

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–SCCP–2013–01. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of SCCP. 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 available publicly.

All submissions should refer to File Number SR–SCCP–2013–01 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71023; File No. SR–BATS–2013–059]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of a Proposed Rule Change in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC

December 6, 2013.

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 November 25, 2013, BATS Exchange, Inc. (the “Exchange”) 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 filed a proposed rule change (the “Proposed Rule Change”) in connection with the proposed business combination (the “Combination”), as described in more detail below, involving its parent company, BATS Global Markets, Inc. and Direct Edge Holdings LLC (“DE Holdings”), the indirect parent company of EDGX Exchange, Inc. (“EDGX”) and EDGA Exchange, Inc. (“EDGA”), each a national securities exchange registered with the Commission.

Upon completion of the Combination (the “Closing”), BATS Global Markets, Inc. and DE Holdings will each become intermediate holding companies, held under a single new holding company. The new holding company, currently named “BATS Global Markets Holdings, Inc.,” will at that time change its name to “BATS Global Markets, Inc.” In addition, the current parent company of the Exchange, BATS Global Markets, Inc., will at that time change its name to “BATS Global Markets Holdings, Inc.”

For ease of reference, this Proposed Rule Change will refer to the current parent company of the Exchange as “Current BGM” when referring to the entity prior to the Closing, and as “BGM Holdings” when referring to that entity after the Closing. The entity that will

become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as “New BGM.”

To effectuate the Combination, the Exchange seeks to obtain the Commission's approval of (i) resolutions of Current BGM's board of directors (the “Resolutions”) making certain determinations regarding New BGM and the impact of the Combination on the Exchange; (ii) the proposed Amended and Restated Certificate of Incorporation of New BGM (the “New BGM Charter”); (iii) the proposed Amended and Restated Bylaws of New BGM (the “New BGM Bylaws”); (iv) the proposed amendments to Current BGM's Second Amended and Restated Certificate of Incorporation (the “Current BGM Charter,” and after such amendments, the “BGM Holdings Charter”); (v) the proposed amendments to the Amended and Restated Bylaws of Current BGM (the “Current BGM Bylaws,” and after such amendments, the “BGM Holdings Bylaws”); (vi) the proposed amendments to the By-Laws of the Exchange (the “Exchange Bylaws”); (vii) the proposed amendments to Exchange Rule 2.3 to reflect the affiliation between the Exchange and two additional registered national securities exchanges; (viii) the proposed amendments to Exchange Rule 2.12 to reflect the affiliation between the Exchange and the routing broker for EDGA and EDGX; and (ix) the indirect acquisition by an affiliate of the Exchange of a Member<sup>3</sup> of the Exchange and the resulting affiliation between the Exchange and the Member of the Exchange, as required under Exchange Rule 2.10.

The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.com>, at the principal office of the Exchange, 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

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> The term “Member” is defined in Exchange Rule 1.5(n) as any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>40</sup> 17 CFR 200.30–3(a)(12).

the most significant parts of such statements.

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

1. Purpose

The Exchange submits this Proposed Rule Change to seek the Commission's approval of various changes to the organizational and governance documents of the Exchange and the Exchange's current and proposed future parent companies, changes to Exchange Rules,<sup>4</sup> and related actions that are necessary in connection with the Closing of the Combination, as described below.

Other than as described herein and set forth in the attached Exhibits 5A through 5H, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted, and will not make any changes to its regulated activities in connection with the Combination. Except as set forth in this Proposed Rule Change, the Exchange is not proposing any amendments to its trading and regulatory rules at this time. If the Exchange determines to make any such changes, it will seek the approval of the Commission to the extent required by the Act, and the Commission's rules thereunder, and the Rules of the Exchange.

1. Current Corporate Structures

The Exchange and BATS Y-Exchange, Inc. ("BYX" and together with the Exchange, the "BATS Exchanges"), are each Delaware corporations that are national securities exchanges registered with the Commission pursuant to Section 6(a) of the Act.<sup>5</sup> Each BATS Exchange is a direct, wholly owned subsidiary of Current BGM, a Delaware corporation. Current BGM also owns 100 percent of the equity interest in BATS Trading, Inc., a Delaware corporation ("BATS Trading") that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each BATS Exchange. In contemplation of the Combination, several new entities have been formed: New BGM, a Delaware corporation, is currently a wholly owned subsidiary of Current BGM, and is currently a shell company with no material assets or operations. New BGM,

in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation ("Blue Merger Sub"), and Delta Merger Sub LLC, a Delaware limited liability company ("Delta Merger Sub"). Each of Blue Merger Sub and Delta Merger Sub are currently shell companies with no material assets or operations.

Current BGM is itself beneficially owned primarily by a consortium of several unaffiliated firms, including Members or affiliates of Members of the Exchange. No firm beneficially owns 20 percent or greater of Current BGM, and the only firms beneficially owning ten percent or greater of Current BGM are (i) GETCO Investments, LLC, an affiliate of KCG Holdings, Inc., (ii) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (iii) Strategic Investments I, Inc., an affiliate of Morgan Stanley.<sup>6</sup> Seven other firms each beneficially own five percent or greater but less than ten percent of Current BGM, while seven other firms as well as various individuals each beneficially own less than five percent of Current BGM.

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

As a limited liability company, ownership in DE Holdings is represented by units held by "LLC Members." Certain of the DE Holdings LLC Members are Members or affiliates of Members of the Exchange. The Exchange understands that International Securities Exchange Holdings, Inc. ("ISE Holdings") is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings. Other than ISE Holdings, the only firms beneficially owning ten percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater

but less than ten percent of DE Holdings. Five other firms as well as various individuals each beneficially own less than five percent of DE Holdings.

2. The Combination

On August 23, 2013, an Agreement and Plan of Merger (the "Merger Agreement") was entered into among Current BGM, New BGM, DE Holdings, Blue Merger Sub, Delta Merger Sub, and Cole, Schotz, Meisel, Forman & Leonard, P.A., solely in its capacity as representative of the LLC Members. Pursuant to and subject to the terms of the Merger Agreement, at the Closing, among other things:

(i) Blue Merger Sub will be merged with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM will be the surviving company (the "BATS Merger");

(ii) Delta Merger Sub will be merged with and into DE Holdings, whereupon the separate existence of Delta Merger Sub will cease and DE Holdings will be the surviving company (the "Direct Edge Merger");

(iii) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and

(iv) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or any LLC Member, each LLC Member's membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

Upon the Closing, each of Current BGM and New BGM will amend and restate their respective certificates of incorporation to, among other things, change their names such that New BGM will be renamed "BATS Global Markets, Inc." and Current BGM will be renamed "BATS Global Markets Holdings, Inc."

<sup>4</sup> The term "Exchange Rules" refers to the rules of the Exchange, including those for equities and options.

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

<sup>6</sup> For purposes of this Proposed Rule Change, references to the beneficial ownership of a "firm" refers to the aggregate beneficial ownership of the firm and its affiliated entities.

### 3. Post-Closing Corporate Structure

As a result of the Combination, New BGM will own (i) 100 percent of the equity interest in BGM Holdings (the entity previously referred to as "Current BGM"), and (ii) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in each BATS Exchange and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route<sup>7</sup> and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in each DE Exchange. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

New BGM, as the new top-level holding company for the combined businesses, will have widely dispersed ownership, divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.<sup>8</sup>

<sup>7</sup> As described above, the Combination will result in a change of ownership of both BATS Trading and DE Route, each of which is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). The Exchange understands that, pursuant to NASD Rule 1017, each of BATS Trading and DE Route is seeking approval for this change of ownership from FINRA.

