2.

<sup>160</sup> See MSD Letter, *supra* note 5 at 3 and MSD Letter II, *supra* note 8 at 2.

<sup>161</sup> See MSD Letter, *supra* note 5 at 2.

<sup>162</sup> See *id.* The Exchange noted that the Massachusetts Securities Division has requested comment on a proposed rule change to its regulations to eliminate the exemption from the registration requirements for securities listed on the BX Venture Market. See Amendment No. 2.

<sup>163</sup> See BX Rule 5105 and Amendment No. 2.

<sup>164</sup> See BX Rule 5105.

<sup>165</sup> See *id.*

<sup>166</sup> See BX Rule 5105 and Amendment No. 2.

<sup>167</sup> 15 U.S.C. 77r(c)(1).

<sup>168</sup> See BX Rule 5105 and Amendment No. 2.

<sup>169</sup> See BX Rule 5105.

<sup>170</sup> See Amendment No. 2.

<sup>171</sup> See MSD Letter, *supra* note 5 at 3, MSD Letter II, *supra* note 8 at 2, Pink OTC Markets Letter, *supra* note 5 at 4–5, and Niehoff Letter, *supra* note 8 at 1–2.

<sup>172</sup> See Pink OTC Markets Letter, *supra* note 5 at 2 and OTC Markets Group Letter, *supra* note 8 at 5.

<sup>173</sup> See Pink OTC Markets Letter, *supra* note 5 at 2.

<sup>154</sup> See BX Rule 5105.

<sup>155</sup> See BX Rule 5105 and Amendment No. 2. The Exchange stated that it will have in place, before the BX Venture Market is operational, a contractual agreement with FINRA to regulate market activity on the Exchange. See BX Rule 5105 and Amendment No. 2.

<sup>156</sup> See BX Rule 5105 and Amendment No. 2.

<sup>157</sup> See Amendment No. 2.

<sup>158</sup> See MSD Letter, *supra* note 5 at 3 and MSD Letter II, *supra* note 8 at 2.

or five character symbols.<sup>174</sup> This commenter reiterated these issues in a subsequent letter, and expressed concern that shorter ticker symbols would reduce the amount of over-the-counter market trading volume in BX-listed securities and result in a decrease in competition for execution of investor orders.<sup>175</sup> A second commenter disagreed and contended that ticker symbols no longer say anything to the investor about the nature of the company and changing symbols can cause confusion.<sup>176</sup> However, this commenter stated that it is reasonable to require BX-listed securities to use only four or five character symbols until the industry technology can handle shorter ticker symbols.<sup>177</sup>

With respect to the comments regarding ticker symbols, the Exchange stated that the BX Venture Market is a national securities exchange and a party to the existing National Market System Plan for the Selection and Reservation of Securities Symbols ("Symbolology Plan"), and as such is eligible to trade symbols of one to five characters.<sup>178</sup> The Exchange explained that this eligibility is important because the BX Venture Market is intended to afford a listing venue to former exchange-listed companies that would want to retain their symbols.<sup>179</sup> The Exchange stated its belief that its proposed data vendor display requirement is a far more effective means of communicating the listing market to investors.<sup>180</sup> Further, the Exchange stated that BX Venture Market-listed securities should not be limited to four or five characters because firms can quote or trade securities on either the Exchange or in the over-the-counter market until their technology is updated, and listed companies that believe this hurts their liquidity can elect to change their symbol.<sup>181</sup>

