

Proposed Rule Change by Boston Stock Exchange  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial <input checked="" type="checkbox"/>	Amendment <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input checked="" type="checkbox"/>	Section 19(b)(3)(A) <input type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action <input type="checkbox"/>		Date Expires <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters).

The Exchange proposes to establish new rules for Membership, Member Conduct, and the Listing and Trading of Cash Equity Securities.

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name  Last Name   
 Title   
 E-mail   
 Telephone  Fax

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date   
 By  Vice President  
 (Name) (Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> The Boston Stock Exchange, Incorporated (the “Exchange”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change (i) to adopt new rules governing membership, the regulatory obligations of members, listing, and equity trading, (ii) to amend its certificate of incorporation and by-laws to reflect the proposed change in the name of the Exchange to NASDAQ OMX BX, Inc., (iii) to amend and restate the Operating Agreement of BSX Group LLC (the “Operating Agreement”), which will operate the Exchange’s cash equities trading business, and which will be renamed NASDAQ OMX BX Equities LLC (“BX Equities LLC” or the “Company”), and (iv) to adopt a Delegation Agreement between the Exchange and BX Equities LLC. The text of the proposed new rules of the Exchange is attached as Exhibit 5A. The text of the proposed changes to the Exchange’s Certificate of Incorporation and By-Laws is attached as Exhibit 5B. The text of the proposed changes to the operating agreement of BSX Group LLC is attached as Exhibit 5C. The text of the proposed Delegation Agreement is attached as Exhibit 5D.

(b) and (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The Board of Directors of the Exchange approved the provisions of the proposed rule change contained in Exhibit 5A and Exhibit 5B on October 28, 2008, and October 7, 2008, respectively. The sole stockholder of the Exchange approved the provisions of the

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

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

proposed rule change contained in Exhibit 5B on November 3, 2008. The Board of Directors of the Exchange and the Board of Directors of BSX Group LLC must approve the provisions of the proposed rule change contained in Exhibits 5C and 5D. Once such approvals have been obtained, the Exchange will file a technical amendment to this proposed rule change to reflect such approvals, and no further action by the Exchange in connection with this proposed rule change will be required. The Exchange proposes to implement the proposed rule change as soon as practicable following Commission approval.

Questions regarding this rule filing may be directed to John Yetter at (301) 978-8497 (telephone) or (301) 978-8472 (fax) or John Katovich at (617) 235-2023 (telephone) or (617) 235-2355 (fax).

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

a. Purpose

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). At the time of this acquisition, the Exchange was not operating a venue for trading cash equities. The Exchange is now proposing to adopt a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equity trading. The new rules, which will be referred to as the "Equity Rules," will be based to a substantial extent on the rules of The NASDAQ Stock Market LLC (the "NASDAQ Exchange"). As is the case with the NASDAQ Exchange, administration and enforcement of many of the rules will be supported by the Financial Industry Regulatory Authority, Inc. ("FINRA") through a regulatory services agreement (the "FINRA Regulatory Contract"). Other rules, such as listing rules, will be

administered by personnel who will be dually employed by the Exchange and the NASDAQ Exchange, or solely by the Exchange.

The Exchange's existing rules are divided between the rules currently denominated as the "Rules of the Board of Governors" and the "Rules of the Boston Options Exchange Group LLC" (the "BOX Rules"). The BOX Rules, and certain of the Rules of the Board of Governors that are cross-referenced in the BOX Rules, currently govern trading on the Exchange's Boston Options Exchange facility ("BOX"). The cross-referenced Rules of the Board of Governors will be referred to herein as the "Grandfathered Rules," and the BOX Rules, together with the Grandfathered Rules, will be referred to as the "Options Rules." The Options Rules, together with the Equity Rules, will be referred to as the "Rules of the Exchange." The Exchange is currently preparing a separate proposed rule change to update the Grandfathered Rules in light of their more limited applicability and to reflect changes in the Exchange's operations and corporate form.

At present, a broker-dealer that is authorized for trading on BOX (an "Options Participant") is not required to become a member of the Exchange, but is nevertheless subject to Options Rules as if it were a member.<sup>3</sup> Under the new proposed Rules of the Exchange, this principal will continue to apply. Thus, the Equity Rules will apply to members, which will be authorized to engage in equity trading on the Exchange, and the Options Rules will apply to Options Participants, which will be authorized to engage in options trading. If a member opts to become an Options Participant (or vice versa), it will be subject to both sets of rules. Members must comply with the application

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<sup>3</sup> See Chapter 1, Section 2 of the BOX Rules.

requirements of the Option Rules in order to become Options Participants, and conversely, Options Participants must comply with the membership application procedures of the Equity Rules in order to become members and engage in equity trading.<sup>4</sup>

## **Equity Rules**

### 0100 Series

The 0100 Series Equity Rules contain general provisions, including definitions of general applicability. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 0120 includes definitions for “Rules of the Exchange”, “Equity Rules”, “Options Rules”, “Grandfathered Rules”, “Options Participant”, and “BOX” consistent with the definitions described above. The rule also defines “BOXR” to mean “Boston Options Exchange Regulation, LLC”, a subsidiary of the Exchange that will continue to regulate BOX under the existing Plan of Delegation of Functions and Authority by the Boston Stock Exchange, Inc., to Boston Options Exchange Regulation, LLC (the “Delegation Plan”), and defines “BOX LLC” to mean Boston Options Exchange Regulation, LLC, the entity that operates BOX.
- As described in greater detail below, the Exchange will operate its cash equities trading business, to be named the NASDAQ OMX BX Equities Market, through BX Equities LLC, and will adopt a Delegation Agreement between the Exchange and BX Equities LLC. Accordingly, Equity Rule 0120 contains definitions of

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<sup>4</sup> See Equity Rules 1013 and 1014; Chapter II of the BOX Rules.

“NASDAQ OMX BX Equities Market”, “NASDAQ OMX BX Equities LLC”, and “Delegation Agreement”.

- Equity Rule 0115 provides that the Equity Rules apply to all members and their associated persons, while the Options Rules apply to all Options Participants. The Equity Rules shall apply to Options Participants only if they are also members of the Exchange.
- Equity Rule 0160 references the Delegation Plan and the Delegation Agreement and states that the staff, books, records and premises of BOXR and BX Equities LLC are the staff, books, records and premises of the Exchange subject to oversight pursuant to the Act, and all officers, directors, employees and agents of BOXR are the officers, directors, employees and agents of the Exchange for purposes of the Act.<sup>5</sup>

#### 1000 Series

The 1000 Series Equity Rules contain rules governing membership. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 1002(f) provides that a registered broker-dealer that was a member organization in good standing of the Exchange on the date immediately prior to the acquisition of the Exchange by NASDAQ OMX (a “Continuing Member”) is eligible for continued membership in the Exchange if it continues to satisfy the membership requirements adopted in the Equity Rule 1000 Series. Specifically,

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<sup>5</sup> As described below, BX Equities LLC will have no directors, so the reference to directors is omitted with respect to that entity.

the Continuing Member must sign a revised membership agreement and maintain registrations of its associated persons as required under the Equity Rules.

Associated persons already registered with the Exchange will likewise be eligible for continued registration if they satisfy the requirements under the Equity Rules.

Unlike members in the Exchange prior to the NASDAQ OMX acquisition, members under the Equity Rules do not possess an ownership interest in the Exchange.

- In order to ensure that Continuing Members are not subjected to registration requirements that did not previously exist under the Rules of the Exchange, Equity Rules 1022 and 1032 adopt only those categories of principal registration and representative registration that previously existed and that will be relevant to the future operations of the Exchange. As a result, the Exchange will not be adopting the categories of Limited Principal – Introducing Broker/Dealer Financial and Operations; Limited Principal – Investment Company and Variable Contracts Products; Limited Representative – Investment Company and Variable Contracts Products; Limited Representative – Corporate Securities; Limited Representative – Equity Trader; Assistant Representative – Order Processing; United Kingdom – Limited General Securities Registered Representative; and Canada – Limited General Securities Registered Representative. Similarly, under the Equity Rules, the Exchange is not adopting the categories of Member Exchange and Floor Employee, which were previously recognized by the Exchange, as these categories will no longer be relevant to Exchange operations.



- Because of the similarity between the proposed Equity Rules and both NASDAQ Exchange Rules and FINRA Rules, Equity Rule 1013(a)(5)(C) provides that an approved member of FINRA or the NASDAQ Exchange may apply to become an Exchange member and register with the Exchange all associated persons whose registrations are approved with FINRA or the NASDAQ Exchange (as applicable) in categories of registration recognized by the Exchange through an expedited process by submitting a Short Form Membership Application and Agreement. NASDAQ Exchange Rule 1013 provides for a comparable process for FINRA members becoming NASDAQ Exchange members.

#### 2000 and 3000 Series

The Equity Rule 2000 Series establishes business conduct rules applicable to members, and the Equity Rule 3000 Series establishes the responsibilities of associated persons and employees of members. In each case, they are substantively identical to the comparable rules of the NASDAQ Exchange. The Exchange is, however, amplifying the regulatory requirements applicable to index warrants, currency index warrants, and currency warrants contained in the Equity Rule 2480 Series, and expects the NASDAQ Exchange to adopt a conforming rule change.

#### 4000 Series

The Equity Rule 4000 Series contains marketplace rules governing listing and trading of cash equities on the Exchange.

#### *Listing Rules*

The proposed listing standards for the Exchange are based on the standards of the NASDAQ Exchange. The NASDAQ Exchange, however, has three listing tiers – the

Nasdaq Capital Market, the Nasdaq Global Market, and the Nasdaq Global Select Market – with progressively higher listing standards applicable at each tier. In contrast, the Exchange will have only one listing tier, with listing standards for primary and secondary classes of common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, American Depositary Receipts (“ADRs”), and limited partnership interests that are substantively identical to those of the Nasdaq Capital Market, the tier with the most permissive listing standards.<sup>6</sup> The standards for initial and continued listing of these securities are set forth in the Equity Rule 4300 Series. In addition, the Exchange will adopt, in Equity Rules 4420 and 4450, initial and continued listing standards for Selected Equity-linked Debt Securities (“SEEDS”), units, index warrants, portfolio depository receipts, index fund shares, trust issued receipts, linked securities, managed fund shares, and “other securities” that are substantively identical to those of the NASDAQ Global Market, because the Nasdaq Capital Market does not have standards applicable to any of these securities other than units.<sup>7</sup> Provisions of NASDAQ Rules 4420 and 4450 that establish higher initial and

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<sup>6</sup> The Exchange notes, however, that securities listed on the Nasdaq Capital Market are “covered securities” for purposes of Section 18 of the Securities Act of 1933 (the “Securities Act”), and are therefore exempted from State law registration requirements. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2008) (File No. S7-18-06). Accordingly, following adoption of these Rules, the Exchange expects to petition the Commission to amend Rule 146 under the Securities Act for purposes of recognizing securities listed on the Exchange as covered securities.

<sup>7</sup> The Exchange’s proposed listing standards for units combine elements of the standards of the Nasdaq Capital Market and the Nasdaq Global Market, in that they require the equity component of a unit to satisfy standards equivalent to Nasdaq Capital Market standards but allow the inclusion of a debt component that is not itself eligible for listing but that meets the requirements of Rule 4420(h)(1)(B).

continued listing standards for common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, ADRs, and limited partnership interests seeking inclusion on the NASDAQ Global Market are omitted and replaced with a reference back to the Equity Rule 4300 Series, where the standards for such securities are found. In addition, the listing standards for SEEDS and “other securities” differ slightly from the comparable NASDAQ Exchange standards, in that they require issuers of securities listed thereunder to be eligible for listing on the NASDAQ Exchange or NYSE or to be affiliates of companies that are so eligible, rather than being required to be actually so listed. This difference recognizes the fact that an issuer seeking to list a SEED or “other security” on the Exchange would not necessarily also have a security listed on the NASDAQ Exchange or NYSE, but it would nevertheless be required to demonstrate ability to meet such other listing standards before listing the SEED or “other security.” Finally, NASDAQ Rules 4426 and 4427, which establish standards for NASDAQ’s Global Select Market tier, are omitted in their entirety.<sup>8</sup>

#### *Trading System Rules*

The Exchange’s system for trading cash equities, designated in the Equity Rules as the “NASDAQ OMX BX Equities Market” or the “System”, will operate using NASDAQ OMX’s INET technology, in accordance with rules based to a significant extent on the rules of the Nasdaq Market Center. As a result, the NASDAQ OMX BX Equities Market will feature an electronic central limit order book, with executions

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<sup>8</sup> The Rule 4600 Series is being reserved for the Exchange’s listing fees, which will be included in a separate filing.

occurring in price/time priority (but with displayed orders receiving priority over non-displayed orders). The differences between the two systems will be as follows:

- The NASDAQ OMX BX Equities Market will operate from 8:00 a.m. to 7:00 p.m. Eastern Time (rather than from 7:00 a.m. to 8:00 p.m.). As with the Nasdaq Market Center, regular market hours will be from 9:30 a.m. to 4:00 p.m. (or 4:15 p.m. for any exchange-traded funds that may be so designated by the Exchange).
- The NASDAQ OMX BX Equities Market will not operate an opening cross, a closing cross, or a halt cross. The NASDAQ OMX BX Equities Market will begin to process all eligible Quotes/Orders at 8:00 a.m., adding in time priority all eligible Orders in accordance with each order's defined characteristics. All trades executed prior to 9:30 will be automatically appended with the ".T" modifier. The official opening price for a security listed on the Exchange will be the price of the first trade executed at or after 9:30 a.m. and the official closing price will be the price of the last trade executed at or prior to 4:00 p.m.
- Quoting Market Participants may instruct the Exchange to open their Quotes at 9:25 a.m. at a price of \$0.01 (bid) and \$999,999 (offer) and a size of one round lot in order to provide a two-sided quotation. In all other cases, the quote of a participant will be at the price and size entered by the participant.
- If trading of a security is halted under Equity Rule 4120, the security will be released for trading at a time announced to market participants by the Exchange. Because the Exchange will not have a halt cross, provisions of NASDAQ Rule 4120 relating to a Display Only Period prior to the execution of the halt cross have been omitted.

- The Exchange’s quotation and trade reporting information is disseminated under the Consolidated Quotation Plan (“CQ Plan”) and Consolidated Tape Association Plan (“CTA Plan”), rather than the Nasdaq UTP Plan. Accordingly, the NASDAQ Exchange’s IM-4390, which relates to securities dually listed on the New York Stock Exchange (“NYSE”) and the NASDAQ Exchange is not included in the Equity Rules, since a security listed on the Exchange and NYSE would automatically be included in the CQ Plan and the CTA Plan by virtue of either of its listings.
- Provisions of Rules of the NASDAQ Exchange relating to passive market making under Rule 103 of Regulation M under the Act<sup>9</sup> are being omitted since that rule does not apply to any other exchange, even if it adopts a similar market structure.
- Equity Rule 4620 provides that an Exchange Market Maker that terminates its registration in a security listed on the Exchange may not re-register as a market maker in that security for a period of twenty business days, with a one-day exclusion period for all other securities. The comparable NASDAQ Exchange rule provides for an exclusion period of twenty days for securities listed on the NASDAQ Exchange and one day for all other securities.
- In contrast to the NASDAQ Exchange, the Exchange will not support discretionary orders, orders with a “market hours” time-in-force designation (with the exception of “market hours day” orders), or orders with a “system hours good till cancelled” time-in-force designation.

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<sup>9</sup> 17 C.F.R. 242.103.

- The Exchange will not support an automatic quotation refresh functionality. Thus, market makers will be required to maintain continuous two-sided quotations without the assistance of the functionality. In addition, the Exchange will not allow market participants to maintain quotes or orders on the book overnight; rather, all quotes and orders will be cancelled at the end of the trading day and must be re-entered, if market participants so desire, the following day. Accordingly, the Exchange will not have a rule such as NASDAQ Exchange Rule 4761, which provides for overnight adjustment of open quotes and orders to reflect corporate events such as dividends and splits. The Exchange believes that these differences will reduce burdens on Exchange system resources, and that market participants will be able to maintain comparable functionality using their own systems if they wish.
- The Exchange will not route orders to other market centers. Rather, to ensure the Exchange's compliance with Regulation NMS, Equity Rule 4755 provides that in addition to such other designations as may be chosen by a market participant,<sup>10</sup> all orders that are not entered with a time in force of "System Hours Immediate or Cancel"<sup>11</sup> must be designated as an Intermarket Sweep Order, a Pegged Order, a Price to Comply Order, or a Price to Comply Post Order, and all orders will be

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<sup>10</sup> As is the case with the NASDAQ Exchange, different order designations can be combined. Thus, for example, a Price to Comply Order could be entered with reserve size or as a non-displayed order.