<sup>8</sup> ISE Holdings, which will beneficially own greater than five percent but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the proposed New BGM Charter and described below, shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. See New BGM Charter, Art. FOURTH, para. (b)(ii). Pursuant to the New BGM Charter and the Investor Rights Agreement expected to be entered into at Closing and attached as Exhibit A to the New BGM Bylaws (the "Investor Rights Agreement"), ISE Holdings' shares of Class A Non-Voting Common Stock may convert to Voting Common Stock (i) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (ii) upon the termination of the Investor Rights Agreement; and (iii) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. See New BGM Charter, Art. FOURTH, para. (c); Investor Rights Agreement, Section 2.2(j).

### 4. Voting and Ownership Limitations of Current BGM; Resolutions

The Current BGM Charter provides that (i) no person, either alone or together with its "Related Persons,"<sup>9</sup> may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of its capital stock, and no Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of its capital stock (collectively, the "BGM Ownership Limitation"), and (ii) subject to certain exceptions, no person, either alone or together with its Related Persons, at any time, may, directly, indirectly or pursuant to any of various arrangements, vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of its then issued and outstanding capital stock (the "BGM Voting Limitation").<sup>10</sup> Purported transfers that would result in

<sup>9</sup> The Current BGM Charter generally defines a "Related Person" as, with respect to any person, (i) any "affiliate" of such person (as defined in Rule 12b-2 under the Act); (ii) any other person with which such first person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of Current BGM (provided no person is deemed a Related Person pursuant to clause (ii) solely as a result of such person's being or becoming a party to the Investor Rights Agreement entered into by and among Current BGM and the stockholders named therein on January 1, 2008); (iii) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b-7 under the Act) or director of such person and, in the case of a person that is a partnership or limited liability company, any general partner, managing member or manager of such person, as applicable; (iv) in the case of any person that is a registered broker or dealer that has been admitted to membership in either of the BATS Exchanges (for purposes of this definition of "Related Person," each such national securities exchange shall be referred to generally as an "Exchange" and any member of such Exchange, an "Exchange Member"), any person that is associated with the Exchange Member (as determined using the definition of "person associated with a member" as defined under Section 3(a)(21) of the Act); (v) in the case of a person that is a natural person and Exchange Member, any broker or dealer that is also an Exchange Member with which such person is associated; (vi) in the case of a person that is a natural person, any relative or spouse of such person, or any relative of such spouse who has the same home as such person or who is a director or officer of Current BGM or any of its parents or subsidiaries; (vii) in the case of a person that is an executive officer (as defined under Rule 3b-7 under the Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (viii) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. See Current BGM Charter, Art. FIFTH, para. (a)(i).

<sup>10</sup> See Current BGM Charter, Art. FIFTH, para. (b).

a violation of the BGM Ownership Limitation are not recognized by Current BGM to the extent of any ownership in excess of the BGM Ownership Limitation, and purported voting or voting arrangements in violation of the BGM Voting Limitation are not honored by Current BGM to the extent of any voting in excess of the limitation.<sup>11</sup>

However, the Current BGM Charter provides that each of the BGM Ownership Limitation and the BGM Voting Limitation may be waived (except with respect to Exchange Members and their Related Persons) pursuant to a resolution duly adopted by the board of directors of Current BGM if, in connection with taking such action, the board of directors states in such resolution that it is the determination of the board of directors that the waiver:

- Will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an "exchange" under the Act and the rules and regulations promulgated thereunder;
- is otherwise in the best interests of Current BGM, its stockholders, and each BATS Exchange;
- will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and
- shall not be effective until it is filed with and approved by the Commission.<sup>12</sup>

In granting such a waiver, the Current BGM board of directors has the discretion to impose on the person and its Related Persons, such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each BATS Exchange.<sup>13</sup>

In addition, notwithstanding the above, the Current BGM Charter provides<sup>14</sup> that in any case where a person, either alone or with its Related Persons, would own or vote more than the BGM Ownership Limitation or BGM Voting Limitation, respectively, upon consummation of any proposed sale, assignment or transfer of Current BGM's capital stock, such a transaction will not become effective until the Current BGM board of directors determines, by resolution, that such person and its

<sup>11</sup> See Current BGM Charter, Art. FIFTH, para. (d).

<sup>12</sup> See Current BGM Charter, Art. FIFTH, para. (b)(ii)(B).

<sup>13</sup> *Id.*

<sup>14</sup> See Current BGM Charter, Art. FIFTH, para. (b)(iii).

Related Persons are not subject to any “statutory disqualification,” as defined in Section 3(a)(39) of the Act.<sup>15</sup>

As described above, upon the Closing of the proposed Combination, New BGM will become the sole owner of Current BGM (referred to as “BGM Holdings” upon the Closing and thereafter). Additionally, as discussed in more detail below, the Exchange is also seeking the Commission’s approval for Current BGM’s proposal to, contemporaneously with the Closing, amend and restate the Current BGM Charter as the BGM Holdings Charter, and for New BGM to adopt the New BGM Charter. Unlike the Current BGM Charter, as proposed to be amended, the BGM Holdings Charter will not contain the BGM Ownership Limitation or the BGM Voting Limitation.<sup>16</sup> While the BGM Ownership Limitation and BGM Voting Limitation will not be contained in the BGM Holdings Charter, the BGM Holdings Charter specifies that BGM Holdings’ sole stockholder will be New BGM, and the New BGM Charter will contain substantively identical ownership and voting limitation provisions, which will also become effective contemporaneously with the Closing.<sup>17</sup>

As a result, New BGM’s acquisition of ownership and voting rights in BGM Holdings upon Closing would not cause New BGM to contravene the BGM Ownership Limitation or BGM Voting Limitation, because the Current BGM Charter will be contemporaneously amended to eliminate the BGM Ownership Limitation and the BGM Voting Limitation, and the New BGM Charter will be contemporaneously amended with respect to New BGM’s stockholders.

Nevertheless, because the Combination will result in a change of ownership of Current BGM (in that New BGM will become the sole stockholder of Current BGM), the Exchange and the board of directors of Current BGM each believe that it is appropriate for the board of directors of Current BGM to adopt the Resolutions, attached as Exhibit 5A, making certain determinations with respect to New BGM and the Combination similar to those that would be necessary to waive the BGM Ownership Limitation and BGM Voting Limitation. Specifically, the board of directors of Current BGM determined that:

- The acquisition of the proposed ownership by New BGM in Current

BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, is otherwise in the best interests of Current BGM, its stockholders and the BATS Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;

- the acquisition or exercise of the proposed voting rights by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of the Current BGM, its stockholders and the BATS Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;

- neither New BGM, nor any of its Related Persons, is subject to “statutory disqualification” within the meaning of Section 3(a)(39) of the Act;<sup>18</sup> and

- neither New BGM, nor any of its Related Persons (excluding BATS Trading, an Exchange Member whose affiliation with the Exchanges has been approved/permitted by the Commission pursuant to Rule 2.11 and Rule 2.12 of each Exchange),<sup>19</sup> is an Exchange Member.<sup>20</sup>

The Exchange has reviewed such Resolutions and requests that the Commission approve such Resolutions. The Exchange believes that the Commission should approve the Resolutions, as the Combination will not impair the ability of either BATS Exchange to carry out its functions and responsibilities as an “exchange” under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder. The BATS Exchanges will continue to operate and regulate their markets and Members as

they have done prior to the Combination. Thus, each BATS Exchange will continue to enforce the Act, the Commission’s rules thereunder, and each Exchange’s own rules, in the manner it does today. Further, the Commission will continue to have plenary regulatory authority over the BATS Exchanges, as is currently the case with these entities.

The Exchange also notes that the Resolutions reflect the determination by the Current BGM board of directors that the Combination and New BGM’s resulting ownership and voting rights in BGM Holdings are otherwise in the best interests of Current BGM, its stockholders, and the BATS Exchanges.