As noted in Section II above, the Exchange proposes different ticker symbol requirements, depending on whether the company was previously listed on a national securities exchange. Specifically, the Exchange would prohibit companies that were not previously listed on a national securities exchange from utilizing one to three character ticker symbols.<sup>182</sup> Companies that were delisted from a national

securities exchange before listing on BX could retain their one to three character ticker symbols, provided that the company must, prior to listing on the BX Venture Market, issue a press release announcing its delisting from the other exchange and comply with the disclosure requirements of Item 3.01 of Form 8-K.<sup>183</sup> The Commission believes that such approach is not inconsistent with the Act. As the Exchange noted, this approach is permitted under the Symbolology Plan.<sup>184</sup> In addition, as stated above, although certain companies might be permitted to retain their one to three character ticker symbols when listing on the BX Venture Market, in order to inform investors, such companies would be required to issue a press release announcing its delisting and comply with the disclosure requirements of Form 8-K.<sup>185</sup> The Commission acknowledges the comments that companies with ticker symbols of less than four characters cannot trade on the OTCBB or the Pink OTC system because they are programmatically limited to four or five character symbols;<sup>186</sup> however, the Commission notes that companies that believe this limitation hurts their liquidity can elect to not list on the BX Venture Market, or, as the Exchange noted in the BX Response Letter, change their symbol.<sup>187</sup>

While the Exchange is not substantially changing the ticker symbol length a BX Venture Market-listed company can use,<sup>188</sup> the Exchange has proposed several other measures intended to reduce the likelihood that investors will believe securities listed on the BX Venture Market are of the same caliber as securities listed on other national securities exchanges. In particular, the Exchange proposes specific rules to differentiate securities of the BX Venture Market from those of the NASDAQ Stock Market, which is also owned by the NASDAQ OMX Group. Toward that end, the listing rules of the BX Venture Market specify that a BX Venture Market-listed company must refer to its listing as on the BX Venture Market, unless

otherwise required by applicable rules or regulations, and that such company must never represent that it is listed on The NASDAQ Stock Market.<sup>189</sup> To enforce this prohibition, the Exchange has committed to monitor the press releases issued by BX Venture Market-listed companies and to annually review each company's Web site to determine how each company is referring to its listing.<sup>190</sup> A BX Venture Market-listed company that refers to itself as listed on the NASDAQ Stock Market or on NASDAQ will be subject to immediate delisting.<sup>191</sup>

Additionally, in describing the BX Venture Market, the Exchange will refer to itself as the BX Venture Market, and not as NASDAQ OMX BX, in its communications and marketing literature.<sup>192</sup> The Exchange will also include information prominently on its Web site describing the differences between the BX Venture Market and other national securities exchanges, including Nasdaq.<sup>193</sup> For example, the Exchange's Web site will inform users in a prominent manner that BX Venture Market-listed securities are not "blue sky" exempt, are not NMS securities, and are not subject to the Commission's trade-through rule.<sup>194</sup> The Exchange's Web site also will provide side-by-side comparisons of BX Venture Market and NASDAQ Stock Market features.<sup>195</sup> Additionally, marketing materials for the BX Venture Market will include a prominent disclaimer explaining that BX Venture Market is separate from, and not a tier of, the NASDAQ Stock Market.<sup>196</sup> Further, in order to prevent regulatory arbitrage, the Exchange proposes that any company that meets the quantitative (e.g., financial) requirements for listing on any tier of the NASDAQ Stock Market will not be approved for listing on the BX Venture Market.<sup>197</sup> Specifically, it is appropriate for the Exchange to restrict such companies from listing on the BX Venture Market to reduce the likelihood of a company listing on the Exchange to benefit from lower quantitative listing standards when such companies are of sufficient size that it should comply with the higher Nasdaq listing standards.

The Exchange will disseminate information about securities listed on the BX Venture Market via several

<sup>174</sup> See *id.* at 2–3.

<sup>175</sup> See OTC Markets Group Letter, *supra* note 8 at 5–6.

<sup>176</sup> See Angel Letter, *supra* note 8 at 11.

<sup>177</sup> See *id.*

<sup>178</sup> See BX Response Letter, *supra* note 9 at 7.

<sup>179</sup> See *id.*

<sup>180</sup> See *id.* at 8.

<sup>181</sup> See *id.* at note 28.

<sup>182</sup> See BX Rule 5210(j).