<sup>11</sup> A "System Hours Immediate or Cancel" order is an immediate or cancel order that may be entered between 8:00 a.m. and 7:00 p.m. Eastern Time, the hours of operation of the NASDAQ OMX BX Equities Market. If a System Hours Immediate or Cancel order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) is canceled and returned to the entering Participant.

processed in a manner that avoids trading through protected quotations and avoids locked and crossed markets.

- A System Hours Immediate or Cancel Order is compliant with Regulation NMS because it will not, by its terms, execute or post at a price that would result in a trade-through of a protected quotation or lock or cross another market.
- A Pegged Order is compliant with Regulation NMS because it is continually re-priced to avoid locking or crossing.
- In entering an Intermarket Sweep Order, the market participant represents that it is simultaneously routing one or more additional limit orders, as necessary, to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS) in the case of a limit order to sell or buy with a price that is superior to the limit price of the order identified as an Intermarket Sweep Order. These additional routed orders must also be identified as Intermarket Sweep Orders. As provided by Regulation NMS, the Exchange will automatically execute orders identified as Intermarket Sweep Orders. Members will be responsible for ensuring that their use of Intermarket Sweep Orders complies with Regulation NMS, and the Exchange's T+1 surveillance program will monitor members' use of Intermarket Sweep Orders.
- If, at the time of entry, a Price to Comply Order would lock or cross the quotation of an external market, the order will be priced to the current low offer (for bids) or to the current best bid (for offers) but displayed at a

price one minimum price increment lower than the offer (for bids) or higher than the bid (for offers). Thus, an incoming order priced to execute against the displayed price will receive the superior undisplayed price.<sup>12</sup>

The displayed and undisplayed prices of a Price to Comply order may be adjusted once or multiple times depending upon the method of order entry and changes to the prevailing national best bid/best offer.

- If, at the time of entry, a Price to Comply Post Order would lock or cross the protected quote of an external market or would cause an Order Protection Rule violation, the order will be re-priced and displayed to one minimum price increment (i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or to one penny above the current best bid (for offers).<sup>13</sup>

By requiring all orders to be entered with one of these designations, the Exchange will ensure that all orders will either be priced or cancelled in a manner consistent with avoidance of trade-throughs and locked and crossed markets, or will execute as Intermarket Sweep Orders along with other Intermarket Sweep Orders sent to protected quotes. Because the Exchange will not route to other market centers, its policies and procedures under Rule 611(a) under Regulation NMS will

contemplate reliance on information provided by the NASDAQ Exchange for

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<sup>12</sup> For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply order to buy 10,000 shares at \$10.01, the order will display at \$9.99, but will reside on the System book at \$10.00. If a seller then enters an order at \$9.99, it will execute at \$10.00, up to the full 10,000 shares of the order.

<sup>13</sup> For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply post order to buy at \$10.01, the order will be repriced and displayed at \$9.99. If a seller enters an order at \$9.99, it will execute at that price.



purposes of determining whether another trading center is experiencing a failure, material delay, or malfunction of its systems or equipment within the meaning of Rule 611(b)(1).

*Affiliation with NASDAQ Execution Services, LLC*

Although the Exchange will not route to other market centers, the Exchange will receive orders routed to it by other market centers, including the NASDAQ Exchange. Nasdaq Execution Services, LLC (“NES”) is the approved outbound routing facility of the NASDAQ Exchange for cash equities. Rules 4751 and 4758 of the NASDAQ Exchange establish the conditions under which the NASDAQ Exchange is permitted to own and operate NES in its capacity as a facility of the NASDAQ Exchange that routes orders from the NASDAQ Exchange to other market centers. These conditions include requirements that: (1) NES is operated and regulated as a facility of the NASDAQ Exchange; (2) NES will not engage in any business other than as an outbound router for the NASDAQ Exchange and any other activities as approved by the Commission;<sup>14</sup> (3) the primary regulatory responsibility for NES lies with an unaffiliated self-regulatory organization; (4) use of NES for outbound routing is optional for other NASDAQ Exchange members; and (5) the NASDAQ Exchange will not route orders to an affiliated exchange, such as the Exchange, unless they check the NASDAQ Exchange book prior to routing.

In connection with the Exchange’s resumption of equity trading pursuant to this filing, the NASDAQ Exchange will file a proposed rule change to modify the last of

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<sup>14</sup> Because only NASDAQ Exchange members may enter orders into the NASDAQ Exchange, it also follows that routing by NES is conducted only with respect to orders of NASDAQ Exchange members.

these conditions to allow it to route all forms of orders, including Directed Orders, to the Exchange on a one-year pilot basis. Directed Orders are orders that route directly to other exchanges on an immediate-or-cancel basis without first checking the NASDAQ Exchange book for available liquidity. In order to appropriately address concerns previously raised by the Commission regarding the potential for conflicts of interest and informational advantages that may arise from the use of affiliated members to route orders between exchanges owned by a common parent, the Exchange is proposing certain restrictions and undertakings.

In order to manage the concerns raised by the Commission regarding conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange notes that, with respect to orders routed to the Exchange by NES in its capacity as a facility of the NASDAQ Exchange, NES is subject to independent oversight and enforcement by FINRA, an unaffiliated SRO that is NES's designated examining authority. In this capacity, FINRA is responsible for examining NES with respect to its books and records and capital obligations and also has the responsibility for reviewing NES's compliance with intermarket trading rules such as SEC Regulation NMS. In addition, the Exchange intends to enter into a regulatory services agreement with FINRA as well as an agreement with FINRA pursuant to the provisions of Rule 17d-2 under the Act,<sup>15</sup> under which FINRA staff will review NES's compliance with the Exchange's rules through FINRA's examination program. FINRA

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<sup>15</sup> 17 CFR 240.17d-2.

and the Exchange<sup>16</sup> will also monitor NES for compliance with the Exchange's trading rules, subject, of course, to SEC oversight of the regulatory program of the Exchange and FINRA. The Exchange will, however, retain ultimate responsibility for enforcing its rules with respect to NES except to the extent that they are covered by an agreement with FINRA pursuant to Rule 17d-2, in which case regulatory responsibility will be allocated to FINRA as provided in Rule 17d-2(d).

Furthermore, in order to minimize the potential for conflicts of interest, the Exchange and FINRA will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the NASDAQ Exchange, routing orders to the Exchange) is identified as a participant that has potentially violated applicable SEC or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the SEC's Office of Compliance Inspections and Examinations. FINRA will then provide a report to the Exchange's Chief Regulatory Officer, on at least a quarterly basis, which (i) quantifies all alerts (of which the Exchange and FINRA become aware) that identify NES as a participant that has potentially violated Exchange or SEC rules and (ii) quantifies the number of all investigations that identify NES as a participant that has potentially violated Exchange or SEC rules.<sup>17</sup>

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<sup>16</sup> Employees of the Exchange performing real-time oversight of equity trading may also be employed by the NASDAQ Exchange to perform similar functions with respect to its rules.

<sup>17</sup> The Exchange, FINRA, and SEC staff may agree going forward to reduce the number of applicable or relevant surveillances that form the scope of the agreed upon report.

In order to address the Commission's concerns about potential for information advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members, the Exchange is proposing Rule 2140(c). Rule 2140(c) will require the implementation of policies and procedures that are reasonably designed to prevent NES from acting on non-public information regarding Exchange systems prior to the time that such information is made available generally to all members of such entity performing inbound routing functions. These policies and procedures would include systems development protocols to facilitate an audit of the efficacy of these policies and procedures.

Specifically, new Rule 2140(c) shall provide as follows:

The NASDAQ OMX Group, Inc., which is the holding company owning both the Exchange and NASDAQ Execution Services, LLC, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound routing to the Exchange.

In addition, the NASDAQ Exchange, in its filing regarding routing to the Exchange, will amend Rule 4758 to provide that NES will establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities (including the NES), and any other entity (including the Exchange). The Exchange believes these measures will effectively address the concerns identified by the Commission regarding the potential for informational advantages favoring NES vis-à-vis other non-affiliated Exchange members.

5000, 6000, and 8000 Series

As with the NASDAQ Exchange Rules, the Equity Rule 5000 Series will be reserved for future use. The Equity Rule 8000 Series governs investigations and sanctions of members by the Exchange, and is substantively identical to the comparable rules of the NASDAQ Exchange. The Equity Rule 6000 Series contains rules implementing a version of the Order Audit Trail System (“OATS”) for the Exchange. The Exchange believes that as an affiliate of the NASDAQ Exchange, it should ensure that its regulatory requirements are generally consistent with those of the NASDAQ Exchange. As provided in NASDAQ Exchange rules, Exchange members that are also FINRA members must comply with the FINRA OATS rules requiring daily reporting of audit trail information for transactions in securities listed on the NASDAQ Exchange. In addition, as provided in NASDAQ Exchange rules, Exchange members that are not FINRA members must compile and maintain audit trail information for securities listed on the NASDAQ Exchange, but are required to transmit this information to FINRA only if requested. Similarly, the Exchange will require all members to maintain audit trail information for securities listed on the Exchange, and to transmit the information to FINRA upon request, but will not require daily OATS reporting for securities listed on the Exchange.<sup>18</sup> As is true with respect to the NASDAQ Exchange, OATS data will be used by the Exchange for regulatory purposes only.<sup>19</sup>

#### 9000 Series

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<sup>18</sup> The Rule 7000 Series is reserved for the Exchange’s fees other than listing fees, which will be included in a separate filing.

<sup>19</sup> See Securities Exchange Act Release No. 53128 (January 13, 2006); 71 FR 3350 (January 23, 2006) (File No. 10-131).

The 9000 Series governs procedures for disciplinary proceedings against members and associated persons. The sole substantive difference between these rules and the corresponding NASDAQ Exchange rules pertains to the permissible composition of a Hearing Panel authorized to hear cases under the rule series. Under NASDAQ Exchange rules, a hearing panel is composed of a Hearing Office and two Panelists. Panelist may be drawn from a pool consisting of persons who previously served on the Nasdaq Review Council (the “appellate body” that reviews disciplinary matters) or a subcommittee thereof; previously served as a director of the NASDAQ Exchange; previously served on FINRA’s National Adjudicatory Council or a subcommittee thereof prior to the date that the NASDAQ Exchange commenced operating as a national securities exchange; or currently serves or previously, within the past four years, served on the NASDAQ Exchange Market Regulation Committee. Under NASDAQ Exchange rules, however, current and former members of the Market Regulation Committee may serve on a Panel only if the case involves quotations of securities, execution of transactions, reporting of transactions, or trading practices.

The Exchange’s rules regarding Hearing Panel composition will allow Panelists to be drawn from a pool consisting of persons who previously served on the Exchange Review Council, the appellate body comparable to the Nasdaq Review Council or a subcommittee thereof; previously served as a director of the Exchange or as a Governor of the exchange prior to its acquisition by NASDAQ OMX; or currently serves or previously, within the past four years, served on the Exchange’s Market Regulation Committee. Former members of the FINRA National Adjudicatory Council would not be eligible for service on a Panel, however, since that aspect of the NASDAQ Exchange’s

rules is a function of the NASDAQ Exchange's genesis as a subsidiary of the National Association of Securities Dealers, FINRA's predecessor. However, to ensure that there is an adequate supply of Panelists available to hear cases under the 9000 Series rules, the Exchange will not limit the types of cases that may be heard by Panelists currently or previously serving on the Exchange's Market Regulation Committee. The absence of this limitation is reflected in Equity Rules 9212, 9221, 9231, and 9232, all of which differ from corresponding NASDAQ Exchange rules in this respect.

The 9000 Series also contains, in IM-9216, a list of rules being added to the Exchange's Minor Rule Violation Plan. These are in addition to the existing provisions of the Plan, as described in Chapter X of the Options Rules and Chapter XXXIV of the Grandfathered Rules, which remains in effect with respect to BOX.

#### 10000 Series

The Equity Rule 10000 Series incorporates by reference the NASD Code of Arbitration Procedure for Customer Disputes and the NASD Code of Arbitration Procedure for Industry Disputes. The Exchange's arbitration program will be administered by FINRA under the FINRA Regulatory Contract. The Equity Rule 10000 Series is substantively identical to the corresponding rules of the NASDAQ Exchange.

#### 11000 Series

The Equity Rule 11000 Series adopts the Uniform Practice Code as rules of the Exchange, and is substantively identical to the corresponding NASDAQ Exchange rules. Exchange Rule 11890 governs nullification and modification of clearly erroneous transactions on the Exchange, and is generally consistent with the corresponding NASDAQ Exchange rule. Trades in securities listed on the Exchange will be adjudicated

under the standards applicable to NASDAQ Exchange-listed securities under that rule. In addition, language in the rule pertaining to trades occurring in the closing or opening crosses is omitted, since the Exchange will not be operating crossing sessions.

### **Certificate and By-Laws**

The Exchange proposes to amend its Certificate of Incorporation and By-Laws to adopt NASDAQ OMX BX, Inc. as the new name of the Exchange.

### **NASDAQ OMX BX Equities LLC**

The Exchange will operate the NASDAQ OMX BX Equities Market through BSX Group LLC, the same entity that operated the Exchange's cash equities trading business prior to the acquisition of the Exchange by NASDAQ OMX. However, to reflect the limited liability company's status as a closely held subsidiary of the Exchange, whose only members are the Exchange and the Exchange's parent corporation, NASDAQ OMX, the Exchange proposes to amend and restate the Operating Agreement to vest management rights directly in the Exchange, rather than in a Board of Directors. The model for this corporate form is The NASDAQ Options Market LLC, which operates the NASDAQ Options Market as a subsidiary of the NASDAQ Exchange, but with management rights vested in the NASDAQ Exchange. The Exchange also proposes to change the name of the entity from BSX Group LLC to NASDAQ OMX BX Equities LLC. Although NASDAQ OMX will remain a Member of the Company to avoid certain adverse tax consequences that would be associated with contributing its ownership interest to the Exchange, the amendments to the Operating Agreement will leave it with no direct management role in the operation of the entity, with the exception of its role as "tax matters member" under Sections 10.9 and 12.6 and in the definition of "Capital



Account,” and its limited rights with regard to dissolution of the entity under Article 11 and capital contributions under Section 7.4.

In addition, and also in keeping with the model established by the NASDAQ Exchange and the NASDAQ Options Market LLC, the Exchange and BX Equities LLC will enter into a Delegation Agreement, under which the Exchange will delegate certain authority to BX Equities LLC, and BX Equities LLC will agree to abide by certain regulatory requirements. The Delegation Agreement is described in greater detail below.

BX Equities LLC will be an extension of the Exchange, and the NASDAQ OMX BX Equities Market and BX Equities LLC will be subject to self-regulation by the Exchange and oversight by the Commission. As a facility of the Exchange, the NASDAQ OMX BX Equities Market will be subject to the Exchange’s self-regulatory organization functions and the Exchange will have regulatory responsibility for the activities of the NASDAQ OMX BX Equities Market. The Exchange represents that it has the ability to discharge all regulatory functions related to the facility that it has undertaken to perform by virtue of operating the NASDAQ OMX BX Equities Market as a facility of the Exchange.

The amended and restated Operating Agreement for BX Equities LLC contains provisions relating to the governance of the Company that will ensure that the Exchange has authority over the Company to fulfill the Exchange’s responsibility for all regulatory functions related to the NASDAQ OMX BX Equities Market. Thus, this rule filing is intended to establish that the Exchange’s corporate and self-regulatory structures along with the proposed structure of BX Equities LLC as a controlled subsidiary of the Exchange are sufficient to ensure that BX Equities LLC and the NASDAQ OMX BX

Equities Market will be operated and regulated in a manner that is consistent with the Act.