In addition, the Exchange notes that notwithstanding the Resolutions and the Combination, the BGM Ownership Limitation and the BGM Voting Limitation will remain in place with respect to potential future transactions involving the ultimate parent company of the BATS Exchanges. As described in more detail below, the Exchange is also proposing the adoption of the New BGM Charter and the New BGM Bylaws, which are modeled in large part on the Current BGM Charter and the Current BGM Bylaws (and include provisions substantially identical to the BGM Ownership Limitation and the BGM Voting Limitation), creating an ownership structure that will continue to provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities, and its directors, officers, employees and agents to the extent they are involved in the activities of the Exchange, and protect the independence of the Exchange’s self-regulatory activities.

The Exchange therefore requests that the Commission approve the Resolutions, attached as Exhibit 5A.

## 5. Adoption of New BGM Charter and New BGM Bylaws

New BGM was incorporated on August 22, 2013, under the name BATS Global Markets Holdings, Inc., by filing a certificate of incorporation with the Secretary of State of Delaware. Upon incorporation, New BGM also adopted bylaws. New BGM is currently a shell company, with no material assets or operations. Therefore, neither its certificate of incorporation nor bylaws currently need or contain any provisions that would be appropriate for an entity that has direct or indirect ownership in a registered national securities exchange.

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

<sup>16</sup> See *infra* text accompanying note 58.

<sup>17</sup> See *infra* text accompanying notes 23 through 27.

<sup>18</sup> 15 U.S.C. 78c(a)(39).

<sup>19</sup> As noted above, BATS Trading is a routing broker-dealer and an Exchange Member that is affiliated with the Exchange, pursuant to Exchange Rules 2.11 and 2.12, and a direct subsidiary of Current BGM. The same structure will continue to be in place following the Closing and BATS Trading will remain a direct subsidiary of BGM Holdings.

<sup>20</sup> In addition, the Resolutions contain a determination that the execution and delivery of the Merger Agreement by New BGM constituted notice of New BGM’s intention to acquire ownership and voting rights in excess of the BGM Ownership Limitation and BGM Voting Limitation, respectively, in writing and not less than 45 days before the Closing. See Current BGM Charter, Art. FIFTH, para. (b)(iv).

However, in connection with the Combination, upon the Closing, New BGM will become (i) the indirect owner (through BGM Holdings) of each of the BATS Exchanges and BATS Trading, (ii) the indirect owner (through DE Holdings and DEI) of each of the DE Exchanges, and (iii) the indirect owner (through DE Holdings) of DE Route. As a result, the Exchange is proposing that in connection with New BGM's acquisition of indirect ownership in the Exchange, New BGM would amend and restate each of its certificate of incorporation and bylaws to adopt provisions designed to protect and maintain the integrity of the self-regulatory functions of the Exchange and to facilitate the ability of the Exchange and the Commission to carry out their regulatory and oversight obligations under the Act. Each of the New BGM Charter and the New BGM Bylaws is modeled on, and substantially similar to, the Current BGM Charter and Current BGM Bylaws, respectively, except with respect to the differences described below.

#### a. New BGM Charter

The New BGM Charter is proposed to be adopted as the Amended and Restated Certificate of Incorporation of BATS Global Markets Holdings, Inc. However, the New BGM Charter will effect an amendment to the name of the corporation upon Closing such that it will be renamed "BATS Global Markets, Inc."<sup>21</sup> The change of name is intended to reflect the fact that New BGM is succeeding to the business of Current BGM in all respects, notwithstanding the technical change of corporate entity that will result from the structure of the Combination.

The New BGM Charter, which is attached as Exhibit 5B, is substantially similar to the Current BGM Charter, which the Commission has previously found to be consistent with the Act.<sup>22</sup> It contains provisions imposing the BGM Ownership Limitation and the BGM Voting Limitation on any owners or prospective owners of New BGM.<sup>23</sup> In addition, similar to the Current BGM Charter, the New BGM Charter prohibits a Member of any of New BGM's registered national securities exchange subsidiaries, either alone or together with such Member's Related Persons,<sup>24</sup>

from owning, directly or indirectly, of record or beneficially, more than 20 percent of shares of any class of capital stock of New BGM.<sup>25</sup> As in the Current BGM Charter, purported sales, transfers, assignments, pledges or ownership that would result in a violation of the BGM Ownership Limitation will not be recognized by New BGM to the extent of any ownership in excess of the limitation, and New BGM shall have the right to redeem the shares in excess of the applicable ownership limit for their fair market value. In addition, in contrast to the Current BGM Charter, the New BGM Charter would clarify that these same non-recognition and redemption rights apply in the case of a purported conversion of shares resulting in a violation of the BGM Ownership Limitation, as apply to purported sales, transfers, assignments, pledges or ownership that result in such a violation.<sup>26</sup> Similarly, as in the Current BGM Charter, purported voting or voting arrangements in violation of the BGM Voting Limitation will not be honored by New BGM to the extent of any voting in excess of the limitation.<sup>27</sup>

These provisions are designed to prevent any stockholder from exercising undue control over the operation of the BATS Exchanges or the DE Exchanges (together, the "Exchange Subsidiaries"), each of which New BGM will indirectly own following the Combination, and to assure that each Exchange Subsidiary and the Commission are able to carry out their regulatory obligations under the Act.

Further, consistent with the Current BGM Charter, the New BGM Charter provides that, for so long as New BGM controls, directly or indirectly, a registered national securities exchange, before any amendment to the New BGM Charter may be effective, those changes must be submitted to the board of directors of each such exchange, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act,<sup>28</sup> such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>29</sup> The Exchange believes that these provisions will assist the Exchange in

such definition is expanded to refer to any national securities exchange that is a direct or indirect subsidiary of New BGM, and (ii) the reference to the Investor Rights Agreement has been revised to refer to the Investor Rights Agreement to be entered into upon Closing.

<sup>25</sup> See New BGM Charter, Art. FIFTH para. (b)(i)(B).

<sup>26</sup> See New BGM Charter, Art. FIFTH, paras. (d)–(e).

<sup>27</sup> See New BGM Charter, Art. FIFTH, para. (d).

<sup>28</sup> 15 U.S.C. 78s(b).

<sup>29</sup> See New BGM Charter, Art. TWELFTH.

fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Charter differ from those of the Current BGM Charter in certain limited respects:

- The total number of shares of common stock that New BGM will have authority to issue is 75,000,000, divided between 55,000,000 shares designated as Voting Common Stock, 10,000,000 shares designated as Class A Non-Voting Common Stock, and 10,000,000 shares designated as Class B Non-Voting Common Stock.<sup>30</sup> This represents an increase from the 25,000,000 shares that Current BGM is authorized to issue (divided between 24,500,000 shares designated as Voting Common Stock and 500,000 shares designated as Non-Voting Common Stock). The increase in authorized shares is due to the greater number of stockholders that New BGM will have following the Combination, as compared to Current BGM, as well as to provide an adequate number of authorized shares to allow for potential future issuances. The rights and preferences of the Class A Non-Voting Common Stock and Class B Non-Voting Common Stock are identical in all respects, except for conversion rights. Class A Non-Voting Common Stock converts into Voting Common Stock automatically upon transfer to a person other than a Related Person of such holder, upon termination of the Investor Rights Agreement, and may be converted into Voting Common Stock at any time at the option of the holder.<sup>31</sup> Class B Non-Voting Common Stock, however, may only be converted into Voting Common Stock following a "Qualified Transfer."<sup>32</sup> The term

<sup>30</sup> See New BGM Charter, Art. FOURTH, para. (a).

<sup>31</sup> See New BGM Charter, Art. FOURTH, para. (c). In addition, Class A Non-Voting Common Stock held by ISE Holdings will convert automatically if ISE Holdings includes any such shares in any public offering of stock of New BGM.