<sup>183</sup> See *id.*

<sup>184</sup> See Securities Exchange Act Release No. 58904 (November 6, 2008), 73 FR 67218 (November 13, 2008) (order approving the National Market System Plan for the Selection and Reservation of Securities Symbols).

<sup>185</sup> See BX Rule 5210(j).

<sup>186</sup> See Pink OTC Markets Letter, *supra* note 5 at 2–3.

<sup>187</sup> See BX Response Letter, *supra* note 9 at note 28.

<sup>188</sup> As stated above, the Exchange, however, will prohibit companies not previously listed on a national securities exchange from utilizing a one to three character ticker symbol.

<sup>189</sup> See BX Rule 5250(b)(4).

<sup>190</sup> See Amendment No. 2.

<sup>191</sup> See BX Rule 5250(b)(4).

<sup>192</sup> See BX Rule 5106 and Amendment No. 2.

<sup>193</sup> See BX Rule 5106 and Amendment No. 2.

<sup>194</sup> 17 CFR 242.611. See Amendment No. 2.

<sup>195</sup> See *id.*

<sup>196</sup> See BX Rule 5106.

<sup>197</sup> See BX Rule 5210(i).

mechanisms to ensure broad dissemination of quotation and last sale information.<sup>198</sup> The Exchange committed to ensuring that BX Venture Market-listed securities are clearly distinguished, and distinguishable, from securities listed on the traditional exchanges on its data products and to end-users of the data.<sup>199</sup> The Exchange stated that all market data for BX Venture Market-listed securities will include a unique data identifier in the "Market Center" field to distinguish the security from those listing on other exchanges and the over-the-counter markets ("Market Center Identifier").<sup>200</sup> The Exchange represented that it will require that market data distributors use the Market Center Identifier to prominently identify the listing market with quotation and last sale information for BX Venture Market-listed securities through its distribution agreements and by amendments to its global market data policy document.<sup>201</sup> Specifically, the Exchange will require market data distributors to prominently identify the BX Venture Market as the listing market, and where the display of text is not consistent with the display methodology or user needs of the distributor, to use "B".<sup>202</sup>

The Commission believes that the measures described above that are designed to help clarify the differences between the BX Venture Market and the NASDAQ Stock Market should aid in reducing the potential for investor confusion. For example, as stated above, the Exchange stated that it will require market data distributors to prominently display the listing market for BX Venture Market-listed securities through its distribution agreements and its global market data policy document and that these agreements and amendments will be in place before the BX Venture Market begins operations.<sup>203</sup> The Exchange also represented that the Market Center Identifier will be distributed by the Exchange and displayed by the data vendors upon

launch of the market.<sup>204</sup> To assure compliance with this requirement, the Exchange stated that it will proactively review the displays of prominent data distributors in connection with the launch of the market and the displays of all data distributors periodically after the launch, and require immediate compliance if any displays fail to meet the requirements of the market data agreements.<sup>205</sup> The Exchange further stated that if a market data vendor does not satisfy this display requirement, the Exchange will take action against the vendor, up to and including terminating the vendor's ability to receive data from the Exchange.<sup>206</sup> Lastly, the Exchange has stated that it is committed to working with market participants and the Commission to evaluate, on an ongoing basis, whether the display requirement described above is effective in distinguishing BX Venture Market-listed securities from those listed on another national securities exchange in order to reduce investor confusion.<sup>207</sup>

The Commission recognizes the reputational tradeoff associated with distinguishing the BX Venture Market from Nasdaq. If the BX Venture Market were to fail, Nasdaq would not suffer as much reputational damage as investors and issuers would not necessarily associate a BX Venture Market failure with Nasdaq. As a result, Nasdaq may not have as much incentive to ensure that the BX Venture Market is a success than if Nasdaq had more reputation capital on the line. While considering this tradeoff, the Commission believes that Nasdaq has sufficient incentives, absent this reputational risk, to ensure that the BX Venture Market is a success, and that avoiding the risk of investor confusion is a priority.