#### Corporate Structure

The Commission, in approving the Exchange's amended and restated Certificate of Incorporation and By-Laws in connection with its acquisition by NASDAQ OMX, determined that the Exchange's current structure and self-regulatory functions are adequately designed to ensure the completeness and independence of regulation of the Exchange.<sup>20</sup> NASDAQ OMX is currently organized as a holding company with multiple subsidiaries, including the Exchange and the NASDAQ Exchange. Although NASDAQ OMX does not itself carry out regulatory functions, its activities with respect to the operation of the Exchange were designed to be consistent with, and not interfere with, the Exchange's self-regulatory obligations. Thus, NASDAQ OMX's corporate documents include provisions that maintain the independence of the Exchange's self-regulatory function from NASDAQ OMX, enable the Exchange to operate in a manner that complies with the federal securities laws, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

For example, NASDAQ OMX submitted to the Commission's jurisdiction with respect to activities relating to the Exchange, and agreed to provide the Commission with access to its books and records. NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function of the Exchange and not to use such information for any non-regulatory purpose. In addition, the board of directors of NASDAQ OMX, as well as its officers, employees, and agents are required to give due

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<sup>20</sup> Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; -23; -25; SR-BSECC-2008-01).

regard to the preservation of the independence of the Exchange's self-regulatory function. NASDAQ OMX's By-Laws require that any changes to the NASDAQ OMX Certificate of Incorporation or By-Laws be submitted to the Board of Directors of the Exchange ("Exchange Board"), and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

NASDAQ OMX's Certificate of Incorporation imposes limits on direct and indirect changes in control, which prevent any stockholder from exercising undue control over the operation of the Exchange. Specifically, no person who beneficially owns NASDAQ OMX common stock or other voting securities in excess of five percent of the total outstanding voting securities may vote the excess shares. The Exchange's rules also prohibit Exchange members and persons associated with Exchange members from beneficially owning more than twenty percent of the then-outstanding voting securities of NASDAQ OMX. These rules prevent a member that is a stockholder of NASDAQ OMX from exerting a controlling influence to direct or otherwise cause the Exchange to refrain from diligently monitoring and surveiling the member's conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that may violate such provisions.

The protections, limitations, and requirements provided by the structure established in NASDAQ OMX's governing documents will continue to exist and, under this proposal, will apply with equal force to BX Equities LLC as a facility and subsidiary of the Exchange. Moreover, Commission approval would be required in order to modify the protections provided by NASDAQ OMX's governing documents.

In addition to protections contained in the NASDAQ OMX structure, the Exchange structure also provides protections via the composition of its Board of Directors, Board Committees, and several regulatory structures. Under the Exchange's By-Laws, twenty percent of the Directors on the Exchange Board, which is the governing body of the Exchange and possesses all of the powers necessary for the execution of its responsibilities as a self-regulatory organization ("SRO"), must be "Member Representative Directors." In addition, the number of "Non-Industry Directors" must equal or exceed the sum of the number of "Industry Directors" and "Member Representative Directors." The Exchange Board must also include at least one "Public Director" and at least one Director who is representative of issuers and investors. The requirement that twenty percent of the directors be "Member Representative Directors" and the means by which they are selected by members provides for the fair representation of members in the selection of directors and the administration of the Exchange consistent with the requirement in Section 6(b)(3) of the Act.<sup>21</sup> This requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that the Exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. In the Exchange's view, the protections provided by the composition and selection of the Exchange's Board of Directors carry through to the NASDAQ OMX BX Equities Market by virtue of the fact that all of its participants will be members of the Exchange. As a result, NASDAQ OMX BX Equities Market participants will have an equal opportunity to participate in the selection of Member Representative Directors who, along with the entire Exchange Board, will have a duty to

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<sup>21</sup> 15 U.S.C. 78f(b)(3).

ensure that the NASDAQ OMX BX Equities Market is administered in a fair and equitable manner.

As Exchange members, NASDAQ OMX BX Equities Market participants will also be protected by several committees established by the Exchange's By-Laws that are composed solely of directors: an Executive Committee, a Finance Committee, a Management Compensation Committee, an Audit Committee, and a Regulatory Oversight Committee ("ROC"). In addition, the Exchange has these other committees that are not required to be composed solely of directors: the Exchange Listing and Hearing Review Committee, the Exchange Review Council (the "Review Council"), a Nominating Committee, a Member Nominating Committee, a Quality of Markets Committee, a Market Operations Review Committee, an Arbitration and Mediation Committee, and a Market Regulation Committee. The Exchange's committees enable it to carry out its responsibilities under the Act.

The ROC will play a central role in the regulation of the Exchange and its facilities. It consists of three members, each of whom must be a Public Director and "independent director" as defined by NASDAQ Exchange Rule 4200. The ROC is responsible for monitoring the adequacy and effectiveness of the Exchange's regulatory program, assessing the Exchange's regulatory performance, and assisting the Exchange Board in reviewing the Exchange's regulatory plan and the overall effectiveness of the Exchange's regulatory functions. The ROC meets with the Chief Regulatory Officer ("CRO") in executive session at regularly scheduled meetings and at any time upon request of the CRO or any member of the ROC. The ROC is informed about the CRO's compensation, promotion, or termination (including reasons). Finally, the Exchange

regulatory budget is presented to the ROC so that its members may inquire as to the adequacy of resources available for the Exchange's regulatory program. Under this proposal, the ROC and the Exchange CRO will assume responsibility for regulating quoting and trading on the NASDAQ OMX BX Equities Market and conduct by its market participants.

The Exchange's CRO has general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions. The CRO will administer the Exchange's regulatory services agreement with FINRA. Although the Exchange is an SRO with all of the attendant regulatory obligations under the Act, it has entered into the Regulatory Contract with FINRA, under which FINRA will perform certain regulatory functions on its behalf. In addition to performing certain membership functions for the Exchange, FINRA will perform certain disciplinary and enforcement functions for the Exchange. Generally, FINRA will investigate members, issue complaints, and conduct hearings pursuant to the Exchange's rules. Appeals of disciplinary hearings, however, will be handled by the Review Council. The Regulatory Contract between the Exchange and FINRA governs the Exchange and its facilities and therefore will automatically govern the NASDAQ OMX BX Equities Market and Exchange members trading on it.

Notwithstanding the Regulatory Contract, the Exchange retains ultimate legal responsibility for the regulation of its members and its market. The Exchange's By-Laws and rules provide that it has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws. The Exchange's rules also permit it to sanction members for violations of its rules and

violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member. The Exchange's rules also provide for the imposition of fines for minor rule violations in lieu of commencing disciplinary proceedings.

The Exchange's independent Regulation Department will carry out many of the Exchange's regulatory functions, including administering its membership and disciplinary rules, and is functionally separate from the Exchange's business lines. The Regulation Department includes MarketWatch, which will perform real-time intraday surveillance over the Exchange's listed companies and participants in the NASDAQ OMX BX Equities Market. More specifically, MarketWatch will oversee the complete and timely disclosure of issuers' material information to determine if a trading halt is necessary to maintain an orderly market for the release of material news. In addition, MarketWatch, through its automated detection system, will monitor the trading activity of each security and will generate a price and volume alert to aid in the assessment of unusual market activity. MarketWatch will also coordinate and execute the release of initial public offerings; administer market participants' excused withdrawal requests; and handle the clearly erroneous trade adjudication process. If MarketWatch observes any activity that may involve a violation of Commission or Exchange rules, MarketWatch will immediately refer the activity to FINRA's Market Regulation Department for further investigation and potential disciplinary action.

#### BX Equities LLC Structure

BX Equities LLC will be established as a facility of and controlled subsidiary owned and operated by the Exchange in a manner designed to extend to cash equities

trading on the NASDAQ OMX BX Equities Market each and every regulatory protection provided by the NASDAQ OMX and Exchange structures described above. BX Equities LLC is a limited liability company under the laws of the State of Delaware. BX Equities LLC will be governed by the amended and restated Operating Agreement, filed herewith. The Operating Agreement provides that the Exchange and NASDAQ OMX are the sole members of BX Equities LLC, and Articles 3 and 4 state that the Exchange shall have all powers necessary to act for BX Equities LLC, as well as to exercise all rights and powers conferred to BX Equities LLC under Delaware law. Section 4.2(b) requires BX Equities LLC and its members to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority.

By virtue of BX Equities LLC's structure as a facility of the Exchange, and the Exchange's exclusive management rights, BX Equities LLC will, by that fact, be bound by all of the regulatory obligations of its SRO-member, and it will be endowed with all of the self-regulatory protections provided by the NASDAQ OMX and Exchange governance documents. BX Equities LLC will be under the complete control and discretion of the Exchange and can act only through the action of the Exchange and its officers and directors by virtue of the fact that there will be no separate BX Equities LLC board and all BX Equities LLC officers will be officers of the Exchange. The Exchange, in turn, is governed by its By-Laws, its Exchange Board, and its Committees, as described above. All actions by BX Equities LLC that, if taken by the Exchange would require a vote of the Exchange Board, will also require a vote of the Exchange Board. Any action by BX Equities LLC that, were it taken by the Exchange would require a



proposed rule change under Section 19 of the Act, will require a proposed rule change under Section 19 of the Act.

Not only is BX Equities LLC limited to acting exclusively through the Exchange, it is also limited to acting only through officers of the Exchange. Under Article 5 of the Operating Agreement, each officer of BX Equities LLC will also be an officer of the Exchange with the same powers, obligations, and responsibilities as an officer of the Exchange. Moreover, the Operating Agreement requires BX Equities LLC officers separately to agree to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority and the provisions of the Operating Agreement. Any violation of federal securities laws by an individual officer acting in his or her capacity as a BX Equities LLC officer would also be a violation by an Exchange officer and, in both cases, such violations would be subject to Commission jurisdiction.

Each broker-dealer that participates in trading on the NASDAQ OMX BX Equities Market must be a member of the Exchange. As a result, all cash equities trading and all market participants will operate pursuant to Exchange rules, subject to Exchange regulation, and Commission oversight. The Exchange will regulate NASDAQ OMX BX Equities Market activity via a combination of structural regulation by the Exchange, the Exchange Board, the ROC, and the Exchange CRO, real-time surveillance by the Exchange, and the Regulatory Contract with FINRA.

The specific changes being made to the Operating Agreement to implement the structure described above are as follows:

- The introductory paragraphs are being amended to reflect the new names of

the Company and the Exchange, to remove language referring to the possibility of additional members becoming party to the Agreement, and to remove language describing the past history of the entity that is no longer necessary.

- Article I is being amended to remove definitions of the terms “Board”, “BSE Facilities Services Agreement”, “BeX”, “DGCL”, “Directors”, “Disclosing Member”, “Excess Units”, “Initial Funding Date”, “Member Entities”, “Member Information”, “Ownership Concentration Limit”, “Regulatory Services Provider”, “Self-Regulatory Organization”, “Senior Executive”, “Total Votes”, “Transfer”, “Transferee”, and “Transferring Member”. The Article is also being amended to add a new definition of “Officer”, to simplify the definition of “Confidential Information,” to reflect the new name of the Exchange, to reflect NASDAQ OMX’s role as the tax matters member of the Company, and to amend the definition of “Member” to clearly reflect that NASDAQ OMX and the Exchange are the sole Members of the Company.
- Article 16 and Sections 2.1, 2.8, 7.1, 18.1, and 18.6, as well as Schedules 1, 2, and 3, are being amended to reflect the new names of the Company and the Exchange.
- Section 2.2 is amended to provide that the Exchange may determine the principal place of business of the Company.
- Articles 6, 15, and 16 and Sections 2.2, 2.4, 2.5, 2.8, 7.3, 7.4, 7.5, 7.6, 9.1, 9.2, 11.1, 12.1, 12.2, 14.1, 18.1 are amended to reflect that management authority is vested in the Exchange directly, rather than in a Board of Directors.

- Section 2.8(e) is being amended to stipulate that the legend printed on certificates representing ownership interests in the Company must include language stating that the interests may not be sold, assigned or transferred unless such sale, assignment or transfer has been filed with and approved by the Commission under Section 19 of the Act<sup>22</sup> and the rules promulgated thereunder.
- Articles 3, 4, and 5 are being amended in their entirety to adopt language drawn from LLC Agreement of The NASDAQ Options Market LLC. The effect of the language is to place management authority directly in the Exchange. As a result, provisions relating to the current governance structure of the entity are being removed. Moreover, because BX Equities LLC will be operated directly by the Exchange, references to the BSE Facilities Services Agreement formerly in place between the Exchange and BSX Group LLC are being deleted. The new provisions include language stating that:
  - BX Equities LLC's purposes include (i) supporting the operation, regulation, and surveillance of a cash equities exchange, (ii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removing impediments to and perfecting the mechanisms of a free and open market and a national market system, and, in general,

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15 U.S.C. 78s.

protecting investors and the public interest, (iii) supporting the various elements of the national market system pursuant to Section 11A of the Act and the rules thereunder, (iv) fulfilling self-regulatory responsibilities, and (v) supporting such other initiatives as the Members may deem appropriate.

- BX Equities LLC and its Members shall comply with the federal securities laws and the rules and regulations thereunder; shall cooperate with the SEC and the Exchange pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with BX Equities LLC's ability: 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.
- All persons appointed as officers of the Company must also be officers of the Exchange. Each officer shall comply with the federal securities laws of the United States and the rules and regulations thereunder; shall cooperate with the SEC pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with the Company's ability:

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.

- Article 8 and Section 7.3 are being amended to stipulate that the Members may not transfer membership Units, and BX Equities LLC may not issue additional Units, without the approval of the SEC pursuant to Section 19 of the Act<sup>23</sup> and the rules promulgated thereunder. Because any transfer or dilution would require direct SEC approval, the more complex provisions of Article 8 relating to transfers, ownership concentration limits, and voting limits are being deleted as unnecessary.
- Article 11 is being amended to make provisions relating to dissolution of the Company more consistent with comparable provisions in the LLC Agreement of The NASDAQ Options Market LLC.
- Section 12.3 is being amended to make the fiscal year of the Company consistent with that of NASDAQ OMX.
- Article 14 and Sections 7.5, 18.1 and 18.10 (redesignated as Section 18.8) are being amended to remove references to “Related Agreements” that were

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<sup>23</sup> 15 U.S.C. 78s.

formerly in place between the Exchange and BSX Group LLC but that are unnecessary due to the Exchange's direct rights to manage the Company.

- Article 15 is being deleted as unnecessary in light of, and in some respects inconsistent with, the Exchange's direct management authority.
- Most of Article 16 and all of Article 17 are being deleted, because specific restrictions on intellectual property and use of confidential information are unnecessary in the context of a closely held entity such as BX Equities LLC. However, current Section 16.7 (redesignated as Article 16), which relates to confidential regulatory information, is being retained. Similarly, Section 18.8 is being deleted as unnecessary in the context of a closely held subsidiary.
- Sections 18.6 and 18.12 (redesignated as 18.10) are being amended to make changes to conform to changes made elsewhere in the Operating Agreement.
- Schedule 3 is being amended to eliminate representations and warranties and covenants that are unnecessary in light of BX Equities LLC's status as a closely held subsidiary, and to make conforming changes. In light of the proposal to operate the NASDAQ OMX BX Equities Market through BX Equities LLC, however, the provisions describing the Exchange's capital contribution to BX Equities LLC are substantively unchanged. Schedule 4, which described the BSE Facility Services Agreement, is being deleted, in light of the proposal to adopt a Delegation Agreement as described below.

### **Delegation Agreement**

The Exchange intends to delegate to BX Equities LLC certain limited responsibilities and obligations solely with respect to the operation of a cash equities

trading facility pursuant to a Delegation Agreement. The delegation is limited to the Exchange's cash equities market functions and does not include other functions not specifically mentioned in the limited delegation.

Specifically, the Exchange will delegate performance of the following functions to BX Equities LLC pursuant to the Delegation Agreement:

1. To operate the NASDAQ OMX BX Equities Market, including automated systems supporting it.
2. To provide and maintain a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions in cash equities.
3. To act as a Securities Information Processor for quotations and transaction information related to securities traded on the NASDAQ OMX BX Equities Market and any trading facilities operated by BX Equities LLC.
4. To administer the participation of the Exchange in the National Market System plans governing the quoting, trading, and regulation of cash equities and Commission regulations related thereto.
5. To collect, process, consolidate and provide to the Exchange accurate information requisite to operation of a surveillance audit trail for the quoting and trading of cash equities.
6. To establish and assess access fees, transaction fees, market data fees and other fees for the products and services offered by BX Equities LLC.
7. To develop, adopt and administer rules governing participation in the NASDAQ OMX BX Equities Market.
8. To refer to the Exchange any complaints of a regulatory nature involving potential rule violations by member organizations or employees.
9. To establish the annual budget for BX Equities LLC for approval by the Exchange.
10. To determine allocation of BX Equities LLC resources.
11. To manage external relations on matters related to trading on and the operation and functions of the NASDAQ OMX BX Equities Market with Congress, the Commission, state regulators, other SROs, business groups, and the public.