<sup>32</sup> The Exchange notes that, notwithstanding the conversion features, neither Class A Non-Voting Common Stock nor Class B Non-Voting Common Stock may convert into Voting Common Stock if such a conversion would cause the stockholder to own, alone or with its Related Persons, directly or indirectly, of record or beneficially (i) more than 40% of any class of capital stock of New BGM in contravention of the BGM Ownership Limitation (unless a waiver is granted by the board of directors of New BGM and approved by the Commission), or (ii) in the case of an Exchange Member stockholder, more than 20% of any class of capital stock of New BGM. See New BGM Charter, Art. FIFTH, para. (b)(i)(A) and (B). In addition, to the extent that any Class A Non-Voting Common Stock or Class B Non-Voting Common Stock is converted into Voting Common Stock, the stockholder owning the converted Voting Common Stock would be subject to the BGM Voting Limitation and not permitted, either alone or together with its Related Persons, at any time, directly, indirectly or pursuant to any of

Continued

<sup>21</sup> See New BGM Charter, Art. FIRST.

<sup>22</sup> See Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

<sup>23</sup> See New BGM Charter, Art. FIFTH paras. (b)(i)(A) and (C).

<sup>24</sup> The New BGM Charter defines "Related Persons" consistent with the definition in the Current BGM Charter, *see supra* note 9, except that (i) the definition of "Exchange" for purposes of

“Qualified Transfer” means a sale or other transfer of Class B Non-Voting Common Stock by a holder of such shares: (a) In a widely distributed public offering registered pursuant to the Securities Act of 1933;<sup>33</sup> (b) in a private sale or transfer in which the relevant transferee (together with its Affiliates, as defined below, and other transferees acting in concert with it) acquires no more than two percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3) and determined by giving effect to any such permitted conversion of transferred shares of Class B Non-Voting Common Stock upon such transfer pursuant to Article FOURTH of the New BGM Charter), (c) to a transferee that (together with its Affiliates and other transferees acting in concert with it) owns or controls more than 50 percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3)) of New BGM without regard to any transfer of shares from the transferring holder of shares of Class B Non-Voting Common Stock, or (d) to New BGM. As used above, the term “Affiliate” means, with respect to any person, any other person directly or indirectly controlling, controlled by or under common control with such person, and “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”) has the meaning set forth in 12 CFR 225.2(e)(1).<sup>34</sup> The Exchange understands that certain persons that will become stockholders of New BGM as of the Closing may be, or may become, subject to restrictions under the Bank Holding Company Act of 1956<sup>35</sup> on the extent to which they are permitted to own voting stock of New BGM or certain types of non-voting stock convertible into voting stock of New BGM. The Exchange understands that New BGM’s Class B Non-Voting Common Stock is designed to permit a stockholder that may be subject to such restrictions to maintain an economic interest in New BGM, through ownership of Class B Non-Voting Common Stock, in excess of its voting interest and in compliance with such restrictions, for purposes of the Bank Holding Company Act of 1956.

• The term “Exchange,” as used in the New BGM Charter, is defined to

various arrangements, to vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM (unless a waiver is granted by the board of directors of New BGM and approved by the Commission). See New BGM Charter, Art. FIFTH, para. (b)(i)(C).

<sup>33</sup> 15 U.S.C. 77a.

<sup>34</sup> See New BGM Charter, Art. FOURTH, para. (d)(i).

<sup>35</sup> 12 U.S.C. 1841 *et seq.*

refer to “any national securities exchange registered under Section 6 of the Act with the [Commission] that is a direct or indirect subsidiary” of New BGM.<sup>36</sup> The term “Exchange” is used throughout the New BGM Charter to refer to subsidiaries of New BGM that are registered as national securities exchanges. This definition differs from the definition contained in the Current BGM Charter, which defines “Exchange” by specific reference to the names of the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Charter has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.

• The New BGM Charter reflects certain non-substantive differences and typographical corrections, including conforming the spelling of “Bylaws” throughout the organizational documents of New BGM and its proposed subsidiaries.

#### b. New BGM Bylaws

As with the New BGM Charter, the New BGM Bylaws, which are set forth in Exhibit 5C, contain provisions substantially similar to those of the Current BGM Bylaws, which the Commission has previously found to be consistent with the Act.<sup>37</sup> This includes provisions that are designed to maintain the independence of the self-regulatory functions of the Exchange Subsidiaries. Consistent with the Current BGM Bylaws, the New BGM Bylaws provide that New BGM and its officers, directors, employees and agents submit to the Commission’s jurisdiction with respect to activities relating to any of the Exchange Subsidiaries,<sup>38</sup> and, for so long as New BGM controls, directly or indirectly, such Exchange Subsidiary, New BGM agrees to provide the Commission and each Exchange Subsidiary with access to its books and records that are related to the operation or administration of the Exchange Subsidiary.<sup>39</sup> In addition, to the extent they are related to the operation or administration of an Exchange Subsidiary, the books, records, premises, officers, directors, agents, and employees of New BGM shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange Subsidiary

<sup>36</sup> See New BGM Charter, Art. FIFTH, para. (a)(ii).

<sup>37</sup> See Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

<sup>38</sup> See New BGM Bylaws, Section 14.05.

<sup>39</sup> See New BGM Bylaws, Section 14.03.

for purposes of, and subject to oversight pursuant to, the Act.<sup>40</sup>

The New BGM Bylaws also provide that all books and records of an Exchange Subsidiary reflecting confidential information pertaining to the self-regulatory function of the Exchange Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM shall not be made available other than to those officers, directors, employees and agents of New BGM that have a reasonable need to know the contents thereof, and shall be retained in confidence by New BGM, the members of its board of directors, its officers, employees and agents, and not used for any non-regulatory purposes.<sup>41</sup> The New BGM Bylaws, however, specify that the New BGM Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or an Exchange Subsidiary to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New BGM to disclose such confidential information to the Commission or an Exchange Subsidiary.<sup>42</sup>

In addition, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, the directors, officers, employees and agents of New BGM are required to give due regard to the preservation of the independence of each Exchange Subsidiary’s self-regulatory functions, and to its obligations to investors and the general public, and not take any actions which would interfere with the effectuation of decisions by the board of directors of such Exchange Subsidiary relating to regulatory functions (including disciplinary matters) or which would interfere with such Exchange Subsidiary’s ability to carry out its responsibilities under the Act.<sup>43</sup> Further, the New BGM Bylaws require that, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of the New BGM Bylaws may be effective, those changes must be submitted to the board of directors of each Exchange Subsidiary, and, if such amendment is required to be filed with, or filed with and

<sup>40</sup> *Id.*

<sup>41</sup> See New BGM Bylaws, Section 14.02.

<sup>42</sup> See *id.*

<sup>43</sup> See New BGM Bylaws, Section 14.01.

approved by, the Commission before the changes may be effective under Section 19 of the Act and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.<sup>44</sup> The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Bylaws differ from those of the Current BGM Bylaws in certain limited respects:

- The New BGM Bylaws provide for two separate corporate officer positions, one known as the Chief Executive Officer and another known as the President. The Current BGM Bylaws, in contrast, provide for a combined position known as the President and Chief Executive Officer.<sup>45</sup> Under the New BGM Bylaws, the Chief Executive Officer will be the chief executive officer of New BGM and subject to the control of the board of directors of New BGM, has general supervision, direction and control of the business and affairs of New BGM,<sup>46</sup> while the President will be a senior executive officer with certain designated powers, among other things, to serve as the chief executive officer in the absence or disability of the Chief Executive Officer.<sup>47</sup> References to corporate officers throughout the New BGM Bylaws reflect this difference. The difference in corporate officer designations is intended to facilitate the anticipated executive leadership of New BGM following the Combination. It is anticipated that, following the Combination, the current President and Chief Executive Officer of Current BGM will become the Chief Executive Officer of New BGM, while the current Chief Executive Officer of DE Holdings will become the President of New BGM.