#### D. Review Process

The Commission believes that the proposed deficiency notification, delisting, and appeals procedures strike a balance between the Exchange's obligation to protect investors and their confidence in the market, with its parallel obligation to perfect the mechanism of a free and open market. The measures by which a company may return to compliance with continued listing standards are explicitly delineated, providing transparency to the process and potentially fostering investor confidence in the integrity of the markets.

The Commission further notes that the compliance periods and discretion

to allow a non-compliant company to remain listed are generally shorter on the BX Venture Market than what would be allowed a company listed on other exchanges, including Nasdaq. For example, a Hearings Panel would be permitted to grant only 90 calendar days for a company to regain compliance with a listing standard,<sup>208</sup> instead of the 180 calendar days available on Nasdaq.<sup>209</sup> Similarly, a company that falls below the market value of listed securities requirement would be provided a 90 calendar day compliance period,<sup>210</sup> instead of the 180 days available to a Nasdaq company.<sup>211</sup> The Commission believes that these shorter timelines will serve to protect investors, given that the securities listed on the BX Venture Market are subject to lower listing standards than other exchange-listed securities.

One commenter suggested that the Exchange should increase the amount of time a company has to regain compliance with BX listing standards from 90 to 180 days because it will allow companies that are trading publicly for the first time to learn the nuances of the market and to adjust to the market.<sup>212</sup> The Commission believes that the compliance period timeframe proposed by the Exchange is appropriate. The Commission notes that the listing standards of the BX Venture Market are substantially lower than the listing standards of other national securities exchanges. The Commission believes that the lower-tier and smaller companies likely to trade on the BX Venture Market warrant careful monitoring and, for reasons of investor protection, believes that such companies cannot be permitted to not meet listing standards for a lengthy period of time. The Commission believes that 90 calendar days is sufficient to determine whether BX-listed companies have the resources and capability to attain compliance with listing standards.

Overall, the Commission believes that the proposed appeals process is reasonable and affords adequate due process to issuers, while at the same time bringing efficiency to the listing and delisting processes. Among other things, the process provides companies with the right to appeal a staff determination to deny initial or continued listing to a Hearings Panel.<sup>213</sup> The company has the right to appeal an

<sup>198</sup> See Amendment No. 2.

<sup>199</sup> See BX Rule 5106.

<sup>200</sup> See Amendment No. 2. The Exchange stated that BX Venture Market-listed securities would be identified with its own unique Market Center Identifier ("B") on any new consolidated data feeds and in the BX Venture Market Daily List data product. See *id.* The Exchange stated that the Daily List will be adopted in a separate filing with the Commission. See *id.* The Commission notes that approval of the BX Venture Market in no way prejudices or determines what action the Commission may take with respect to any data product not previously approved by the Commission.

<sup>201</sup> See BX Rule 5106 and Amendment No. 2.

<sup>202</sup> See BX Rule 5106 and Amendment No. 2.

<sup>203</sup> See BX Rule 5106 and Amendment No. 2.

<sup>204</sup> See BX Rule 5106.

<sup>205</sup> See BX Rule 5106 and Amendment No. 2.

<sup>206</sup> See BX Rule 5106 and Amendment No. 2.

<sup>207</sup> See Amendment No. 2.

<sup>208</sup> See BX Rule 5815(c)(1)(A).

<sup>209</sup> See Nasdaq Rule 5815(c)(1)(A).

<sup>210</sup> See BX Rule 5810(c)(3)(B).

<sup>211</sup> See Nasdaq Rule 5810(c)(3)(C).

<sup>212</sup> See BIO Letter, *supra* note 8 at 3.