The Exchange will have ultimate responsibility for the operations, rules and

regulations developed by the NASDAQ OMX BX Equities Market, as well as their enforcement. Actions taken pursuant to delegated authority will remain subject to review, approval or rejection by the board of directors of the Exchange in accordance with procedures established by that board of directors.

In addition, the Exchange will expressly retain the following authority and functions:

1. To exercise overall responsibility for ensuring that statutory and self-regulatory obligations and functions of the Exchange are fulfilled and to perform any duties and functions not delegated.
2. To delegate authority to BX Equities LLC to take actions on behalf of the Exchange.
3. To direct BX Equities LLC to take action necessary to effectuate the purposes and functions of the Exchange, consistent with the independence of the Exchange's regulatory functions, exchange rules, policies and procedures and the federal securities laws.

In addition, for so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, BX Equities LLC agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange or any delegated market responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange that shall come into the possession of BX Equities LLC shall: (a) not be made available to any person (other than as provided in the proviso at the end of this sentence) other than to those officers, employees and agents of the BX Equities LLC who have a reasonable need to know the contents thereof; (b) be retained in confidence by BX Equities LLC and the officers, employees and agents of BX Equities LLC; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or the Exchange 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, employees or agents of BX Equities LLC to disclose such confidential information to the Commission or the Exchange.
2. BX Equities LLC's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by the Exchange.



3. BX Equities LLC's books and records shall be maintained within the United States.
4. The books, records, premises, officers, and employees of BX Equities LLC shall be deemed to be the books, records, premises, officers and employees of the Exchange for purposes of and subject to oversight pursuant to the Act.
5. BX Equities LLC shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Exchange pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, the Exchange pursuant to their regulatory authority.
6. BX Equities LLC and its officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of the Exchange relating to their regulatory functions (including disciplinary matters) or that would interfere with the ability of the Exchange to carry out its responsibilities under the Act.
7. BX Equities LLC, its officers, and those of its employees whose principal place of business and residence is outside of the United States shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the Exchange or any delegated market responsibility (and shall be deemed to agree that BX Equities LLC may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and BX Equities LLC and each such officer or employee, in the case of any such officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

For so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, the Exchange agrees that it may not transfer or assign any of its ownership of BX Equities LLC. The Delegation Agreement may not be modified except pursuant to a written agreement among the Exchange and BX Equities LLC;

provided that, prior to the effectiveness of any such amendment, such amendment shall be filed with, and approved by, the Commission under Section 19 of the Act and the rules promulgated thereunder.

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>24</sup> in general, and with Section 6(b)(1) and (b)(5) of the Act,<sup>25</sup> in particular, in that the proposal 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 with and enforce compliance by Exchange Members and persons associated with Exchange Members with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and 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.

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

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

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

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<sup>24</sup> 15 U.S.C. 78f.

<sup>25</sup> 15 U.S.C. 78f(b)(1), (5).

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

The Exchange consents to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act<sup>26</sup> until thirty-five days after the Exchange has filed an amendment reflecting approval of the provisions of the proposed rule change contained in Exhibits 5C and 5D by the Board of Directors of the Exchange and the Board of Directors of BSX Group LLC.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rules of the Exchange are based to a substantial extent upon the rules of the NASDAQ Exchange. Differences are discussed in the “Purpose” section of the filing.

9. Exhibits

1. Form of Notice of the Proposed Rule Change for the Federal Register.

5A. Text of Proposed New Rules of the Exchange

5B. Text of Proposed Changes to the Certificate of Incorporation and By-Laws of the Exchange

5C. Text of Proposed Changes to the Operating Agreement of BSX Group LLC

5D. Text of Proposed Delegation Agreement

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<sup>26</sup> 15 U.S.C. 78s(b)(2).

## EXHIBIT 1

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- \_\_\_\_\_ ; File No. SR-BSE-2008-\_\_\_)

Self-Regulatory Organizations; Boston Stock Exchange, Incorporated; Notice of Filing of Proposed Rule Change To Establish New Rules for Membership, Member Conduct, and the Listing and Trading of Cash Equity Securities

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 3, 2008, the Boston Stock Exchange (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 from interested persons.

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

The Exchange proposes: (i) to adopt new rules governing membership, the regulatory obligations of members, listing, and equity trading, (ii) to amend its certificate of incorporation and by-laws to reflect the proposed change in the name of the Exchange to NASDAQ OMX BX, Inc., (iii) to amend and restate the Operating Agreement of BSX Group LLC (the “Operating Agreement”), which will operate the Exchange’s cash equities trading business, and which will be renamed NASDAQ OMX BX Equities LLC (“BX Equities LLC” or the “Company”), and (iv) to adopt a Delegation Agreement between the Exchange and BX Equities LLC. The text of the proposed rule change is

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

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

available from the principal office of the Exchange and from the Commission, and is also available at [www.nasdaqtrader.com/Trader.aspx?id=BSEPendingRules](http://www.nasdaqtrader.com/Trader.aspx?id=BSEPendingRules).

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

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). At the time of this acquisition, the Exchange was not operating a venue for trading cash equities. The Exchange is now proposing to adopt a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equity trading. The new rules, which will be referred to as the "Equity Rules," will be based to a substantial extent on the rules of The NASDAQ Stock Market LLC (the "NASDAQ Exchange"). As is the case with the NASDAQ Exchange, administration and enforcement of many of the rules will be supported by the Financial Industry Regulatory Authority, Inc. ("FINRA") through a regulatory services agreement (the "FINRA Regulatory Contract"). Other rules, such as listing rules, will be administered by personnel who will be dually employed by the Exchange and the NASDAQ Exchange, or solely by the Exchange.

The Exchange's existing rules are divided between the rules currently denominated as the "Rules of the Board of Governors" and the "Rules of the Boston Options Exchange Group LLC" (the "BOX Rules"). The BOX Rules, and certain of the Rules of the Board of Governors that are cross-referenced in the BOX Rules, currently govern trading on the Exchange's Boston Options Exchange facility ("BOX"). The cross-referenced Rules of the Board of Governors will be referred to herein as the "Grandfathered Rules," and the BOX Rules, together with the Grandfathered Rules, will be referred to as the "Options Rules." The Options Rules, together with the Equity Rules, will be referred to as the "Rules of the Exchange." The Exchange is currently preparing a separate proposed rule change to update the Grandfathered Rules in light of their more limited applicability and to reflect changes in the Exchange's operations and corporate form.

At present, a broker-dealer that is authorized for trading on BOX (an "Options Participant") is not required to become a member of the Exchange, but is nevertheless subject to Options Rules as if it were a member.<sup>3</sup> Under the new proposed Rules of the Exchange, this principal will continue to apply. Thus, the Equity Rules will apply to members, which will be authorized to engage in equity trading on the Exchange, and the Options Rules will apply to Options Participants, which will be authorized to engage in options trading. If a member opts to become an Options Participant (or vice versa), it will be subject to both sets of rules. Members must comply with the application requirements of the Option Rules in order to become Options Participants, and conversely, Options Participants must comply with the membership application

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<sup>3</sup> See Chapter 1, Section 2 of the BOX Rules.

procedures of the Equity Rules in order to become members and engage in equity trading.<sup>4</sup>

## **Equity Rules**

### 0100 Series

The 0100 Series Equity Rules contain general provisions, including definitions of general applicability. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 0120 includes definitions for “Rules of the Exchange”, “Equity Rules”, “Options Rules”, “Grandfathered Rules”, “Options Participant”, and “BOX” consistent with the definitions described above. The rule also defines “BOXR” to mean “Boston Options Exchange Regulation, LLC”, a subsidiary of the Exchange that will continue to regulate BOX under the existing Plan of Delegation of Functions and Authority by the Boston Stock Exchange, Inc., to Boston Options Exchange Regulation, LLC (the “Delegation Plan”), and defines “BOX LLC” to mean Boston Options Exchange Regulation, LLC, the entity that operates BOX.
- As described in greater detail below, the Exchange will operate its cash equities trading business, to be named the NASDAQ OMX BX Equities Market, through BX Equities LLC, and will adopt a Delegation Agreement between the Exchange and BX Equities LLC. Accordingly, Equity Rule 0120 contains definitions of “NASDAQ OMX BX Equities Market”, “NASDAQ OMX BX Equities LLC”, and “Delegation Agreement”.

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<sup>4</sup> See Equity Rules 1013 and 1014; Chapter II of the BOX Rules.

- Equity Rule 0115 provides that the Equity Rules apply to all members and their associated persons, while the Options Rules apply to all Options Participants. The Equity Rules shall apply to Options Participants only if they are also members of the Exchange.
- Equity Rule 0160 references the Delegation Plan and the Delegation Agreement and states that the staff, books, records and premises of BOXR and BX Equities LLC are the staff, books, records and premises of the Exchange subject to oversight pursuant to the Act, and all officers, directors, employees and agents of BOXR are the officers, directors, employees and agents of the Exchange for purposes of the Act.<sup>5</sup>

#### 1000 Series

The 1000 Series Equity Rules contain rules governing membership. The rules are substantively identical to the corresponding rules of the NASDAQ Exchange, with the following exceptions:

- Equity Rule 1002(f) provides that a registered broker-dealer that was a member organization in good standing of the Exchange on the date immediately prior to the acquisition of the Exchange by NASDAQ OMX (a “Continuing Member”) is eligible for continued membership in the Exchange if it continues to satisfy the membership requirements adopted in the Equity Rule 1000 Series. Specifically, the Continuing Member must sign a revised membership agreement and maintain registrations of its associated persons as required under the Equity Rules.

Associated persons already registered with the Exchange will likewise be eligible

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<sup>5</sup> As described below, BX Equities LLC will have no directors, so the reference to directors is omitted with respect to that entity.



- for continued registration if they satisfy the requirements under the Equity Rules. Unlike members in the Exchange prior to the NASDAQ OMX acquisition, members under the Equity Rules do not possess an ownership interest in the Exchange.
- In order to ensure that Continuing Members are not subjected to registration requirements that did not previously exist under the Rules of the Exchange, Equity Rules 1022 and 1032 adopt only those categories of principal registration and representative registration that previously existed and that will be relevant to the future operations of the Exchange. As a result, the Exchange will not be adopting the categories of Limited Principal – Introducing Broker/Dealer Financial and Operations; Limited Principal – Investment Company and Variable Contracts Products; Limited Representative – Investment Company and Variable Contracts Products; Limited Representative – Corporate Securities; Limited Representative – Equity Trader; Assistant Representative – Order Processing; United Kingdom – Limited General Securities Registered Representative; and Canada – Limited General Securities Registered Representative. Similarly, under the Equity Rules, the Exchange is not adopting the categories of Member Exchange and Floor Employee, which were previously recognized by the Exchange, as these categories will no longer be relevant to Exchange operations.
  - Because of the similarity between the proposed Equity Rules and both NASDAQ Exchange Rules and FINRA Rules, Equity Rule 1013(a)(5)(C) provides that an approved member of FINRA or the NASDAQ Exchange may apply to become an Exchange member and register with the Exchange all associated persons whose registrations are approved with FINRA or the NASDAQ Exchange (as applicable)

in categories of registration recognized by the Exchange through an expedited process by submitting a Short Form Membership Application and Agreement. NASDAQ Exchange Rule 1013 provides for a comparable process for FINRA members becoming NASDAQ Exchange members.

#### 2000 and 3000 Series

The Equity Rule 2000 Series establishes business conduct rules applicable to members, and the Equity Rule 3000 Series establishes the responsibilities of associated persons and employees of members. In each case, they are substantively identical to the comparable rules of the NASDAQ Exchange. The Exchange is, however, amplifying the regulatory requirements applicable to index warrants, currency index warrants, and currency warrants contained in the Equity Rule 2480 Series, and expects the NASDAQ Exchange to adopt a conforming rule change.

#### 4000 Series

The Equity Rule 4000 Series contains marketplace rules governing listing and trading of cash equities on the Exchange.

#### *Listing Rules*

The proposed listing standards for the Exchange are based on the standards of the NASDAQ Exchange. The NASDAQ Exchange, however, has three listing tiers – the Nasdaq Capital Market, the Nasdaq Global Market, and the Nasdaq Global Select Market – with progressively higher listing standards applicable at each tier. In contrast, the Exchange will have only one listing tier, with listing standards for primary and secondary classes of common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, American Depositary Receipts (“ADRs”), and limited partnership interests that are substantively identical to

those of the Nasdaq Capital Market, the tier with the most permissive listing standards.<sup>6</sup> The standards for initial and continued listing of these securities are set forth in the Equity Rule 4300 Series. In addition, the Exchange will adopt, in Equity Rules 4420 and 4450, initial and continued listing standards for Selected Equity-linked Debt Securities (“SEEDS”), units, index warrants, portfolio depository receipts, index fund shares, trust issued receipts, linked securities, managed fund shares, and “other securities” that are substantively identical to those of the NASDAQ Global Market, because the Nasdaq Capital Market does not have standards applicable to any of these securities other than units.<sup>7</sup> Provisions of NASDAQ Rules 4420 and 4450 that establish higher initial and continued listing standards for common stock, preferred stock, convertible debt, rights and warrants, shares or certificates of beneficial interest of trusts, foreign securities, ADRs, and limited partnership interests seeking inclusion on the NASDAQ Global Market are omitted and replaced with a reference back to the Equity Rule 4300 Series, where the standards for such securities are found. In addition, the listing standards for SEEDS and “other securities” differ slightly from the comparable NASDAQ Exchange standards, in that they require issuers of securities listed thereunder to be eligible for

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<sup>6</sup> The Exchange notes, however, that securities listed on the Nasdaq Capital Market are “covered securities” for purposes of Section 18 of the Securities Act of 1933 (the “Securities Act”), and are therefore exempted from State law registration requirements. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2008) (File No. S7-18-06). Accordingly, following adoption of these Rules, the Exchange expects to petition the Commission to amend Rule 146 under the Securities Act for purposes of recognizing securities listed on the Exchange as covered securities.

<sup>7</sup> The Exchange’s proposed listing standards for units combine elements of the standards of the Nasdaq Capital Market and the Nasdaq Global Market, in that they require the equity component of a unit to satisfy standards equivalent to Nasdaq Capital Market standards but allow the inclusion of a debt component that is not itself eligible for listing but that meets the requirements of Rule 4420(h)(1)(B).

listing on the NASDAQ Exchange or NYSE or to be affiliates of companies that are so eligible, rather than being required to be actually so listed. This difference recognizes the fact that an issuer seeking to list a SEED or “other security” on the Exchange would not necessarily also have a security listed on the NASDAQ Exchange or NYSE, but it would nevertheless be required to demonstrate ability to meet such other listing standards before listing the SEED or “other security.” Finally, NASDAQ Rules 4426 and 4427, which establish standards for NASDAQ’s Global Select Market tier, are omitted in their entirety.<sup>8</sup>

#### *Trading System Rules*

The Exchange’s system for trading cash equities, designated in the Equity Rules as the “NASDAQ OMX BX Equities Market” or the “System”, will operate using NASDAQ OMX’s INET technology, in accordance with rules based to a significant extent on the rules of the Nasdaq Market Center. As a result, the NASDAQ OMX BX Equities Market will feature an electronic central limit order book, with executions occurring in price/time priority (but with displayed orders receiving priority over non-displayed orders). The differences between the two systems will be as follows:

- The NASDAQ OMX BX Equities Market will operate from 8:00 a.m. to 7:00 p.m. Eastern Time (rather than from 7:00 a.m. to 8:00 p.m.). As with the Nasdaq Market Center, regular market hours will be from 9:30 a.m. to 4:00 p.m. (or 4:15 p.m. for any exchange-traded funds that may be so designated by the Exchange).
- The NASDAQ OMX BX Equities Market will not operate an opening cross, a closing cross, or a halt cross. The NASDAQ OMX BX Equities Market will

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<sup>8</sup> The Rule 4600 Series is being reserved for the Exchange’s listing fees, which will be included in a separate filing.

begin to process all eligible Quotes/Orders at 8:00 a.m., adding in time priority all eligible Orders in accordance with each order's defined characteristics. All trades executed prior to 9:30 will be automatically appended with the ".T" modifier.