- The New BGM Bylaws provide for a board of directors consisting of 15 members, or such other number of members as the board of directors determines from time to time. The Current BGM Bylaws provide that the board of directors will consist of one or more members, as determined by resolution of the board of directors.<sup>48</sup> The size of the New BGM board is proposed to be initially set at 15 in order to reflect the anticipated initial membership of the board of directors of

New BGM. The Current BGM board of directors currently has 13 members. After the Closing, it is anticipated that the New BGM board of directors will consist of the same members as the Current BGM board, except that the New BGM board will be expanded by two members, to include representatives of two additional firms that are currently LLC Members of DE Holdings but will, by virtue of the Combination, become stockholders of New BGM.

- Section 5.02(a) of the Current BGM Bylaws sets forth the process for representatives of Current BGM to attend meetings of, and vote the shares of, any corporation, partnership or other entity (including each BATS Exchange) in which Current BGM may hold stock, partnership, or other equity interests. This provision parenthetically refers to the BATS Exchanges to reflect the fact that Current BGM is the direct owner of each of the BATS Exchanges. However, following the Combination, New BGM will instead be the direct owner of each of BGM Holdings and DE Holdings. The corresponding provision in the New BGM Bylaws therefore contains a similar parenthetical reference to its ownership of BGM Holdings and DE Holdings, rather than the BATS Exchanges.<sup>49</sup> In addition, the New BGM Bylaws include a reference to meetings of “members” of any “limited liability company” in which New BGM holds equity interests, which terms are not included in the corresponding provision in the Current BGM Bylaws.<sup>50</sup> This is intended to reflect the fact that New BGM will, following the Closing, be the sole member of DE Holdings, a limited liability company, while Current BGM does not hold equity in any limited liability companies.<sup>51</sup> In addition, the Current BGM Bylaws contain provisions that relate to Current BGM’s voting of shares in the election of directors, and Members of the Member Nominating Committees, of the BATS Exchanges.<sup>52</sup> These provisions will not be applicable to New BGM and are not included in the New BGM Bylaws, as the BATS Exchanges will be directly owned by BGM Holdings, rather than New BGM.<sup>53</sup>

- The term “Exchange,” as used in the New BGM Bylaws, is defined to refer to “any national securities exchange registered with the [Commission] under Section 6 of the

[Act] that is a direct or indirect subsidiary” of New BGM.<sup>54</sup> The term “Exchange” is used throughout the New BGM Bylaws to refer to subsidiaries of New BGM that are registered as national securities exchanges. The Current BGM Bylaws either refer to each BATS Exchange by name or define “Exchange” by specific reference to the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Bylaws has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.

- The New BGM Bylaws reflect certain non-substantive updates to dates of agreements and cross-references, as well as typographical corrections, including conforming the spelling of “Bylaws” throughout the organizational documents of New BGM and its proposed subsidiaries.

#### 6. Adoption of BGM Holdings Charter and BGM Holdings Bylaws

Effective as of the Closing of the Combination, BGM Holdings (previously referred to as Current BGM) will continue to hold direct ownership of the BATS Exchanges and BATS Trading, but will no longer be the ultimate holding company of the corporate structure, itself being a wholly owned subsidiary of New BGM. As a result, provisions of the Current BGM Charter and Current BGM Bylaws, which contemplate an entity that was the ultimate holding company in the corporate structure, will no longer be appropriate. The Exchange is therefore proposing the amendment and restatement of each of the Current BGM Charter (as amended, referred to as the “BGM Holdings Charter”) and the Current BGM Bylaws (as amended, referred to as the “BGM Holdings Bylaws”). Each of the proposed BGM Holdings Charter and the BGM Holdings Bylaws are modeled on, and substantially similar to, the current certificate of incorporation and bylaws, respectively, of DEI, which is similarly situated as an intermediate holding company between DE Holdings and the DE Exchanges. The Commission has previously found the DEI certificate of incorporation and bylaws to be consistent with the Act.<sup>55</sup>

Following the Closing, BGM Holdings will be the sole stockholder of the BATS Exchanges. Although BGM Holdings will not carry out any regulatory

<sup>44</sup> See New BGM Bylaws, Art. XII.

<sup>45</sup> Compare New BGM Bylaws, Sections 4.01 and 4.02 with Current BGM Bylaws, Sections 4.01 and 4.02(c) and (d).

<sup>46</sup> See New BGM Bylaws, Section 4.02(c).

<sup>47</sup> See New BGM Bylaws, Section 4.02(d).

<sup>48</sup> Compare New BGM Bylaws, Section 3.01 with Current BGM Bylaws, Section 3.01.

<sup>49</sup> See New BGM Bylaws, Section 5.02.

<sup>50</sup> *Id.*

<sup>51</sup> Compare New BGM Bylaws, Section 5.02 with Current BGM Bylaws, Section 5.02.

<sup>52</sup> See Current BGM Bylaws, Sections 5.02(b) and (c).

<sup>53</sup> Substantially identical provisions are instead included in the BGM Holdings Bylaws. See *infra* text accompanying note 70.

<sup>54</sup> See New BGM Bylaws, Section 10.02.

<sup>55</sup> See Securities Exchange Act Release No. 62515 (July 16, 2010), 75 FR 43584 (July 26, 2010) (SR-EDGX-2010-02).



functions, the Exchange notes that its activities with respect to the operation of the BATS Exchanges must be consistent with, and must not interfere with, the self-regulatory obligations of each BATS Exchange. The BGM Holdings Charter and the BGM Holdings Bylaws therefore include certain provisions that are designed to maintain the independence of the BATS Exchanges' self-regulatory functions, enable the BATS Exchanges to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b)<sup>56</sup> and 19(g)<sup>57</sup> of the Act, and facilitate the ability of each BATS Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

#### a. BGM Holdings Charter

With respect to ownership and control of BGM Holdings, the proposed BGM Holdings Charter, attached as Exhibit 5D, specifically provides that BGM Holdings' sole stockholder will be New BGM.<sup>58</sup> This restriction is designed to assure that any change to the ownership or control of the BATS Exchanges may only occur through a change in the ownership or control of New BGM. As such, any purported change of such ownership or control would need to comply with the New BGM Charter and New BGM Bylaws, including the BGM Ownership Limitation and the BGM Voting Limitation (or a Commission-approved waiver therefrom).

The proposed BGM Holdings Charter further specifies that nothing contained therein or in the BGM Holdings Bylaws shall be applicable where the application of the provision would interfere with the effectuation of any and all decisions relating to the regulatory functions of the BATS Exchanges (including disciplinary matters) or the structure of the market that each BATS Exchange regulates, or would interfere with the ability of each BATS Exchange to carry out its responsibilities under the Act or oversee the market that each regulates.<sup>59</sup>

In addition, the proposed BGM Holdings Charter provides that for so long as BGM Holdings controls, directly or indirectly, a registered national securities exchange, before any amendment to or repeal of any provision of the BGM Holdings Charter may be effective, those changes shall be submitted to the board of directors of

each such exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act<sup>60</sup> and the rules promulgated thereunder, then such proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.<sup>61</sup>

#### b. BGM Holdings Bylaws

The proposed BGM Holdings Bylaws, attached as Exhibit 5E, contain several provisions designed to protect the independence of the self-regulatory functions of the BATS Exchanges. The proposed BGM Holdings Bylaws require that, for so long as BGM Holdings, directly or indirectly, controls a BATS Exchange, BGM Holdings' board of directors, officers, employees and agents must give due regard to the preservation of independence of the self-regulatory functions of each BATS Exchange and not interfere with the effectuation of any decisions by either of the BATS Exchange boards of directors relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of such exchange to carry out its responsibilities under the Act.<sup>62</sup> The BGM Holdings Bylaws would further require that BGM Holdings comply with the U.S. federal securities laws and rules and regulations thereunder and shall cooperate with the Commission and each BATS Exchange, as applicable, pursuant to and to the extent of their respective regulatory authority.<sup>63</sup> Pursuant to the BGM Holdings Bylaws, BGM Holdings' officers, directors, employees and agents shall be deemed to agree to (i) comply with the U.S. federal securities laws and the rules and regulations thereunder; and (ii) to cooperate with the Commission and each BATS Exchange in respect of the Commission's oversight responsibilities regarding the BATS Exchanges and their self-regulatory functions and responsibilities of the BATS Exchanges, and BGM Holdings will take reasonable steps to cause its officers, directors, employees and agents to so cooperate.<sup>64</sup>