<sup>213</sup> See BX Rule 5815.

adverse Hearings Panel decision to the Listing Council.<sup>214</sup> All decisions of the Listing Council, as well as certain Hearings Panel decisions also will be subject to review at the discretion of the Exchange Board.<sup>215</sup>

#### E. Fees

In response to the proposed fees, one commenter stated that a market targeted to smaller companies, with listing requirements and listing costs tailored to their current economic reality, would open a door that has been closed for many venture-backed companies.<sup>216</sup> After considering this comment, the Commission finds that the proposed fees are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4) and (b)(5) of the Act,<sup>217</sup> which require, among other things, that the rules of an exchange (i) provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and (ii) are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal does not unfairly discriminate between issuers as all companies will be subject to the same fee schedule. The Commission believes that the proposed fees are reasonable, given the regulatory expenses of the Exchange and the types of companies expected to list on the Exchange. The Commission notes that the Exchange has committed to enhanced vetting, examination, surveillance and disclosure requirements, all of which require additional expenses. In addition, the Commission expects the Exchange to maintain its commitment of resources to its regulatory oversight of the listing process and its ongoing compliance review of listed companies under its regulatory program.

According to the Exchange, 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.<sup>218</sup> Similarly, the

annual fee would offset the staff and system costs of continued monitoring of the company.<sup>219</sup> In addition, the Commission notes that the proposed application and annual fees are less than those charged by other national securities exchanges.<sup>220</sup> Also, the Exchange states that fees for certain one-time events (*i.e.*, 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) will allow it to recover some of the costs associated with facilitating these events.<sup>221</sup> The Exchange further proposes a \$15,000 fee for written interpretations of Exchange rules, and states that the fee for written interpretations of Exchange rules is intended to recoup the cost of Exchange staff's time in reviewing and responding to the request and that no such fee would be charged in connection with requests involving a company's initial listing application, given that the company will pay an application fee.<sup>222</sup>

The Commission notes that companies that were previously listed on Nasdaq would receive a credit, which could be used only 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.<sup>223</sup> The Exchange believes that this credit is reasonable because it will avoid double charging companies that have paid Nasdaq a non-refundable fee to provide similar services as those that the Exchange will provide under its annual fee.<sup>224</sup> In approving this fee credit, the Commission notes its expectation that a rigorous and independent review by the Exchange of compliance with the listing

additional class of securities listed on the Exchange. See BX Rule 5910.

<sup>219</sup> See Amendment No. 2.

<sup>220</sup> For example, the Exchange noted that 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 Amendment No. 2 (citing Nasdaq Rule 5920(a)(1) and (c)(1)(A), NYSE Amex Listed Company Guide Sections 140 and 141, and NYSE Listed Company Manual 902.02 and 902.03).

<sup>221</sup> See BX Rules 5815(a)(3) and 5910 and Amendment No. 2.

<sup>222</sup> See BX Rule 5602 and Amendment No. 2. See also Securities Exchange Act Release No. 61669 (March 5, 2010), 75 FR 11958 (March 12, 2010) (SR-NASDAQ-2009-081) (order granting approval of Nasdaq's proposed rule change to modify the fee for written interpretations of Nasdaq listing rules to \$15,000).

<sup>223</sup> See Amendment No. 2.

<sup>224</sup> See *id.*

standards will be conducted for any former Nasdaq-listed company that is eligible for a credit, just as for any company that lists on the BX Venture Market.

#### F. Market Data

Currently, NMS securities listed on national securities exchanges are subject to a consolidated trade reporting plan,<sup>225</sup> so that all trades are disseminated in a single data stream. Likewise, because all trades in non-NMS securities today occur in the over-the-counter market, complete trade data is collected and distributed by FINRA. Since there currently is no joint SRO trade reporting plan for non-NMS securities, trades on the BX Venture Market and any other exchange that might trade BX Venture Market-listed securities pursuant to unlisted trading privileges ("UTP") could be reported separately from the over-the-counter trade data disseminated by FINRA. For similar reasons, quotation data could be disseminated separately by BX and any UTP exchange.