The official opening price for a security listed on the Exchange will be the price of the first trade executed at or after 9:30 a.m. and the official closing price will be the price of the last trade executed at or prior to 4:00 p.m.

- Quoting Market Participants may instruct the Exchange to open their Quotes at 9:25 a.m. at a price of \$0.01 (bid) and \$999,999 (offer) and a size of one round lot in order to provide a two-sided quotation. In all other cases, the quote of a participant will be at the price and size entered by the participant.
- If trading of a security is halted under Equity Rule 4120, the security will be released for trading at a time announced to market participants by the Exchange. Because the Exchange will not have a halt cross, provisions of NASDAQ Rule 4120 relating to a Display Only Period prior to the execution of the halt cross have been omitted.
- The Exchange's quotation and trade reporting information is disseminated under the Consolidated Quotation Plan ("CQ Plan") and Consolidated Tape Association Plan ("CTA Plan"), rather than the Nasdaq UTP Plan. Accordingly, the NASDAQ Exchange's IM-4390, which relates to securities dually listed on the New York Stock Exchange ("NYSE") and the NASDAQ Exchange is not included in the Equity Rules, since a security listed on the Exchange and NYSE would automatically be included in the CQ Plan and the CTA Plan by virtue of either of its listings.

- Provisions of Rules of the NASDAQ Exchange relating to passive market making under Rule 103 of Regulation M under the Act<sup>9</sup> are being omitted since that rule does not apply to any other exchange, even if it adopts a similar market structure.
- Equity Rule 4620 provides that an Exchange Market Maker that terminates its registration in a security listed on the Exchange may not re-register as a market maker in that security for a period of twenty business days, with a one-day exclusion period for all other securities. The comparable NASDAQ Exchange rule provides for an exclusion period of twenty days for securities listed on the NASDAQ Exchange and one day for all other securities.
- In contrast to the NASDAQ Exchange, the Exchange will not support discretionary orders, orders with a “market hours” time-in-force designation (with the exception of “market hours day” orders), or orders with a “system hours good till cancelled” time-in-force designation.
- The Exchange will not support an automatic quotation refresh functionality. Thus, market makers will be required to maintain continuous two-sided quotations without the assistance of the functionality. In addition, the Exchange will not allow market participants to maintain quotes or orders on the book overnight; rather, all quotes and orders will be cancelled at the end of the trading day and must be re-entered, if market participants so desire, the following day. Accordingly, the Exchange will not have a rule such as NASDAQ Exchange Rule 4761, which provides for overnight adjustment of open quotes and orders to reflect corporate events such as dividends and splits. The Exchange believes that these differences will reduce burdens on Exchange system resources, and that

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<sup>9</sup> 17 C.F.R. 242.103.

market participants will be able to maintain comparable functionality using their own systems if they wish.

- The Exchange will not route orders to other market centers. Rather, to ensure the Exchange's compliance with Regulation NMS, Equity Rule 4755 provides that in addition to such other designations as may be chosen by a market participant,<sup>10</sup> all orders that are not entered with a time in force of "System Hours Immediate or Cancel"<sup>11</sup> must be designated as an Intermarket Sweep Order, a Pegged Order, a Price to Comply Order, or a Price to Comply Post Order, and all orders will be processed in a manner that avoids trading through protected quotations and avoids locked and crossed markets.
  - A System Hours Immediate or Cancel Order is compliant with Regulation NMS because it will not, by its terms, execute or post at a price that would result in a trade-through of a protected quotation or lock or cross another market.
  - A Pegged Order is compliant with Regulation NMS because it is continually re-priced to avoid locking or crossing.
  - In entering an Intermarket Sweep Order, the market participant represents that it is simultaneously routing one or more additional limit orders, as necessary, to execute against the full displayed size of any protected bid or

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<sup>10</sup> As is the case with the NASDAQ Exchange, different order designations can be combined. Thus, for example, a Price to Comply Order could be entered with reserve size or as a non-displayed order.

<sup>11</sup> A "System Hours Immediate or Cancel" order is an immediate or cancel order that may be entered between 8:00 a.m. and 7:00 p.m. Eastern Time, the hours of operation of the NASDAQ OMX BX Equities Market. If a System Hours Immediate or Cancel order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) is canceled and returned to the entering Participant.

offer (as defined in Rule 600(b) of Regulation NMS) in the case of a limit order to sell or buy with a price that is superior to the limit price of the order identified as an Intermarket Sweep Order. These additional routed orders must also be identified as Intermarket Sweep Orders. As provided by Regulation NMS, the Exchange will automatically execute orders identified as Intermarket Sweep Orders. Members will be responsible for ensuring that their use of Intermarket Sweep Orders complies with Regulation NMS, and the Exchange's T+1 surveillance program will monitor members' use of Intermarket Sweep Orders.

- If, at the time of entry, a Price to Comply Order would lock or cross the quotation of an external market, the order will be priced to the current low offer (for bids) or to the current best bid (for offers) but displayed at a price one minimum price increment lower than the offer (for bids) or higher than the bid (for offers). Thus, an incoming order priced to execute against the displayed price will receive the superior undisplayed price.<sup>12</sup> The displayed and undisplayed prices of a Price to Comply order may be adjusted once or multiple times depending upon the method of order entry and changes to the prevailing national best bid/best offer.
- If, at the time of entry, a Price to Comply Post Order would lock or cross the protected quote of an external market or would cause an Order Protection Rule violation, the order will be re-priced and displayed to one

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For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply order to buy 10,000 shares at \$10.01, the order will display at \$9.99, but will reside on the System book at \$10.00. If a seller then enters an order at \$9.99, it will execute at \$10.00, up to the full 10,000 shares of the order.



minimum price increment (i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or to one penny above the current best bid (for offers).<sup>13</sup>

By requiring all orders to be entered with one of these designations, the Exchange will ensure that all orders will either be priced or cancelled in a manner consistent with avoidance of trade-throughs and locked and crossed markets, or will execute as Intermarket Sweep Orders along with other Intermarket Sweep Orders sent to protected quotes. Because the Exchange will not route to other market centers, its policies and procedures under Rule 611(a) under Regulation NMS will contemplate reliance on information provided by the NASDAQ Exchange for purposes of determining whether another trading center is experiencing a failure, material delay, or malfunction of its systems or equipment within the meaning of Rule 611(b)(1).

*Affiliation with NASDAQ Execution Services, LLC*

Although the Exchange will not route to other market centers, the Exchange will receive orders routed to it by other market centers, including the NASDAQ Exchange. Nasdaq Execution Services, LLC (“NES”) is the approved outbound routing facility of the NASDAQ Exchange for cash equities. Rules 4751 and 4758 of the NASDAQ Exchange establish the conditions under which the NASDAQ Exchange is permitted to own and operate NES in its capacity as a facility of the NASDAQ Exchange that routes orders from the NASDAQ Exchange to other market centers. These conditions include requirements that: (1) NES is operated and regulated as a facility of the NASDAQ Exchange; (2) NES will not engage in any business other than as an outbound router for

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<sup>13</sup> For example, if the national best bid and best offer is \$9.97 x \$10.00, and a participant enters a price to comply post order to buy at \$10.01, the order will be repriced and displayed at \$9.99. If a seller enters an order at \$9.99, it will execute at that price.

the NASDAQ Exchange and any other activities as approved by the Commission;<sup>14</sup> (3) the primary regulatory responsibility for NES lies with an unaffiliated self-regulatory organization; (4) use of NES for outbound routing is optional for other NASDAQ Exchange members; and (5) the NASDAQ Exchange will not route orders to an affiliated exchange, such as the Exchange, unless they check the NASDAQ Exchange book prior to routing.

In connection with the Exchange's resumption of equity trading pursuant to this filing, the NASDAQ Exchange will file a proposed rule change to modify the last of these conditions to allow it to route all forms of orders, including Directed Orders, to the Exchange on a one-year pilot basis. Directed Orders are orders that route directly to other exchanges on an immediate-or-cancel basis without first checking the NASDAQ Exchange book for available liquidity. In order to appropriately address concerns previously raised by the Commission regarding the potential for conflicts of interest and informational advantages that may arise from the use of affiliated members to route orders between exchanges owned by a common parent, the Exchange is proposing certain restrictions and undertakings.

In order to manage the concerns raised by the Commission regarding conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange notes that, with respect to orders routed to the Exchange by NES in its capacity as a facility of the NASDAQ Exchange, NES is subject to independent oversight and enforcement by FINRA, an unaffiliated SRO that is NES's designated examining authority. In this capacity, FINRA is responsible for examining

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<sup>14</sup> Because only NASDAQ Exchange members may enter orders into the NASDAQ Exchange, it also follows that routing by NES is conducted only with respect to orders of NASDAQ Exchange members.

NES with respect to its books and records and capital obligations and also has the responsibility for reviewing NES's compliance with intermarket trading rules such as SEC Regulation NMS. In addition, the Exchange intends to enter into a regulatory services agreement with FINRA as well as an agreement with FINRA pursuant to the provisions of Rule 17d-2 under the Act,<sup>15</sup> under which FINRA staff will review NES's compliance with the Exchange's rules through FINRA's examination program. FINRA and the Exchange<sup>16</sup> will also monitor NES for compliance with the Exchange's trading rules, subject, of course, to SEC oversight of the regulatory program of the Exchange and FINRA. The Exchange will, however, retain ultimate responsibility for enforcing its rules with respect to NES except to the extent that they are covered by an agreement with FINRA pursuant to Rule 17d-2, in which case regulatory responsibility will be allocated to FINRA as provided in Rule 17d-2(d).

Furthermore, in order to minimize the potential for conflicts of interest, the Exchange and FINRA will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the NASDAQ Exchange, routing orders to the Exchange) is identified as a participant that has potentially violated applicable SEC or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the SEC's Office of Compliance Inspections and Examinations. FINRA will then provide a report to the Exchange's Chief Regulatory Officer, on at least a quarterly basis, which (i) quantifies all alerts (of which the Exchange and FINRA

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<sup>15</sup> 17 CFR 240.17d-2.

<sup>16</sup> Employees of the Exchange performing real-time oversight of equity trading may also be employed by the NASDAQ Exchange to perform similar functions with respect to its rules.

become aware) that identify NES as a participant that has potentially violated Exchange or SEC rules and (ii) quantifies the number of all investigations that identify NES as a participant that has potentially violated Exchange or SEC rules.<sup>17</sup>

In order to address the Commission's concerns about potential for information advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members, the Exchange is proposing Rule 2140(c). Rule 2140(c) will require the implementation of policies and procedures that are reasonably designed to prevent NES from acting on non-public information regarding Exchange systems prior to the time that such information is made available generally to all members of such entity performing inbound routing functions. These policies and procedures would include systems development protocols to facilitate an audit of the efficacy of these policies and procedures.

Specifically, new Rule 2140(c) shall provide as follows:

The NASDAQ OMX Group, Inc., which is the holding company owning both the Exchange and NASDAQ Execution Services, LLC, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound routing to the Exchange.

In addition, the NASDAQ Exchange, in its filing regarding routing to the Exchange, will amend Rule 4758 to provide that NES will establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities

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<sup>17</sup> The Exchange, FINRA, and SEC staff may agree going forward to reduce the number of applicable or relevant surveillances that form the scope of the agreed upon report.

(including the NES), and any other entity (including the Exchange). The Exchange believes these measures will effectively address the concerns identified by the Commission regarding the potential for informational advantages favoring NES vis-à-vis other non-affiliated Exchange members.

5000, 6000, and 8000 Series

As with the NASDAQ Exchange Rules, the Equity Rule 5000 Series will be reserved for future use. The Equity Rule 8000 Series governs investigations and sanctions of members by the Exchange, and is substantively identical to the comparable rules of the NASDAQ Exchange. The Equity Rule 6000 Series contains rules implementing a version of the Order Audit Trail System (“OATS”) for the Exchange. The Exchange believes that as an affiliate of the NASDAQ Exchange, it should ensure that its regulatory requirements are generally consistent with those of the NASDAQ Exchange. As provided in NASDAQ Exchange rules, Exchange members that are also FINRA members must comply with the FINRA OATS rules requiring daily reporting of audit trail information for transactions in securities listed on the NASDAQ Exchange. In addition, as provided in NASDAQ Exchange rules, Exchange members that are not FINRA members must compile and maintain audit trail information for securities listed on the NASDAQ Exchange, but are required to transmit this information to FINRA only if requested. Similarly, the Exchange will require all members to maintain audit trail information for securities listed on the Exchange, and to transmit the information to FINRA upon request, but will not require daily OATS reporting for securities listed on the Exchange.<sup>18</sup> As is true with respect to the NASDAQ Exchange, OATS data will be used by the Exchange for regulatory purposes only.<sup>19</sup>

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<sup>18</sup> The Rule 7000 Series is reserved for the Exchange’s fees other than listing fees,

9000 Series

The 9000 Series governs procedures for disciplinary proceedings against members and associated persons. The sole substantive difference between these rules and the corresponding NASDAQ Exchange rules pertains to the permissible composition of a Hearing Panel authorized to hear cases under the rule series. Under NASDAQ Exchange rules, a hearing panel is composed of a Hearing Office and two Panelists. Panelist may be drawn from a pool consisting of persons who previously served on the Nasdaq Review Council (the “appellate body” that reviews disciplinary matters) or a subcommittee thereof; previously served as a director of the NASDAQ Exchange; previously served on FINRA’s National Adjudicatory Council or a subcommittee thereof prior to the date that the NASDAQ Exchange commenced operating as a national securities exchange; or currently serves or previously, within the past four years, served on the NASDAQ Exchange Market Regulation Committee. Under NASDAQ Exchange rules, however, current and former members of the Market Regulation Committee may serve on a Panel only if the case involves quotations of securities, execution of transactions, reporting of transactions, or trading practices.

The Exchange’s rules regarding Hearing Panel composition will allow Panelists to be drawn from a pool consisting of persons who previously served on the Exchange Review Council, the appellate body comparable to the Nasdaq Review Council or a subcommittee thereof; previously served as a director of the Exchange or as a Governor of the exchange prior to its acquisition by NASDAQ OMX; or currently serves or

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which will be included in a separate filing.

<sup>19</sup> See Securities Exchange Act Release No. 53128 (January 13, 2006); 71 FR 3350 (January 23, 2006) (File No. 10-131).

previously, within the past four years, served on the Exchange's Market Regulation Committee. Former members of the FINRA National Adjudicatory Council would not be eligible for service on a Panel, however, since that aspect of the NASDAQ Exchange's rules is a function of the NASDAQ Exchange's genesis as a subsidiary of the National Association of Securities Dealers, FINRA's predecessor. However, to ensure that there is an adequate supply of Panelists available to hear cases under the 9000 Series rules, the Exchange will not limit the types of cases that may be heard by Panelists currently or previously serving on the Exchange's Market Regulation Committee. The absence of this limitation is reflected in Equity Rules 9212, 9221, 9231, and 9232, all of which differ from corresponding NASDAQ Exchange rules in this respect.

The 9000 Series also contains, in IM-9216, a list of rules being added to the Exchange's Minor Rule Violation Plan. These are in addition to the existing provisions of the Plan, as described in Chapter X of the Options Rules and Chapter XXXIV of the Grandfathered Rules, which remains in effect with respect to BOX.

#### 10000 Series

The Equity Rule 10000 Series incorporates by reference the NASD Code of Arbitration Procedure for Customer Disputes and the NASD Code of Arbitration Procedure for Industry Disputes. The Exchange's arbitration program will be administered by FINRA under the FINRA Regulatory Contract. The Equity Rule 10000 Series is substantively identical to the corresponding rules of the NASDAQ Exchange.

#### 11000 Series

The Equity Rule 11000 Series adopts the Uniform Practice Code as rules of the Exchange, and is substantively identical to the corresponding NASDAQ Exchange rules. Exchange Rule 11890 governs nullification and modification of clearly erroneous

transactions on the Exchange, and is generally consistent with the corresponding NASDAQ Exchange rule. Trades in securities listed on the Exchange will be adjudicated under the standards applicable to NASDAQ Exchange-listed securities under that rule. In addition, language in the rule pertaining to trades occurring in the closing or opening crosses is omitted, since the Exchange will not be operating crossing sessions.