Furthermore, BGM Holdings and its officers, directors, employees and agents will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each BATS Exchange, as applicable, for purposes of

any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder arising out of, or relating to, the activities of such exchange.<sup>65</sup>

The proposed BGM Holdings Bylaws also contain a number of provisions designed to ensure that the BATS Exchanges have sufficient access to the books and records of BGM Holdings. Pursuant to the BGM Holdings Bylaws, the books, records, premises, officers, directors, agents, and employees of BGM Holdings are deemed to be the books, records, premises, officers, directors, agents and employees of the BATS Exchanges to the extent they are related to the operation or administration of such exchange.<sup>66</sup> In addition, for as long as BGM Holdings controls, directly or indirectly, the BATS Exchanges, BGM Holdings' books and records shall be subject at all times to inspection and copying by the Commission and the BATS Exchanges, provided that such books and records are related to the operation or administration of the BATS Exchanges.<sup>67</sup>

The proposed BGM Holdings Bylaws also provide that, to the fullest extent permitted by law, all books and records of the BATS Exchanges reflecting confidential information pertaining to the self-regulatory function of such exchange (including disciplinary matters, trading data, trading practices and audit information) that comes into the possession of BGM Holdings, shall be retained in confidence by BGM Holdings and its stockholders, board of directors, officers, employees and agents, and not be used for any non-regulatory purposes.<sup>68</sup> The proposed BGM Holdings Bylaws provide, however, that the foregoing shall not limit or impede the rights of the Commission or the BATS Exchanges to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or limit or impede the ability of any BGM Holdings stockholders, officers, directors, employees or agents to disclose such confidential information to the Commission or either BATS Exchange.<sup>69</sup>

With respect to the election of directors of the BATS Exchanges, Current BGM is currently the sole and direct stockholder of each of the BATS Exchanges. As noted above, while

<sup>56</sup> 15 U.S.C. 78f(b).

<sup>57</sup> 15 U.S.C. 78s(g).

<sup>58</sup> See BGM Holdings Charter, Art. SEVENTH, para. 4.

<sup>59</sup> See BGM Holdings Charter, Art. FIFTH, para. 2.

<sup>60</sup> 15 U.S.C. 78s(b).

<sup>61</sup> See BGM Holdings Charter, Art. SEVENTH, para. 3.

<sup>62</sup> See BGM Holdings Bylaws, Section 7.1.

<sup>63</sup> See BGM Holdings Bylaws, Section 7.2.

<sup>64</sup> *Id.*

<sup>65</sup> See BGM Holdings Bylaws, Section 7.3.

<sup>66</sup> See BGM Holdings Bylaws, Section 5.8(b).

<sup>67</sup> *Id.*

<sup>68</sup> See BGM Holdings Bylaws, Section 5.8(a).

<sup>69</sup> *Id.*



Current BGM will become BGM Holdings, it will continue to hold the direct ownership interest and voting rights in the BATS Exchanges. Therefore, the BGM Holdings Bylaws are proposed to maintain provisions relating to its voting of its interests in the BATS Exchanges that are substantially identical to those contained in the Current BGM Bylaws.<sup>70</sup> In particular, the proposed BGM Holdings Bylaws would continue to provide that at any meeting of the stockholders of either BATS Exchange held for the purpose of electing directors and members of such exchange's Member Nominating Committee, or in the event written consents are solicited or otherwise sought from the stockholders of such BATS Exchange with respect thereto, BGM Holdings will cause all outstanding shares of the BATS Exchange owned by BGM Holdings to be voted in favor of only those Member Representative Directors and nominees for the Member Nominating Committee nominated in accordance with such exchange's bylaws, and, with respect to any written consents, BGM Holdings will only cause to be validly executed written consents electing such directors and members of the Member Nominating Committee.<sup>71</sup> The Exchange believes that this requirement will ensure that BGM Holdings effectuates the election of directors and members of the Exchange's Member Nominating Committee in the manner contemplated by the Exchange's Bylaws, ensuring the fair representation of members in the selection of directors and the administration of the Exchange as required by Section 6(b)(3) of the Act.<sup>72</sup>

Similar to the proposed BGM Holdings Charter, the proposed BGM Holdings Bylaws provide that for so long as BGM Holdings controls either BATS Exchange, before any amendment to or repeal of any provision of the BGM Holdings Bylaws will be effective, those changes must be submitted to the board of directors of each BATS Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act,<sup>73</sup> and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with

and approved by, the Commission, as the case may be.<sup>74</sup>

Lastly, while as noted above, the BGM Holdings Bylaws are modeled on the current bylaws of DEI (the "DEI Bylaws"), in contrast with the current DEI Bylaws, the proposed BGM Holdings Bylaws do not contain a provision relating to BGM Holdings' handling of funds derived from the regulatory operations of its exchange subsidiaries (such as regulatory fees, fines and penalties). The Exchange Bylaws and the bylaws of BYX each prohibit the Exchange and BYX, respectively, from distributing any such funds to its stockholder, instead requiring that such funds only be applied to fund the legal and regulatory operations of the respective exchange or pay restitution and disgorgement of funds intended for customers.<sup>75</sup> As a result, BGM Holdings will not be permitted to come into possession of regulatory funds, as they will remain at the respective exchange and used only for permitted purposes. The Exchange therefore believes that including a provision in the BGM Holdings Bylaws relating to the handling by BGM Holdings of such funds is unnecessary and potentially confusing. The Exchange understands that the DE Exchanges are each proposing to amend DEI's bylaws to eliminate the corresponding provision.<sup>76</sup>

#### 7. Bylaws of the Exchange

In connection with the Combination, the Exchange proposes to amend and restate its Second Amended and Restated By-Laws and adopt the amended Exchange Bylaws as its Third Amended and Restated Bylaws, attached as Exhibit 5F. The Exchange proposes making the following amendments to the Exchange Bylaws:

- Amending Article I, paragraph (cc) of the Exchange Bylaws to reflect the change of name of the Exchange's stockholder from Current BGM to BGM Holdings. This amendment is intended to reflect the change in the Exchange's corporate holding structure and corporate name changes described above as well as prevent any change of ownership of the Exchange other than in accordance with the requirements set forth in the organizational documents of the Exchange's parent and indirect parent companies.
- Amending Section 2(b) and Section 3(b) of Article III of the Exchange Bylaws to clarify that the Chief Executive Officer of the Exchange is

considered to be an Industry Director, but is excluded from being designated as a member of one of the three classes of directors for purposes of the Board's staggered three-year terms. This amendment is meant to clarify, rather than change, current practice. The Exchange Bylaws require that the Board of Directors be composed of one Director who is the Chief Executive Officer of the Exchange, and a sufficient number of Non-Industry Directors (including Independent Directors), Industry Directors and Member Representative Directors such that (i) the number of Non-Industry Directors, including at least one Independent Director, equals or exceeds the sum of the number of Industry Directors and Member Representative Directors, and (ii) the number of Member Representative Directors equals at least 20 percent of the Board of Directors (the "Exchange Board Composition Requirements").<sup>77</sup> Because the definition of "Industry Director" includes a Director that has an employment relationship with the Exchange,<sup>78</sup> the Chief Executive Officer of the Exchange will always meet the definition of "Industry Director." Consistent with this definition, and in order to effectuate the Exchange Board Composition Requirements, the Exchange considers the Chief Executive Officer to be an Industry Director. Were the Chief Executive Officer to not be considered for purposes of determining composition of the board, the total number of persons affiliated with the securities industry (including Industry Directors, Member Representative Directors and the Chief Executive Officer) could potentially exceed the number of Non-Industry Directors—a result that the Exchange believes the Exchange Board Composition Requirements were intended to prevent. The Exchange therefore proposes to amend Section 2(b) of Article III of the Exchange Bylaws to explicitly clarify that the Chief Executive Officer shall be considered to be an Industry Director. The Exchange Bylaws separately provide that each of the Non-Industry Directors and Industry Directors are divided into one of three classes to serve staggered three-year terms.<sup>79</sup> Unlike other Industry Directors, rather than serving a three-year term, the Chief Executive Officer of the Exchange serves on the Board of Directors until he or she ceases to be Chief Executive Officer.<sup>80</sup>

<sup>70</sup> Compare BGM Holdings Bylaws, Sections 2.15(b) and (c) with Current BGM Bylaws, Sections 5.02(b) and (c).