In the Order Instituting Proceedings, the Commission asked whether BX sufficiently addressed how quotations and transactions reports relating to BX-listed securities will be disseminated. The Commission was concerned that the proposal could result in fragmentation of pricing information relating to these securities and undermine the ability of investors to receive best execution. One commenter stated that fragmentation of pricing data was a valid concern.<sup>226</sup> Another commenter stated that market data for BX-listed securities must be disseminated in a manner that makes clear that BX-listed securities are not NMS securities and that they do not meet the higher listing standards for exchange-listed securities.<sup>227</sup> This commenter stated that in order to prevent investor confusion between NMS securities and BX-listed securities, quotations and transaction reports for BX-listed securities should not be disseminated under any NMS plan and should not be commingled with NMS data.<sup>228</sup> Further, this commenter stated that it would be inappropriate for market data of BX-listed securities to be distributed under the Nasdaq UTP plan.<sup>229</sup> Another commenter stated that BX must clarify how market data

<sup>225</sup> See 17 CFR 242.608.

<sup>226</sup> See Niehoff Letter, *supra* note 8 at 2-3.

<sup>227</sup> See Pink OTC Markets Letter, *supra* note 5 at 2-3 and OTC Markets Group Letter, *supra* note 8 at 6-7.

<sup>228</sup> See Pink OTC Markets Letter, *supra* note 5 at 3. See also OTC Markets Letter, *supra* note 8 at 7.

<sup>229</sup> See Pink OTC Markets Letter, *supra* note 5 at 3. See also OTC Markets Letter, *supra* note 8 at 7.

<sup>214</sup> See BX Rule 5820.

<sup>215</sup> See BX Rule 5825.

<sup>216</sup> See Madrona Letter, *supra* note 5 at 1.

<sup>217</sup> 15 U.S.C. 78f(b)(4) and (b)(5).

<sup>218</sup> See Amendment No. 2. The Exchange proposed a \$7,500 initial listing fee, and a \$15,000 annual fee for the first class of securities listed on the Exchange and a \$5,000 annual fee for each

products will be engaged to ensure broad dissemination of quotation and last sale information and suggested that the Commission require the consolidation of market place quotation and last sale data for BX Venture Market-listed securities from the BX execution system and the over-the-counter market.<sup>230</sup> However, a third commenter believed that the proposal could provide a good experiment in the dissemination of market data outside the existing NMS plans, in which Nasdaq OMX directly markets the data to market participants.<sup>231</sup>

In response, the Exchange stated that it “is committed to ensuring that quotations and transaction information for listed securities occurring on The BX Venture Market \* \* \* are consolidated fully with the same information from OTC quoting and trading that FINRA supervises.”<sup>232</sup> Additionally, in response to comments that market data for BX Venture Market-listed securities must be disseminated in a manner that makes clear that these securities are not NMS securities and that they do not meet the higher listing standards for exchange-listed securities, the Exchange proposed restrictions on the use of one to three character ticker symbols, as discussed above.<sup>233</sup>

With respect to the trading of BX Venture Market-listed securities, the Commission notes that until other exchanges have appropriate trading rules and oversight mechanisms for transactions in second-tier securities, other exchanges will not be able to extend UTP to BX-listed securities.<sup>234</sup>

The Commission notes, however, that until other exchanges trade BX Venture Market-listed securities on a UTP basis, BX Venture Market-listed securities could trade not only on BX, but also over-the-counter, thus increasing the competition for orders in these securities, as these securities previously were only able to trade over-the-counter or not at all.