### **Certificate and By-Laws**

The Exchange proposes to amend its Certificate of Incorporation and By-Laws to adopt NASDAQ OMX BX, Inc. as the new name of the Exchange.

### **NASDAQ OMX BX Equities LLC**

The Exchange will operate the NASDAQ OMX BX Equities Market through BSX Group LLC, the same entity that operated the Exchange's cash equities trading business prior to the acquisition of the Exchange by NASDAQ OMX. However, to reflect the limited liability company's status as a closely held subsidiary of the Exchange, whose only members are the Exchange and the Exchange's parent corporation, NASDAQ OMX, the Exchange proposes to amend and restate the Operating Agreement to vest management rights directly in the Exchange, rather than in a Board of Directors. The model for this corporate form is The NASDAQ Options Market LLC, which operates the NASDAQ Options Market as a subsidiary of the NASDAQ Exchange, but with management rights vested in the NASDAQ Exchange. The Exchange also proposes to change the name of the entity from BSX Group LLC to NASDAQ OMX BX Equities LLC. Although NASDAQ OMX will remain a Member of the Company to avoid certain adverse tax consequences that would be associated with contributing its ownership interest to the Exchange, the amendments to the Operating Agreement will leave it with no direct management role in the operation of the entity, with the exception of its role as



“tax matters member” under Sections 10.9 and 12.6 and in the definition of “Capital Account,” and its limited rights with regard to dissolution of the entity under Article 11 and capital contributions under Section 7.4.

In addition, and also in keeping with the model established by the NASDAQ Exchange and the NASDAQ Options Market LLC, the Exchange and BX Equities LLC will enter into a Delegation Agreement, under which the Exchange will delegate certain authority to BX Equities LLC, and BX Equities LLC will agree to abide by certain regulatory requirements. The Delegation Agreement is described in greater detail below.

BX Equities LLC will be an extension of the Exchange, and the NASDAQ OMX BX Equities Market and BX Equities LLC will be subject to self-regulation by the Exchange and oversight by the Commission. As a facility of the Exchange, the NASDAQ OMX BX Equities Market will be subject to the Exchange’s self-regulatory organization functions and the Exchange will have regulatory responsibility for the activities of the NASDAQ OMX BX Equities Market. The Exchange represents that it has the ability to discharge all regulatory functions related to the facility that it has undertaken to perform by virtue of operating the NASDAQ OMX BX Equities Market as a facility of the Exchange.

The amended and restated Operating Agreement for BX Equities LLC contains provisions relating to the governance of the Company that will ensure that the Exchange has authority over the Company to fulfill the Exchange’s responsibility for all regulatory functions related to the NASDAQ OMX BX Equities Market. Thus, this rule filing is intended to establish that the Exchange’s corporate and self-regulatory structures along with the proposed structure of BX Equities LLC as a controlled subsidiary of the Exchange are sufficient to ensure that BX Equities LLC and the NASDAQ OMX BX

Equities Market will be operated and regulated in a manner that is consistent with the Act.

#### Corporate Structure

The Commission, in approving the Exchange's amended and restated Certificate of Incorporation and By-Laws in connection with its acquisition by NASDAQ OMX, determined that the Exchange's current structure and self-regulatory functions are adequately designed to ensure the completeness and independence of regulation of the Exchange.<sup>20</sup> NASDAQ OMX is currently organized as a holding company with multiple subsidiaries, including the Exchange and the NASDAQ Exchange. Although NASDAQ OMX does not itself carry out regulatory functions, its activities with respect to the operation of the Exchange were designed to be consistent with, and not interfere with, the Exchange's self-regulatory obligations. Thus, NASDAQ OMX's corporate documents include provisions that maintain the independence of the Exchange's self-regulatory function from NASDAQ OMX, enable the Exchange to operate in a manner that complies with the federal securities laws, and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

For example, NASDAQ OMX submitted to the Commission's jurisdiction with respect to activities relating to the Exchange, and agreed to provide the Commission with access to its books and records. NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function of the Exchange and not to use such information for any non-regulatory purpose. In addition, the board of directors of NASDAQ OMX, as well as its officers, employees, and agents are required to give due

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<sup>20</sup> Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; -23; -25; SR-BSECC-2008-01).

regard to the preservation of the independence of the Exchange's self-regulatory function. NASDAQ OMX's By-Laws require that any changes to the NASDAQ OMX Certificate of Incorporation or By-Laws be submitted to the Board of Directors of the Exchange ("Exchange Board"), and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

NASDAQ OMX's Certificate of Incorporation imposes limits on direct and indirect changes in control, which prevent any stockholder from exercising undue control over the operation of the Exchange. Specifically, no person who beneficially owns NASDAQ OMX common stock or other voting securities in excess of five percent of the total outstanding voting securities may vote the excess shares. The Exchange's rules also prohibit Exchange members and persons associated with Exchange members from beneficially owning more than twenty percent of the then-outstanding voting securities of NASDAQ OMX. These rules prevent a member that is a stockholder of NASDAQ OMX from exerting a controlling influence to direct or otherwise cause the Exchange to refrain from diligently monitoring and surveiling the member's conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that may violate such provisions.

The protections, limitations, and requirements provided by the structure established in NASDAQ OMX's governing documents will continue to exist and, under this proposal, will apply with equal force to BX Equities LLC as a facility and subsidiary of the Exchange. Moreover, Commission approval would be required in order to modify the protections provided by NASDAQ OMX's governing documents.

In addition to protections contained in the NASDAQ OMX structure, the Exchange structure also provides protections via the composition of its Board of Directors, Board Committees, and several regulatory structures. Under the Exchange's By-Laws, twenty percent of the Directors on the Exchange Board, which is the governing body of the Exchange and possesses all of the powers necessary for the execution of its responsibilities as a self-regulatory organization ("SRO"), must be "Member Representative Directors." In addition, the number of "Non-Industry Directors" must equal or exceed the sum of the number of "Industry Directors" and "Member Representative Directors." The Exchange Board must also include at least one "Public Director" and at least one Director who is representative of issuers and investors. The requirement that twenty percent of the directors be "Member Representative Directors" and the means by which they are selected by members provides for the fair representation of members in the selection of directors and the administration of the Exchange consistent with the requirement in Section 6(b)(3) of the Act.<sup>21</sup> This requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that the Exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. In the Exchange's view, the protections provided by the composition and selection of the Exchange's Board of Directors carry through to the NASDAQ OMX BX Equities Market by virtue of the fact that all of its participants will be members of the Exchange. As a result, NASDAQ OMX BX Equities Market participants will have an equal opportunity to participate in the selection of Member Representative Directors who, along with the entire Exchange Board, will have a duty to

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<sup>21</sup> 15 U.S.C. 78f(b)(3).

ensure that the NASDAQ OMX BX Equities Market is administered in a fair and equitable manner.

As Exchange members, NASDAQ OMX BX Equities Market participants will also be protected by several committees established by the Exchange's By-Laws that are composed solely of directors: an Executive Committee, a Finance Committee, a Management Compensation Committee, an Audit Committee, and a Regulatory Oversight Committee ("ROC"). In addition, the Exchange has these other committees that are not required to be composed solely of directors: the Exchange Listing and Hearing Review Committee, the Exchange Review Council (the "Review Council"), a Nominating Committee, a Member Nominating Committee, a Quality of Markets Committee, a Market Operations Review Committee, an Arbitration and Mediation Committee, and a Market Regulation Committee. The Exchange's committees enable it to carry out its responsibilities under the Act.

The ROC will play a central role in the regulation of the Exchange and its facilities. It consists of three members, each of whom must be a Public Director and "independent director" as defined by NASDAQ Exchange Rule 4200. The ROC is responsible for monitoring the adequacy and effectiveness of the Exchange's regulatory program, assessing the Exchange's regulatory performance, and assisting the Exchange Board in reviewing the Exchange's regulatory plan and the overall effectiveness of the Exchange's regulatory functions. The ROC meets with the Chief Regulatory Officer ("CRO") in executive session at regularly scheduled meetings and at any time upon request of the CRO or any member of the ROC. The ROC is informed about the CRO's compensation, promotion, or termination (including reasons). Finally, the Exchange regulatory budget is presented to the ROC so that its members may inquire as to the

adequacy of resources available for the Exchange's regulatory program. Under this proposal, the ROC and the Exchange CRO will assume responsibility for regulating quoting and trading on the NASDAQ OMX BX Equities Market and conduct by its market participants.

The Exchange's CRO has general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions. The CRO will administer the Exchange's regulatory services agreement with FINRA. Although the Exchange is an SRO with all of the attendant regulatory obligations under the Act, it has entered into the Regulatory Contract with FINRA, under which FINRA will perform certain regulatory functions on its behalf. In addition to performing certain membership functions for the Exchange, FINRA will perform certain disciplinary and enforcement functions for the Exchange. Generally, FINRA will investigate members, issue complaints, and conduct hearings pursuant to the Exchange's rules. Appeals of disciplinary hearings, however, will be handled by the Review Council. The Regulatory Contract between the Exchange and FINRA governs the Exchange and its facilities and therefore will automatically govern the NASDAQ OMX BX Equities Market and Exchange members trading on it.

Notwithstanding the Regulatory Contract, the Exchange retains ultimate legal responsibility for the regulation of its members and its market. The Exchange's By-Laws and rules provide that it has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws. The Exchange's rules also permit it to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring

members, or suspending or barring a person from being associated with a member. The Exchange's rules also provide for the imposition of fines for minor rule violations in lieu of commencing disciplinary proceedings.

The Exchange's independent Regulation Department will carry out many of the Exchange's regulatory functions, including administering its membership and disciplinary rules, and is functionally separate from the Exchange's business lines. The Regulation Department includes MarketWatch, which will perform real-time intraday surveillance over the Exchange's listed companies and participants in the NASDAQ OMX BX Equities Market. More specifically, MarketWatch will oversee the complete and timely disclosure of issuers' material information to determine if a trading halt is necessary to maintain an orderly market for the release of material news. In addition, MarketWatch, through its automated detection system, will monitor the trading activity of each security and will generate a price and volume alert to aid in the assessment of unusual market activity. MarketWatch will also coordinate and execute the release of initial public offerings; administer market participants' excused withdrawal requests; and handle the clearly erroneous trade adjudication process. If MarketWatch observes any activity that may involve a violation of Commission or Exchange rules, MarketWatch will immediately refer the activity to FINRA's Market Regulation Department for further investigation and potential disciplinary action.

#### BX Equities LLC Structure

BX Equities LLC will be established as a facility of and controlled subsidiary owned and operated by the Exchange in a manner designed to extend to cash equities trading on the NASDAQ OMX BX Equities Market each and every regulatory protection provided by the NASDAQ OMX and Exchange structures described above. BX Equities

LLC is a limited liability company under the laws of the State of Delaware. BX Equities LLC will be governed by the amended and restated Operating Agreement, filed herewith. The Operating Agreement provides that the Exchange and NASDAQ OMX are the sole members of BX Equities LLC, and Articles 3 and 4 state that the Exchange shall have all powers necessary to act for BX Equities LLC, as well as to exercise all rights and powers conferred to BX Equities LLC under Delaware law. Section 4.2(b) requires BX Equities LLC and its members to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority.

By virtue of BX Equities LLC's structure as a facility of the Exchange, and the Exchange's exclusive management rights, BX Equities LLC will, by that fact, be bound by all of the regulatory obligations of its SRO-member, and it will be endowed with all of the self-regulatory protections provided by the NASDAQ OMX and Exchange governance documents. BX Equities LLC will be under the complete control and discretion of the Exchange and can act only through the action of the Exchange and its officers and directors by virtue of the fact that there will be no separate BX Equities LLC board and all BX Equities LLC officers will be officers of the Exchange. The Exchange, in turn, is governed by its By-Laws, its Exchange Board, and its Committees, as described above. All actions by BX Equities LLC that, if taken by the Exchange would require a vote of the Exchange Board, will also require a vote of the Exchange Board. Any action by BX Equities LLC that, were it taken by the Exchange would require a proposed rule change under Section 19 of the Act, will require a proposed rule change under Section 19 of the Act.



Not only is BX Equities LLC limited to acting exclusively through the Exchange, it is also limited to acting only through officers of the Exchange. Under Article 5 of the Operating Agreement, each officer of BX Equities LLC will also be an officer of the Exchange with the same powers, obligations, and responsibilities as an officer of the Exchange. Moreover, the Operating Agreement requires BX Equities LLC officers separately to agree to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the SEC and the Exchange pursuant to their regulatory authority and the provisions of the Operating Agreement. Any violation of federal securities laws by an individual officer acting in his or her capacity as a BX Equities LLC officer would also be a violation by an Exchange officer and, in both cases, such violations would be subject to Commission jurisdiction.

Each broker-dealer that participates in trading on the NASDAQ OMX BX Equities Market must be a member of the Exchange. As a result, all cash equities trading and all market participants will operate pursuant to Exchange rules, subject to Exchange regulation, and Commission oversight. The Exchange will regulate NASDAQ OMX BX Equities Market activity via a combination of structural regulation by the Exchange, the Exchange Board, the ROC, and the Exchange CRO, real-time surveillance by the Exchange, and the Regulatory Contract with FINRA.

The specific changes being made to the Operating Agreement to implement the structure described above are as follows:

- The introductory paragraphs are being amended to reflect the new names of the Company and the Exchange, to remove language referring to the possibility of additional members becoming party to the Agreement, and to

remove language describing the past history of the entity that is no longer necessary.

- Article I is being amended to remove definitions of the terms “Board”, “BSE Facilities Services Agreement”, “BeX”, “DGCL”, “Directors”, “Disclosing Member”, “Excess Units”, “Initial Funding Date”, “Member Entities”, “Member Information”, “Ownership Concentration Limit”, “Regulatory Services Provider”, “Self-Regulatory Organization”, “Senior Executive”, “Total Votes”, “Transfer”, “Transferee”, and “Transferring Member”. The Article is also being amended to add a new definition of “Officer”, to simplify the definition of “Confidential Information,” to reflect the new name of the Exchange, to reflect NASDAQ OMX’s role as the tax matters member of the Company, and to amend the definition of “Member” to clearly reflect that NASDAQ OMX and the Exchange are the sole Members of the Company.
- Article 16 and Sections 2.1, 2.8, 7.1, 18.1, and 18.6, as well as Schedules 1, 2, and 3, are being amended to reflect the new names of the Company and the Exchange.
- Section 2.2 is amended to provide that the Exchange may determine the principal place of business of the Company.
- Articles 6, 15, and 16 and Sections 2.2, 2.4, 2.5, 2.8, 7.3, 7.4, 7.5, 7.6, 9.1, 9.2, 11.1, 12.1, 12.2, 14.1, 18.1 are amended to reflect that management authority is vested in the Exchange directly, rather than in a Board of Directors.
- Section 2.8(e) is being amended to stipulate that the legend printed on certificates representing ownership interests in the Company must include language stating that the interests may not be sold, assigned or transferred

unless such sale, assignment or transfer has been filed with and approved by the Commission under Section 19 of the Act<sup>22</sup> and the rules promulgated thereunder.

- Articles 3, 4, and 5 are being amended in their entirety to adopt language drawn from LLC Agreement of The NASDAQ Options Market LLC. The effect of the language is to place management authority directly in the Exchange. As a result, provisions relating to the current governance structure of the entity are being removed. Moreover, because BX Equities LLC will be operated directly by the Exchange, references to the BSE Facilities Services Agreement formerly in place between the Exchange and BSX Group LLC are being deleted. The new provisions include language stating that:
  - BX Equities LLC's purposes include (i) supporting the operation, regulation, and surveillance of a cash equities exchange, (ii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removing impediments to and perfecting the mechanisms of a free and open market and a national market system, and, in general, protecting investors and the public interest, (iii) supporting the various elements of the national market system pursuant to Section 11A of the Act and the rules thereunder, (iv) fulfilling self-regulatory

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responsibilities, and (v) supporting such other initiatives as the Members may deem appropriate.

- BX Equities LLC and its Members shall comply with the federal securities laws and the rules and regulations thereunder; shall cooperate with the SEC and the Exchange pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with BX Equities LLC's ability: 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.
- All persons appointed as officers of the Company must also be officers of the Exchange. Each officer shall comply with the federal securities laws of the United States and the rules and regulations thereunder; shall cooperate with the SEC pursuant to its regulatory authority and the provisions of the Operating Agreement; and shall engage in conduct that fosters and does not interfere with the Company's ability: 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.