<sup>71</sup> See BGM Holdings Bylaws, Sections 2.15(b) and (c).

<sup>72</sup> 15 U.S.C. 78f(b)(3).

<sup>73</sup> 15 U.S.C. 78s.

<sup>74</sup> See BGM Holdings Bylaws, Section 6.4.

<sup>75</sup> See e.g., Exchange Bylaws, Art. X, Section 4.

<sup>76</sup> See DEI Bylaws, Section 4.6(b).

<sup>77</sup> See Exchange Bylaws, Art. III, Section 2(b).

<sup>78</sup> See Exchange Bylaws, Art. I, para. (o)(vi).

<sup>79</sup> See Exchange Bylaws, Art. III, Section 3(b).

<sup>80</sup> See Exchange Bylaws, Art. III, Section 3(a).

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

- Amending Section 4(a), Section 4(c) and Section 4(e) of Article III of the Exchange Bylaws to permit the Director nomination and election process (including the Member Representative Director nomination and election process conducted by the Member Nominating Committee) to be conducted through either an annual or special meeting of stockholders, rather than solely through an annual meeting of stockholders. Under the current Exchange Bylaws, should one or more vacancies on the Board of Directors occur, the vacancies would continue until they can be filled at an annual meeting. As a result, vacancies that arise soon after an annual meeting could remain for close to a full year. The Exchange therefore proposes to amend the Exchange Bylaws to add flexibility to the governance process around the nomination and election of a Director position that may become vacant at a time that does not coincide with the Exchange's annual director election process, by permitting the process to occur at any time via a special meeting of stockholders.

- Amending Section 2(a) of Article V of the Exchange Bylaws to clarify that the Chairman, with the approval of the Board, not only appoints the members of all committees of the Board, but also the chair of each committee. This amendment is intended to reflect the current committee and committee Chair appointment processes utilized by the Exchange.

- Amending Section 6(c) of Article V of the Exchange Bylaws to clarify that the Regulatory Oversight Committee responsibilities include (i) those with regard to each of the Exchange's facilities, as defined in Section 3(a)(2) of the Act,<sup>81</sup> (ii) assessing the Exchange's regulatory performance, (iii) assisting the Board and committees of the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions, and (iii) in consultation with the Chief Executive Officer of the Exchange, establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer of the Company. These amendments are intended to reflect the current responsibilities of the Regulatory Oversight Committee.

- Deleting as outdated Section 1 of Article XI of the Exchange Bylaws, relating to the interpretation of the Exchange Bylaws prior to the Exchange's commencement of business as a national securities exchange, and renumbering the remaining sections within Article XI accordingly.

- Expanding the prohibition contained in Section 3 of Article XI of the Exchange Bylaws (to be renumbered as Section 2). Currently, Section 3 of Article XI prohibits Current BGM's directors, officers, staff, counsel and advisors who are not also directors, officers, staff, counsel or advisors of the Exchange from participating in any meetings of the Exchange's Board of Directors (or any committee thereof) pertaining to the self-regulatory function of the Exchange (including disciplinary matters). Because, following the Combination, the Exchange will be owned directly by BGM Holdings and indirectly by New BGM, instead of only directly by Current BGM, the Exchange is proposing to expand this prohibition to cover both its direct and indirect parent companies. The Exchange believes that this amendment will protect the independence of the Exchange's self-regulatory activities.

- Correcting certain typographical errors, including conforming the spelling of "Bylaws" throughout the organizational documents of the Exchange and its parent companies.

#### 8. Exchange Rule 2.3—Member Eligibility

Pursuant to Exchange Rule 2.3, in order to be eligible for membership in the Exchange, a registered broker or dealer is required to be a member of at least one other national securities association or national securities exchange. However, membership in the Exchange's affiliated national securities exchange, BYX, is not sufficient for purposes of eligibility for Exchange membership. As a result of the Combination, the Exchange will additionally become affiliated with the DE Exchanges. The Exchange continues to believe that it is appropriate to limit its membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the Exchange. Therefore, the Exchange proposes to amend Exchange Rule 2.3 to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than BYX, EDGA or EDGX. The proposed amendments to Exchange Rule 2.3 are set forth in Exhibit 5G.

#### 9. Exchange Rule 2.12—DE Route as Inbound Router

BATS Trading provides Members of the Exchange and BYX with optional routing services to other market centers. Thus, in certain circumstances, BATS Trading provides inbound routing from BYX to the Exchange. Exchange Rule 2.12 governs this inbound routing of orders by BATS Trading to the Exchange in BATS Trading's capacity as a facility of BYX. Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange has implemented limitations and conditions on BATS Trading's affiliation with the Exchange in order to permit the Exchange to accept inbound orders that BATS Trading routes in its capacity as a facility of BYX. These conditions and limitations, set forth in Exchange Rule 2.12, require that:

(1) The Exchange must enter into (a) a plan pursuant to Rule 17d-2 under the Act with a non-affiliated self-regulatory organization ("SRO") to relieve the Exchange of regulatory responsibilities for BATS Trading with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (b) a regulatory services contract ("Regulatory Contract") with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique Exchange rules.

(2) The Regulatory Contract must require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively "Exceptions") in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission Rules, and requires that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission rules.

(3) The Exchange, on behalf of its parent company, must establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Members of the Exchange.

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

(4) The Exchange may furnish to BATS Trading only the same information and on the same terms as the Exchange makes available in the normal course of business to other users.<sup>82</sup>

Similar to the role of BATS Trading with respect to the BATS Exchanges, the Exchange understands that DE Route provides members of the DE Exchanges with optional routing services to other market centers, which may include routing from a DE Exchange to the Exchange. Following the Combination, it is expected that DE Route will continue to provide these routing services, which may involve routing to the Exchange. Because, following the Combination, DE Route will be affiliated with and potentially routing to the Exchange, the Exchange believes that the potential conflict of interest currently addressed by Exchange Rule 2.12 with respect to BATS Trading must also be addressed with respect to DE Route.

The Exchange is therefore proposing to amend and expand Exchange Rule 2.12 such that substantially the same conditions and limitations that currently apply to the inbound routing of orders by BATS Trading apply to the inbound routing of orders by DE Route. The proposed amendments to Exchange Rule 2.12, as set forth in Exhibit 5H, would provide that, in order for the Exchange to accept inbound routed orders from DE Route, the conditions and limitations currently set forth in Exchange Rule 2.12 with respect to BATS Trading must also be satisfied with respect to DE Route.

The Exchange believes that these proposed amendments will adequately manage the potential for a conflict of interest that could arise from DE Route routing orders to the Exchange. The Exchange expects to arrange that these conditions be met prior to the Closing so as to allow DE Route to continue routing to the Exchange following the Closing without interruption.<sup>83</sup>

In addition, the language in Exchange Rule 2.12 leading into the four conditions described above incorrectly refers to the conditions being undertaken by “each of the Exchange and BATS Trading.” However, by their terms, the conditions contained in Exchange Rule 2.12 are undertaken only by the Exchange and, in one case, the Exchange on behalf of its parent

company. The Exchange therefore proposes to delete the incorrect reference to BATS Trading.