#### G. Margin

BX-listed securities may be less liquid and more volatile than securities listed on another national securities exchange. In anticipation of the BX Venture Market, the Commission notes that FINRA has issued Regulatory Notice 11-15 (“FINRA Notice”),<sup>235</sup> which reminds its members to consider the risks associated with low-priced equity securities<sup>236</sup> when extending credit in a strategy-based or portfolio margin account.<sup>237</sup> According to the FINRA Notice, “[p]rice volatility is more often associated with low-priced, rather than higher-priced, equity securities. Low-priced equity securities tend to trade with bid and ask spreads that make up a greater percentage of the security’s price. This is especially true for newer companies whose stock is priced low and whose earnings may be more volatile. In addition, due to lower volumes, low priced equity securities can experience large price swings during a given trading day, which translates into greater price risk. Further, low-priced equity securities may be removed from an index, which can increase the volatility and exacerbate the price risk.”<sup>238</sup>

The FINRA Notice also states that “[f]irms should take into account volatility and concentrated positions in

a single customer account and across all customer accounts, as well as the daily volume and market capitalization of each security when imposing “house” maintenance margin requirements. Firms should also consider the fundamental business drivers and financial performance of the issuer in setting house requirements. Increased maintenance margin requirements can help to ensure that the equity in each customer account is sufficient to cover any large variances in the price of a security.”<sup>239</sup> Further, the Notice states that “FINRA believes that a best practice is for firms to pay close attention to low-priced equity securities when considering the dollar amount of credit to be extended to any one customer. Similarly, in a portfolio margin account, FINRA believes that a best practice is for firms to subject low-priced or concentrated positions to heightened review and daily monitoring, subjected to higher margin requirements, where appropriate, and to include such positions in exception reporting to senior management.”<sup>240</sup> Finally, the FINRA Notice reminds members that, pursuant to the SEC’s net capital rule, Rule 15c3-1,<sup>241</sup> “if markets can absorb only a limited number of shares of a security for which a ready market exists (a marketplace blockage), the non-marketable portion in the proprietary or other accounts of a broker dealer is subject to a 100 percent deduction to net capital, and is treated as a non-allowable asset.”<sup>242</sup> As such, the FINRA Notice reminds firms that when dealing with low-priced equity securities that are thinly traded or concentrated, a firm may be required to impose heightened house margin requirements, where appropriate, and value the securities conservatively, in accordance with FINRA’s margin requirements.<sup>243</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 2, is consistent with the Act. Comments

<sup>230</sup> See Niehoff Letter, *supra* note 8 at 2.

<sup>231</sup> See Angel Letter, *supra* note 8 at 10.

<sup>232</sup> BX Response Letter, *supra* note 9 at 9.

<sup>233</sup> See Section III.C.3, *infra*.

<sup>234</sup> See 17 CFR 240.12f-5. Rule 12f-5 provides that “[a] national securities exchange shall not extend unlisted trading privileges to any security unless the national securities exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.” *Id.* Specifically, the Commission noted that Rule 12f-5 “is intended to preserve a benefit of Commission review of UTP applications,” referring to the fact that the Commission previously reviewed each UTP application to ensure, among other things, that the applicant exchange had proper trading rules in place to provide a fair and orderly market in each security named, and had sufficient standards for regulatory oversight of each security to provide for the protection of investors. See Securities Exchange Act Release Nos. 35323 (February 2, 1995), 60 FR 7718 at 7719, 7722 (February 9, 1995); 35637 (April 21, 1995), 60 FR 20891 at 20892, 20895 (April 28, 1995). Here, the Exchange proposed listing standards that are substantially lower than those of any other listings market, but the Exchange also proposed to adopt a number of enhanced surveillance, oversight and disclosure requirements. As discussed previously, the Commission views these enhanced requirements as being a necessary and integral part of the BX Venture Market proposal. Since these enhanced requirements

address concerns associated with the listing of securities that do not meet the listing requirements of other national securities exchanges and since Rule 12f-5 requires any exchange seeking to trade securities on a UTP basis to have in effect rules that provide for transactions in those securities, the Commission believes that any national securities exchange wishing to extend UTP to a BX Venture Market-listed security would also need to supplement their surveillance, oversight and disclosure requirements in order to comply with Rule 12f-5.