- Article 8 and Section 7.3 are being amended to stipulate that the Members may not transfer membership Units, and BX Equities LLC may not issue additional Units, without the approval of the SEC pursuant to Section 19 of the Act<sup>23</sup> and the rules promulgated thereunder. Because any transfer or dilution would require direct SEC approval, the more complex provisions of Article 8 relating to transfers, ownership concentration limits, and voting limits are being deleted as unnecessary.
- Article 11 is being amended to make provisions relating to dissolution of the Company more consistent with comparable provisions in the LLC Agreement of The NASDAQ Options Market LLC.
- Section 12.3 is being amended to make the fiscal year of the Company consistent with that of NASDAQ OMX.
- Article 14 and Sections 7.5, 18.1 and 18.10 (redesignated as Section 18.8) are being amended to remove references to “Related Agreements” that were formerly in place between the Exchange and BSX Group LLC but that are unnecessary due to the Exchange’s direct rights to manage the Company.
- Article 15 is being deleted as unnecessary in light of, and in some respects inconsistent with, the Exchange’s direct management authority.
- Most of Article 16 and all of Article 17 are being deleted, because specific restrictions on intellectual property and use of confidential information are

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15 U.S.C. 78s.

unnecessary in the context of a closely held entity such as BX Equities LLC. However, current Section 16.7 (redesignated as Article 16), which relates to confidential regulatory information, is being retained. Similarly, Section 18.8 is being deleted as unnecessary in the context of a closely held subsidiary.

- Sections 18.6 and 18.12 (redesignated as 18.10) are being amended to make changes to conform to changes made elsewhere in the Operating Agreement.
- Schedule 3 is being amended to eliminate representations and warranties and covenants that are unnecessary in light of BX Equities LLC's status as a closely held subsidiary, and to make conforming changes. In light of the proposal to operate the NASDAQ OMX BX Equities Market through BX Equities LLC, however, the provisions describing the Exchange's capital contribution to BX Equities LLC are substantively unchanged. Schedule 4, which described the BSE Facility Services Agreement, is being deleted, in light of the proposal to adopt a Delegation Agreement as described below.

### **Delegation Agreement**

The Exchange intends to delegate to BX Equities LLC certain limited responsibilities and obligations solely with respect to the operation of a cash equities trading facility pursuant to a Delegation Agreement. The delegation is limited to the Exchange's cash equities market functions and does not include other functions not specifically mentioned in the limited delegation.

Specifically, the Exchange will delegate performance of the following functions to BX Equities LLC pursuant to the Delegation Agreement:

1. To operate the NASDAQ OMX BX Equities Market, including automated systems supporting it.

2. To provide and maintain a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions in cash equities.
3. To act as a Securities Information Processor for quotations and transaction information related to securities traded on the NASDAQ OMX BX Equities Market and any trading facilities operated by BX Equities LLC.
4. To administer the participation of the Exchange in the National Market System plans governing the quoting, trading, and regulation of cash equities and Commission regulations related thereto.
5. To collect, process, consolidate and provide to the Exchange accurate information requisite to operation of a surveillance audit trail for the quoting and trading of cash equities.
6. To establish and assess access fees, transaction fees, market data fees and other fees for the products and services offered by BX Equities LLC.
7. To develop, adopt and administer rules governing participation in the NASDAQ OMX BX Equities Market.
8. To refer to the Exchange any complaints of a regulatory nature involving potential rule violations by member organizations or employees.
9. To establish the annual budget for BX Equities LLC for approval by the Exchange.
10. To determine allocation of BX Equities LLC resources.
11. To manage external relations on matters related to trading on and the operation and functions of the NASDAQ OMX BX Equities Market with Congress, the Commission, state regulators, other SROs, business groups, and the public.

The Exchange will have ultimate responsibility for the operations, rules and regulations developed by the NASDAQ OMX BX Equities Market, as well as their enforcement. Actions taken pursuant to delegated authority will remain subject to review, approval or rejection by the board of directors of the Exchange in accordance with procedures established by that board of directors.

In addition, the Exchange will expressly retain the following authority and functions:

1. To exercise overall responsibility for ensuring that statutory and self-regulatory obligations and functions of the Exchange are fulfilled and to perform any duties and functions not delegated.
2. To delegate authority to BX Equities LLC to take actions on behalf of the Exchange.
3. To direct BX Equities LLC to take action necessary to effectuate the purposes and functions of the Exchange, consistent with the independence of the Exchange's regulatory functions, exchange rules, policies and procedures and the federal securities laws.

In addition, for so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, BX Equities LLC agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange or any delegated market responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange that shall come into the possession of BX Equities LLC shall: (a) not be made available to any person (other than as provided in the proviso at the end of this sentence) other than to those officers, employees and agents of the BX Equities LLC who have a reasonable need to know the contents thereof; (b) be retained in confidence by BX Equities LLC and the officers, employees and agents of BX Equities LLC; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or the Exchange 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, employees or agents of BX Equities LLC to disclose such confidential information to the Commission or the Exchange.
2. BX Equities LLC's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by the Exchange.
3. BX Equities LLC's books and records shall be maintained within the United States.
4. The books, records, premises, officers, and employees of BX Equities LLC shall be deemed to be the books, records, premises, officers and employees of the Exchange for purposes of and subject to oversight pursuant to the Act.
5. BX Equities LLC shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Exchange pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, the Exchange pursuant to their regulatory authority.



6. BX Equities LLC and its officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of the Exchange relating to their regulatory functions (including disciplinary matters) or that would interfere with the ability of the Exchange to carry out its responsibilities under the Act.
7. BX Equities LLC, its officers, and those of its employees whose principal place of business and residence is outside of the United States shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the Exchange or any delegated market responsibility (and shall be deemed to agree that BX Equities LLC may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and BX Equities LLC and each such officer or employee, in the case of any such officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

For so long as BX Equities LLC has any delegated market responsibility pursuant to the Delegation Agreement, the Exchange agrees that it may not transfer or assign any of its ownership of BX Equities LLC. The Delegation Agreement may not be modified except pursuant to a written agreement among the Exchange and BX Equities LLC; provided that, prior to the effectiveness of any such amendment, such amendment shall be filed with, and approved by, the Commission under Section 19 of the Act and the rules promulgated thereunder.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>24</sup> in general, and with Section 6(b)(1) and (b)(5) of the Act,<sup>25</sup> in particular, in that the proposal 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 with and enforce compliance by Exchange Members and persons associated with Exchange Members with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and 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.

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

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

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

Written comments were neither solicited nor received.

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

Within 35 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

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<sup>24</sup> 15 U.S.C. 78f.

<sup>25</sup> 15 U.S.C. 78f(b)(1), (5).

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 such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules.sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BSE-2008-\_\_\_ on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-BSE-2008-\_\_\_. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule

change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BSE-2008-23 and should be submitted on or before [date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5A**

The text of proposed new rules of the Exchange is below. Proposed new language is underlined.

**RULES OF NASDAQ OMX BX****Equity Rules****0100. General Provisions****0110. Adoption and Application of Rules****0111. Adoption of Rules**

The Rules of the Exchange are adopted pursuant to the By-Laws of the Exchange.

**0112. Effective Date**

The Rules of the Exchange shall become effective as provided in the By-Laws.

**0113. Interpretation**

The Rules of the Exchange shall be interpreted in such manner as will aid in effectuating the purposes and business of the Exchange, and so as to require that all practices in connection with the investment banking and securities business shall be just, reasonable and not unfairly discriminatory.

**0114. Reserved****0115. Applicability**

(a) The Equity Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under the Equity Rules.

(b) The Options Rules (including the Grandfathered Rules) shall apply to all Options Participants. The Equity Rules shall apply to Options Participants only if they are also members of the Exchange. The Grandfathered Rules shall also apply to activities of members, members organizations, persons associated with members, and other persons subject to the jurisdiction of the Exchange that occurred prior to the adoption of the Equity Rules.

(c) A member or person associated with a member, who has been expelled, canceled or revoked from membership or from registration or who has been barred from

being associated with all members, shall cease to have any privileges of membership or registration. A member or person associated with a member who has been suspended from membership or registration shall also cease to have any privileges of membership or registration other than those under the Code of Procedure as set forth in the Rule 9000 Series. In neither case shall such a member or person associated with a member be entitled to recover any admission fees, dues, assessments or other charges paid to the Exchange.

(d) A member or person associated with a member who has been suspended from membership or from registration shall be considered as a non-member during the period of suspension for purposes of applying the provisions of the Equity Rules which govern dealings between members and non-members. However, such member or person associated with a member shall have all of the obligations imposed by the Equity Rules.

### **0120. Definitions**

When used in the Equity Rules, unless the context otherwise requires:

#### **(a) "Act"**

The term "Act" means the Securities Exchange Act of 1934, as amended.

#### **(b) "By-Laws"**

The term "By-Laws" means the By-Laws of the Exchange.

#### **(c) "Code of Procedure"**

The term "Code of Procedure" means the procedural rules contained in the Rule 9000 Series.

#### **(d) "Commission" or "SEC"**

The terms "Commission" or "SEC" mean the Securities and Exchange Commission (SEC), established pursuant to the Act.

#### **(e) "FINRA" or "NASD"**

The terms "FINRA" or "NASD", mean, collectively, the Financial Industry Regulatory Authority, Inc. and its subsidiaries.

#### **(f) "FINRA Regulatory Contract"**

The term "FINRA Regulatory Contract" means the regulatory services agreement between the Exchange and FINRA, pursuant to which FINRA has agreed to perform certain regulatory functions on behalf of the Exchange.

**(g) "Customer"**

The term "customer" shall not include a broker or dealer.

**(h) "Security"**

Unless the context requires otherwise, the term "security" shall mean a security listed on the Exchange or traded on the Exchange pursuant to unlisted trading privileges.

**(i) "Member" or "Exchange Member"**

The terms "member" or "Exchange Member" mean any registered broker or dealer that has been admitted to membership in the Exchange.

**(j) "Regulation Department"**

The term "Regulation Department" means the Department of the Exchange that supervises and administers the regulatory functions of the Exchange, including the administration of any regulatory services agreements with other self-regulatory organizations to which the Exchange is a party.

**(k) "Exchange"**

The term "Exchange" means NASDAQ OMX BX, Inc.

**(l) "Nasdaq"**

The term "Nasdaq" means The NASDAQ Stock Market LLC.

**(m) "Exchange Review Council"**

The term "Exchange Review Council" means the committee authorized and directed to act for the Board of Directors of the Exchange in a manner consistent with the Equity Rules with respect to (1) an appeal or review of a disciplinary proceeding; (2) a statutory disqualification decision; (3) a review of a membership proceeding; (4) a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; (5) the exercise of exemptive authority; and (6) such other proceedings or actions authorized by the Equity Rules.

**(n) "Person"**

The term "person" shall include any natural person, partnership, corporation, association, or other legal entity.

**(o) "Rules" or "Rules of the Exchange"**

The term "Rules" or "Rules of the Exchange" means the Equity Rules and the Options Rules.

**(p) "Equity Rules"**

The term "Equity Rules" means the numbered rules set forth in the Exchange Manual denominated as the 0100, 1000, 2000, 3000, 4000, 5000, 6000, 7000, 8000, 9000, 10000, and 11000 Series Rules, as adopted by the Exchange Board of Directors pursuant to the By-Laws of the Exchange, as hereafter amended or supplemented, and also includes the Certificate of Incorporation and the By-Laws of the Exchange, the Operating Agreement of NASDAQ OMX BX Equities LLC, and the Delegation Agreement between the Exchange and NASDAQ OMX BX Equities LLC.

**(q) "Options Rules"**

The term "Options Rules" means the BOX Rules and also includes the Grandfathered Rules, the Certificate of Incorporation and the By-Laws of the Exchange, the Limited Liability Company Agreement and By-Laws of BOXR, and the Operating Agreement of BOX LLC.

**(r) "Grandfathered Rules"**

The "Grandfathered Rules" means the Rules of Board of Governors of the Boston Stock Exchange as in effect on the date of the closing of the acquisition of the Exchange by The NASDAQ OMX Group, Inc. and as such rules may be subsequently amended, to the extent that such rules are applicable to BOX and to Options Participants. The Grandfathered Rules shall also apply to activities of members, members organizations, persons associated with members, and other persons subject to the jurisdiction of the Exchange that occurred prior to the adoption of the Equity Rules.

**(s) "Options Participant"**

The term "Options Participant" means a firm or organization that is registered with the Exchange pursuant to Chapter II of the Options Rules for purposes of participating in options trading on BOX as an "Order Flow Provider" or "Market Maker".

**(t) "BOXR"**

"BOXR" means Boston Options Exchange Regulation, LLC.

**(u) "BOX LLC"**

"BOX LLC" means Boston Options Exchange Group LLC.

**(v) "BOX"**



“BOX” means the Boston Options Exchange operated by BOX LLC as a facility of, and subject to regulation by, the Exchange.

**(w) “BOX Rules”**

“BOX Rules” means the rules denominated as the Rules of Boston Options Exchange Group LLC.

**(x) “NASDAQ OMX BX Equities Market” or “System”**

“NASDAQ OMX BX Equities Market” or “System” shall mean the automated system for order execution and trade reporting owned and operated by the Exchange through BX Equities LLC as a facility of the Exchange, and which is described fully in the Equity Rule 4750 Series.

**(y) “NASDAQ OMX BX Equities LLC” or “BX Equities LLC”**

“NASDAQ OMX BX Equities LLC” or “BX Equities LLC” means NASDAQ OMX BX Equities LLC, a subsidiary of the Exchange which operates the NASDAQ OMX BX Equities Market pursuant to the Operating Agreement of NASDAQ OMX BX Equities LLC and the Delegation Agreement.

**(z) “Delegation Agreement”**

“Delegation Agreement” shall mean the Delegation Agreement dated \_\_\_\_\_, 2008, between the Exchange and BX Equities LLC, as such Delegation Agreement may from time to time be amended with the approval of the Commission pursuant to Section 19 of the Act and the rules promulgated thereunder.

**0121. Definitions in the By-Laws of the Exchange**

Unless the context otherwise requires, or unless otherwise defined in the Equity Rules, terms used in the Equity Rules and interpretive material, if defined in the By-Laws of the Exchange, shall have the meaning as defined in the By-Laws of the Exchange.

**0130. Regulation of the Exchange and Its Members**

The Exchange and FINRA are parties to the FINRA Regulatory Contract, pursuant to which FINRA has agreed to perform certain functions described in the Equity Rules on behalf of the Exchange. Equity Rules that refer to the Exchange’s Regulation Department, Regulation Department staff, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

Notwithstanding the fact that the Exchange has entered into the FINRA Regulatory Contract with FINRA to perform some of the Exchange's functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions. In addition, the Exchange has incorporated by reference certain NASD rules. Exchange members shall comply with these rules and interpretations as if such rules and interpretations were part of the Equity Rules.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If an NASD rule that is incorporated by reference in a rule of the Exchange is transferred into the FINRA rulebook, then the Exchange rule shall be construed to require Exchange members to comply with the FINRA rule corresponding to the NASD rule (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **0140. Fingerprint-Based Background Checks of Employees and Independent Contractors**

(a) In order to enhance the physical security of the facilities, systems, data, and information of the Exchange and its affiliates (collectively, the "Exchange Entities"), it shall be the policy of the Exchange Entities to conduct a fingerprint-based criminal records check of (i) all prospective and current employees of the Exchange Entities, (ii) all prospective and current independent contractors who have or are anticipated to have access to facilities of the Exchange Entities for ten business days or longer, and (iii) all prospective and current temporary employees who have or are anticipated to have access to facilities of the Exchange Entities for ten business days or longer. The Exchange Entities shall apply this policy in all circumstances where permitted by applicable law.

(b) The Exchange Entities shall submit fingerprint cards obtained pursuant to the foregoing policy to the Attorney General of the United States or his or her designee for identification and processing. The Exchange Entities shall at all times maintain the security of fingerprint cards and information received from the Attorney General or his or her designee.

(c) The Exchange Entities shall evaluate information received from the Attorney General or his or her designee in accordance with the terms of a written fingerprint policy and provisions of applicable law. A felony or serious misdemeanor conviction will be a factor in considering whether to hire a prospective employee, take adverse employment action with respect to a current employee, or deny prospective or current independent contractors or temporary employees access to facilities of the Exchange Entities.