#### 10. Exchange Rule 2.10—Affiliation With DE Route

Exchange Rule 2.10 provides that, subject to certain exceptions, without the prior approval of the Commission, (i) the Exchange or any entity with which the Exchange is affiliated (as defined in Rule 12b-2 under the Act), may not directly or indirectly acquire or maintain an ownership interest in a Member of the Exchange, and (ii) a Member of the Exchange may not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange.

DE Route is currently a Member of the Exchange. As a result of the Combination, (i) New BGM, an entity affiliated with the Exchange, will acquire and maintain an indirect ownership interest in DE Route, and (ii) DE Route will become an affiliate of the Exchange. Pursuant to Exchange Rule 2.10, the Exchange is seeking the Commission’s prior approval to permit this affiliation.

The Exchange notes that the purpose of Exchange Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the Exchange or its affiliates having an ownership interest in an Exchange Member, particularly with respect to the Exchange’s obligation under Section 19(g) of the Act to enforce its Members’ compliance with the Act, the Commission’s rules thereunder, and Exchange Rules.<sup>84</sup>

The Exchange believes that it should be permitted to become affiliated with DE Route, notwithstanding DE Route’s Exchange membership. As described above, as a result of the proposed amendments to Exchange Rule 2.12, the Exchange intends on addressing the potential conflicts of interests arising from its expected affiliation with DE Route by, among other things, entering into (i) a plan pursuant to Rule 17d-2 under the Act with a non-affiliated SRO to relieve the Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (ii) a Regulatory Contract with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique Exchange rules. The Exchange believes that any potential conflict of interest that would arise as a result of its affiliation with DE Route will be mitigated by the same procedures that the Exchange anticipates adopting to satisfy the

proposed amendments to Exchange Rule 2.12. The Exchange therefore requests that, pursuant to Exchange Rule 2.10, the Commission approve the indirect acquisition of DE Route by an affiliate of the Exchange and the resulting affiliation between the Exchange and DE Route, so long as the requirements under Exchange Rule 2.12, as proposed to be amended, are satisfied.

#### 2. Statutory Basis

The Exchange believes that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>85</sup> In particular, the proposal is consistent with Section 6(b)(1) of the Act<sup>86</sup> in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Rules of the Exchange. The Proposed Rule Change is designed to enable the Exchange to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. In particular, the Proposed Rule Change includes in the New BGM Charter and New BGM Bylaws, like the Current BGM Charter and Current BGM Bylaws, various provisions intended to protect and maintain the integrity of the self-regulatory functions of the Exchange upon Closing. For example, the New BGM Bylaws, as described above, are drafted to preserve the independence of the Exchange’s self-regulatory function and ensure that the Exchange is able to obtain information it needs from the specified parties to detect and deter any fraudulent and manipulative acts in its marketplace and carry out their regulatory responsibilities under the Act. In addition, the New BGM Charter and New BGM Bylaws are drafted to make sure that the Exchange’s Board of Directors receives notice of any amendment to the New BGM Charter and New BGM Bylaws so that the Exchange’s Board of Directors may review and approve, and the Exchange may make any filings with the Commission necessary for the Exchange to fulfill its regulatory duties under the Act. The New BGM Charter also imposes the BGM Ownership Limitation

<sup>82</sup> See Securities Exchange Act Release No. 66571 (March 12, 2012), 77 FR 15153 (March 14, 2012) (SR-BATS-2012-013).

<sup>83</sup> If such conditions and limitations are not satisfied by Closing, the Exchange will not accept inbound orders from DE Route until such conditions and limitations are satisfied.

<sup>84</sup> 15 U.S.C. 78s(g).

<sup>85</sup> 15 U.S.C. 78f(b).

<sup>86</sup> 15 U.S.C. 78f(b)(1).

and BGM Voting Limitation to preclude undue influence over or interference with the Exchange's self-regulatory functions and fulfillment of its regulatory duties under the Act.

Moreover, notwithstanding the Proposed Rule Change, including the change to the ownership structure of the Exchange, the Commission will continue to have regulatory authority over the Exchange, as is currently the case, as well as jurisdiction over the Exchange's direct and indirect parents with respect to activities related to the Exchange.<sup>87</sup> As a result, the Proposed Rule Change will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities and their directors, officers, employees and agents to the extent they are involved in the activities of the Exchange.

The Exchange also believes that the Proposed Rule Change furthers the objectives of Section 6(b)(5) of the Act<sup>88</sup> because the Proposed Rule Change would be consistent with and facilitate a governance and regulatory structure that 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.

In addition, the Exchange expects that the Combination will facilitate efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients, thus removing impediments to, and perfecting the mechanism of a free and open market and a national market system. The Combination will benefit investors, the market as a whole, and shareholders by, among other things, enhancing competition among securities venues and reducing costs. In particular, the Combination will result in a third major exchange operator which will have more streamlined and efficient operations, including the transition of the DE Exchanges to a technology platform in common with the BATS Exchanges, thereby intensifying

competition for transaction order flow with other exchange and non-exchange trading centers, as well as potentially in other areas where the two major exchange operators lead, such as proprietary market data products and listings. This enhanced level of competition among trading centers will benefit investors through new or more competitive product offerings and, ultimately, lower costs.

Furthermore, the Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the change in ownership; the Exchange will operate in essentially the same manner upon Closing as it operates today. Therefore, the Exchange believes that it will continue to satisfy the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. The changes the Exchange is proposing to Exchange Rules 2.3 are designed to extend the membership eligibility criteria in a way that is consistent with the current rule, taking into account the prospective affiliation with the DE Exchanges. The proposed change to Exchange Rule 2.12 is designed to address the potential for conflicts of interest due to the prospective affiliation between the Exchange and DE Route. The Exchange believes that the proposed change to its Rules is consistent with the requirements of the Act and the rules and regulations thereunder. The Exchange believes that the rule change promotes the maintenance of a fair and orderly market, the protection of investors and the public interest, and is in the best interests of the Exchange and its Members as it would continue to allow routing of orders between the four affiliated exchanges.

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

The Exchange does not believe that the Proposed Rule Change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that the Proposed Rule Change will enhance competition among intermarket trading venues, as the Exchange believes that the Combination will produce a stronger and more efficient entity that will have an improved ability to provide innovative products and services. Moreover, the Exchange will continue to conduct regulated activities (including operating and regulating its market and Members) of the type it currently conducts, but will be able to do so in a more efficient manner to the benefit of

its Members. Furthermore, the Exchange's conclusion that the Proposed Rule Change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act is consistent with the Commission's prior conclusions about similar combinations involving multiple exchanges in a single corporate family.<sup>89</sup>

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

The Exchange has neither solicited nor received written comments on 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 the 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-059 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.

<sup>89</sup> See, e.g., Securities Exchange Act Release No. 66071 (December 29, 2011), 77 FR 521 (January 05, 2012) (SR-CBOE-2011-107 and SR-NSX-2011-14); Securities Exchange Act Release No. 58324 (Aug. 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01); Securities Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (March 06, 2006) (SR-NYSE-2005-77).

<sup>87</sup> See, e.g., New BGM Bylaws, Section 14.05; BGM Holdings Bylaws, Section 7.3.

<sup>88</sup> 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR-BATS-2013-059. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m. Copies of the 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 available publicly. All submissions should refer to File Number SR-BATS-2013-059, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>90</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71013; File No. SR-NASDAQ-2013-148]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November

27, 2013, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the "Charter") and By-Laws (the "By-Laws") of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX" or the "Company"). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, 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

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

##### (i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the

Charter and By-Laws<sup>3</sup> with a voting standard requiring a "majority of votes cast." The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

##### (ii) Proposed Amendments to Charter

##### (a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a "majority of outstanding shares" voting requirement. The Charter currently includes the following three supermajority voting requirements.

- *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the "Voting Stock"), voting together as a single class.

- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

- *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the

<sup>3</sup> These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

<sup>90</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.