<sup>235</sup> Low-Priced Equity Securities, FINRA Regulatory Notice 11-15 (April 2011) (“FINRA Notice”).

<sup>236</sup> The BX Venture Market may likely have low-priced equity securities listed on its exchange.

<sup>237</sup> As equity securities listed on a national securities exchange, the securities traded on the BX Venture Market would meet the definition of “margin security” under the Federal Reserve Board’s Regulation T, which specifies initial margin requirements. See 12 CFR 220.2. However, in extending credit to customers in a margin account, broker-dealers also must comply with SRO margin requirements (including maintenance margin requirements). See, e.g., FINRA Rule 4210.

<sup>238</sup> FINRA Notice.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> 17 CFR 240.15c3-1.

<sup>242</sup> See FINRA Notice, *supra* note 235; see also Letter from Michael A. Macchiaroli, Assistant Director, Division of Market Regulation, Commission, dated October 5, 1987 to Edward Kwalwasser, Esq., NYSE and Mr. Thomas R. Cassella, NASD; and FINRA Interpretation Rule 15c3-1(c)(2)(vii)/01 in FINRA’s Interpretations of Financial and Operational Rules. These interpretations may be found at FINRA’s Web site at: <http://www.finra.org/Industry/Regulation/Guidance/FOR/index.htm>.

<sup>243</sup> See FINRA Rule 4210.

may 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](mailto: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, 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 Web site (<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 Web site 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 a.m. and 3 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 June 2, 2011.

#### **V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2**

Amendment No. 2 revised the proposed rule change, as modified by Amendment No. 1, to, among other things: (1) Explain the process of reviewing companies for initial listing, including conducting background checks on companies and associated individuals, and the use of third-party

investigative firms; (2) clarify the Exchange's discretionary authority to deny listing to or delist companies based on regulatory concerns; (3) add provisions relating to the internal structure and experience of those charged with oversight of the listing program; (4) describe market oversight activities for BX Venture Market-listed securities; (5) detail the use of market center identifiers to distinguish companies listed on the BX Venture Market; (6) add restrictions on ticker symbol length; and (7) clarify the consolidation of BX Venture Market data with over-the-counter information for the same securities. These amendments clarify aspects of the proposal, are responsive to commenters' concerns about investor protection and brand confusion, and strengthen the listing standards of the BX Venture Market. Accordingly, the Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>244</sup> for approving the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of notice in the **Federal Register**.

#### **VI. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>245</sup> that the proposed rule change (SR-BX-2010-059), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

*It is further ordered* that operation of the BX Venture Market is conditioned on the satisfaction of the requirements below:

**A. Market Data Display.** BX must update its global market data policy document and must enter into amended data distribution agreements to require data vendors to prominently identify the listing market for BX Venture Market-listed securities before the market begins operations. In addition, BX must represent in a letter to the staff in the Commission's Division of Trading and Markets that such policy document and agreements have been amended and that the provisions in such documents that require data vendors to prominently identify or display the listing market for BX-listed securities will be effective with respect to all vendors that distribute BX-listed securities data at the time the BX Venture Market begins operations.

**B. Regulatory Services Agreement.** Before the BX Venture Market begins operations, BX and FINRA must enter into a regulatory services agreement

relating to regulatory activities to be conducted by FINRA as described above.

**C. Examination by the Commission.** BX must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it and FINRA have, adequate regulatory procedures and programs in place to effectively regulate the BX Venture Market and its listing program, and adequate procedures and programs in place to effectively process trades and maintain the confidentiality, integrity, and availability of the Exchange's systems, before the BX Venture Market begins operations.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>246</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-64414; File No. SR-CBOE-2011-045]**

#### **Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the CBOE Stock Exchange Fees Schedule**

May 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 29, 2011, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the CBOE Stock Exchange ("CBSX") Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary, and at the Commission.

<sup>246</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>244</sup> 15 U.S.C. 78s(b)(2).

<sup>245</sup> 15 U.S.C. 78s(b)(2).