(d) All current and prospective employees, independent contractors, and temporary employees of the Exchange Entities shall be fingerprinted prior to being given access to facilities of the Exchange Entities that are subject to regulation by the Commission. All other current or prospective employees, independent contractors, and temporary employees of the Exchange Entities shall be fingerprinted as soon as practicable, either before or after the commencement of an employment or contracting

relationship. A prospective employee, independent contractor, or temporary employee who refuses to submit to fingerprinting will be denied employment or access. A current employee, independent contractor, or temporary employee who refuses to submit to fingerprinting will be denied employment or access following notice and being given three opportunities to submit.

### **0150. Regulatory Independence**

In furtherance of the independence of the Exchange's regulatory functions from its commercial operations, the Exchange shall ensure that, unless it obtains prior Commission approval, the regulatory functions subject to the FINRA Regulatory Contract as in effect on \_\_\_\_\_, 2008 shall at all times continue to be performed by FINRA or an affiliate thereof or by another independent self-regulatory organization.

### **0160. Delegation, Authority and Access**

(a) The Exchange delegates to its subsidiary BOXR the authority to act on behalf of the Exchange as set forth in a Plan of Allocation and Delegation approved by the Commission pursuant to its authority under the Act. The Exchange delegates to its subsidiary BX Equities LLC the authority to act on behalf of the Exchange as set forth in a Delegation Agreement approved by the Commission pursuant to its authority under the Act.

(b) Notwithstanding any delegation of authority to BOXR pursuant to this Rule, the staff, books, records and premises of BOXR are the staff, books, records and premises of the Exchange subject to oversight pursuant to the Act, and all officers, directors, employees and agents of BOXR are the officers, directors, employees and agents of the Exchange for purposes of the Act. Notwithstanding any delegation of authority to BX Equities LLC pursuant to this Rule, the staff, books, records and premises of BX Equities LLC are the staff, books, records and premises of the Exchange subject to oversight pursuant to the Act, and all officers, employees and agents of BX Equities LLC are the officers, employees and agents of the Exchange for purposes of the Act.

## **1000. Membership, Registration and Qualification Requirements**

### **1001. FINRA Regulatory Contract**

The Exchange and FINRA are parties to the FINRA Regulatory Contract, pursuant to which FINRA has agreed to perform certain functions described in the Rule 1000 Series on behalf of the Exchange. Equity Rules that refer to the Regulation Department, Regulation Department staff, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

Notwithstanding the fact that the Exchange has entered into the FINRA Regulatory Contract with FINRA to perform some of the Exchange's functions, the

Exchange shall retain ultimate legal responsibility for, and control of, such functions. In addition, the Exchange has incorporated by reference certain NASD rules. Exchange members shall comply with these rules and interpretations as if such rules and interpretations were part of the Equity Rules.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If an NASD rule that is incorporated by reference in a rule of the Exchange is transferred into the FINRA rulebook, then the Exchange rule shall be construed to require Exchange members to comply with the FINRA rule corresponding to the NASD rule (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

## **1002. Qualifications of Exchange Members and Associated Persons**

(a) Persons Eligible to Become Exchange Members and Associated Persons of Exchange Members.

(1) Any registered broker or dealer shall be eligible for membership in the Exchange, except such registered brokers or dealers as are excluded under paragraph (b).

(2) Any person shall be eligible to become an associated person of an Exchange member, except such persons as are excluded under paragraph (b).

(b) Ineligibility of Certain Persons for Membership or Association

(1) Subject to such exceptions as may be explicitly provided elsewhere in the Equity Rules, no registered broker or dealer shall be admitted to membership, and no Exchange member shall be continued in membership, if such broker, dealer, or Exchange member fails or ceases to satisfy the qualification requirements established by the Equity Rules, or if such broker, dealer, or Exchange member is or becomes subject to a statutory disqualification, or if such broker, dealer, or Exchange member fails to file such forms as the Exchange may require in accordance with such process as the Exchange may prescribe.

(2) Subject to such exceptions as may be explicitly provided elsewhere in the Equity Rules, no person shall become associated with an Exchange member, continue to be associated with an Exchange member, or transfer association to another Exchange member, if such person fails or ceases to satisfy the qualification requirements established by the Equity Rules, or if such person is or becomes subject to a statutory disqualification; and no broker or dealer shall be admitted to membership, and no Exchange member shall be continued in membership, if any person associated with it is ineligible to be an associated person under this subsection.

(c) Payment of Fees, Dues, Assessments, and Other Charges by Members and Associated Persons

(1) Fees, dues, assessments, and other charges shall be called and payable by members and associated persons as determined by the Exchange from time to time.

(2) Each Exchange member or associated person shall promptly furnish all information or reports requested by the Exchange in connection with the determination of the amount of fees, dues, assessments, or other charges owed.

(d) Reinstatement of Membership or Registration. Any membership or registration suspended or canceled under the Equity Rules may be reinstated by the Exchange upon such terms and conditions as are permitted under the Act and the Equity Rules; provided, however, that any applicant for reinstatement of membership or registration shall possess the qualifications required for membership or registration in the Exchange.

(e) Membership in a Registered Securities Association or Another Registered Exchange. As a condition to maintaining membership in the Exchange, members shall at all times maintain membership in a registered securities association that is not registered solely under Section 15A(k) of the Securities Exchange Act of 1934, or another registered exchange that is not registered solely under Section 6(g) of the Securities Exchange Act of 1934. Exchange members that transact business with customers shall at all times be members of FINRA.

(f) Transition Rules for Members of the Exchange Prior to its Acquisition by NASDAQ OMX

(1) A registered broker-dealer that was a member organization in good standing of the Exchange on the date immediately prior to the acquisition of the Exchange by The NASDAQ OMX Group, Inc. (the "Nasdaq Acquisition") shall be eligible for continued membership in the Exchange following the Nasdaq Acquisition if such member organization satisfies the requirements for continued membership under the Rule 1000 Series. Such member organizations shall be required to sign a revised membership agreement in the form adopted by the Exchange.

(2) A person registered with the Exchange as an associated person of a broker-dealer in a category of registration recognized under the Rule 1000 Series shall be eligible for continued registration with the Exchange following the Nasdaq Acquisition if such person satisfies the requirements for continued registration under the Rule 1000 Series.

**IM-1002-1. Filing of Misleading Information as to Membership or Registration**

The filing with the Exchange of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action.

### **IM-1002-2. Status of Persons Serving in the Armed Forces of the United States**

#### (a) Inactive Status of Currently Registered Persons

(1) A registered person of a member who volunteers for or is called into active duty in the Armed Forces of the United States shall be placed, after proper notification to the Exchange, upon inactive status and need not be re-registered by such member upon his or her return to active employment with the member. Such a person will remain eligible to receive transaction-related compensation, including continuing commissions, because he or she remains registered with a member of the Exchange. The employing member also may allow such a person to enter into an arrangement with another registered person of the member to take over and service the person's accounts and to share transaction-related compensation based upon the business generated by such accounts. However, since such persons are inactive, they may not perform any of the duties performed by a registered person.

(2) A registered person who is placed on inactive status pursuant to this paragraph (a) shall not be included within the scope of fees, if any, charged by the Exchange with respect to registered persons.

(3) A registered person who is placed on inactive status pursuant to this paragraph (a) shall not be required to complete either of the Regulatory or Firm Elements of the continuing education requirements set forth in Rule 1120 during the pendency of such inactive status.

(4) The relief provided in subparagraphs (a)(1), (a)(2), and (a)(3) shall be available to a registered person who is placed on inactive status pursuant to this paragraph (a) during the period that such a person remains registered with the member with which he or she was registered at the beginning of active duty in the Armed Forces of the United States, regardless of whether the person returns to active employment with another member upon completion of his or her active duty in the Armed Forces of the United States.

(5) The relief described in this paragraph (a) will be provided only to a person registered with a member and only while the person remains on active military duty.

#### (b) Inactive Status of Sole Proprietorships

(1) A member that is a sole proprietor who temporarily closes his or her business by reason of volunteering for or being called into active duty in the Armed Forces of the United States, shall be placed, after proper notification to the Exchange, on inactive status while the member remains on active military duty.

(2) A sole proprietor member placed on inactive status as set forth in this paragraph (b) shall not be required to pay dues or assessments during the pendency of such inactive status and shall not be required to pay an admission fee upon return to active participation in the investment banking and securities business.

(3) The relief described in this paragraph (b) will be provided only to a sole proprietor member and only while the person remains on active military duty.

(c) Status of Formerly Registered Persons

(1) If a person who is currently not registered with a member volunteers for or is called into active duty in the Armed Forces of the United States at any time within two years after the date the person ceases to be registered with a member, the Exchange will defer the lapse of registration requirements set forth in Rules 1021(c) and 1031(c) (i.e., toll the two-year expiration provisions for qualification examination requirements). The Exchange will defer the lapse of registration requirements commencing on the date the person begins actively serving in the Armed Forces of the United States, provided that the Exchange is properly notified of the person's period of active military service within 90 days following his or her completion of active service or upon his or her re-registration with a member, whichever occurs first. The deferral will terminate 90 days following the person's completion of active service in the Armed Forces of the United States. Accordingly, if such person does not re-register with a member within 90 days following his or her completion of active service in the Armed Forces of the United States, the amount of time in which the person must become re-registered with a member without being subject to the qualification examination requirements shall consist of the standard two-year period provided in Rules 1021(c) and 1031(c) reduced by the period of time between the person's termination of registration and beginning of active service in the Armed Forces of the United States.

(2) If a person placed upon inactive status while serving in the Armed Forces of the United States ceases to be registered with a member, the Exchange will defer the lapse of registration requirements set forth in Rules 1021(c) and 1031(c) (i.e., toll the two-year expiration provisions for qualification examination requirements) during the pendency of his or her active service in the Armed Forces of the United States. The Exchange will defer the lapse of registration requirements based on existing information in the Central Registration Depository, provided that the Exchange is properly notified of the person's period

of active military service within two years following his or her completion of active service or upon his or her re-registration with a member, whichever occurs first. The deferral will terminate 90 days following the person's completion of active service in the Armed Forces of the United States. Accordingly, if such person does not re-register with a member within 90 days following his or her completion of active service in the Armed Forces of the United States, the amount of time in which the person must become re-registered with a member without being subject to the qualification examination requirements shall consist of the standard two-year period provided in Rules 1021(c) and 1031(c).

### **IM-1002-3. Failure to Register Personnel**

The failure of any member to register an employee, who should be so registered, as a Registered Representative may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action.

### **IM-1002-4. Branch Offices and Offices of Supervisory Jurisdiction**

Each member is under a duty to insure that its membership application with the Exchange is kept current at all times by supplementary amendments to its original application and that any offices other than the main office are properly designated and registered, if required, with the Exchange.

Each member must designate to the Exchange those offices of supervisory jurisdiction, including the main office, and must register those offices which are deemed to be branch offices in accordance with the standards set forth in Equity Rule 3010.

Exchange members that are also FINRA members shall be deemed to have complied with the provisions of Equity IM-1002-4 relating to designation of offices of supervisory jurisdiction and branch offices if they are in compliance with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws. Exchange Members that are FINRA members shall comply with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws as if such Rules were part of the Rules of the Exchange. Therefore, Exchange members are complying with the provisions of Equity IM-1002-4 relating to designation of offices or supervisory jurisdiction and branch offices by complying with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity IM-1002-4 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD IM-1000-4 or Article IV, Section 8 of the NASD By-Laws are transferred into the FINRA rulebook, then Equity Rule IM-1002-4 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD IM-1000-4 or Article IV, Section 8 of the NASD By-Laws (regardless of whether



such rules are renumbered or amended) as if such rules were part of the Rules of the Exchange.

Exchange members that are not FINRA members shall designate offices of supervisory jurisdiction and branch offices by submitting to the Exchange a written filing in such form as the Exchange may prescribe.

## **1010. Membership Proceedings**

### **1011. Definitions**

Unless otherwise provided, terms used in the Rule 1000 Series shall have the meaning as defined in Rule 0120.

#### (a) "Applicant"

The term "Applicant" means a person that applies for membership in the Exchange under Rule 1013 or a member that files an application for approval of a change in ownership, control, or business operations under Rule 1017.

#### (b) "Associated Person"

The term "Associated Person" means any partner, officer, director, or branch manager of an Exchange member or Applicant (or person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such Exchange member or Applicant, or any employee of such Exchange member or Applicant, except that any person associated with an Exchange member or Applicant whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of the Equity Rules.

#### (c) "Department"

The term "Department" means the Membership Department located within the Exchange's Regulation Department.

#### (d) "Director"

The term "Director" means a member of the Exchange Board.

#### (e) "Interested Staff"

The term "Interested Staff" means an employee who directly participates in a decision under Rule 1014 or 1017, an employee who directly supervises an employee with respect to such decision, an employee who conducted an investigation or examination of a member that files an application under Rule 1017, and the head of the Department.

(f) "investment banking or securities business"

The term "investment banking or securities business" means the business, carried on by a broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others.

(g) "material change in business operations"

The term "material change in business operations" includes, but is not limited to:

- (1) removing or modifying a membership agreement restriction;
- (2) market making, underwriting, or acting as a dealer for the first time;
- (3) adding business activities that require a higher minimum net capital under SEC Rule 15c3-1; and
- (4) adding business activities that would cause a proprietary trading firm no longer to meet the definition of that term contained in this rule.

(h) "Exchange Board"

The term "Exchange Board" means the Board of Directors of the Exchange.

(i) "principal place of business"

The term "principal place of business" means the executive office from which the sole proprietor or the officers, partners, or managers of the Applicant direct, control, and coordinate the activities of the Applicant, unless the Department determines that the principal place of business is where: (1) the largest number of Associated Persons of the Applicant are located; or (2) the books and records necessary to provide information and data to operate the business and comply with applicable rules are located.

(j) "registered broker or dealer"

The term "registered broker or dealer" means any registered broker or dealer, as defined in Section 3(a)(48) of the Act, that is registered with the Commission under the Act.

(k) "Representative"

The term "Representative" means an Associated Person of a registered broker or dealer, including assistant officers other than principals, who is engaged in the investment banking or securities business for the member including the functions of supervision,

solicitation or conduct of business in securities or who is engaged in the training of persons associated with a broker or dealer for any of these functions are designated as representatives. As provided in Rule 1031, all Representatives of Exchange Members are required to be registered with the Exchange, and Representatives that are so registered are referred to herein as "Registered Representatives."

(l) "sales practice event"

The term "sales practice event" means any customer complaint, arbitration, or civil litigation that has been reported to the Central Registration Depository, currently is required to be reported to the Central Registration Depository, or otherwise has been reported to the Exchange.

(m) "Subcommittee"

The term "Subcommittee" means a subcommittee of the Exchange Review Council that is constituted pursuant to Rule 1015 to conduct a review of a Department decision issued under the Rule 1010 Series.

(n) "statutory disqualification"

The term "statutory disqualification" shall have the meaning set forth in Section 3(a)(39) of the Act.

(o) "Proprietary Trading Firm"

The term "proprietary trading firm" means an Applicant with the following characteristics:

(1) the Applicant is not required by Section 15(b)(8) of the Act to become a FINRA member but is a member of another registered securities exchange not registered solely under Section 6(g) of the Act;

(2) all funds used or proposed to be used by the Applicant for trading are the Applicant's own capital, traded through the Applicant's own accounts;

(3) the Applicant does not, and will not have "customers," as that term is defined in Equity Rule 0120(g); and

(4) all Principals and Representatives of the Applicant acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Applicant.

## **1012. General Provisions**

(a) Filing by Applicant or Service by the Exchange

(1) An Applicant may file an application or any document or information requested under the Equity Rule 1010 Series by first-class mail, overnight courier, or hand delivery. If the Department and the Applicant agree, the Applicant also may file a requested document or information by facsimile.

(2) The Exchange shall serve a notice or decision issued under the Rule 1010 Series by first-class mail on the Applicant or its counsel, unless a Rule specifies a different method of service.

(3) Service by the Exchange or filing by an Applicant shall be deemed complete as follows:

(A) Service or filing by first-class mail shall be deemed complete on the date of postmark;

(B) Service or filing by overnight courier shall be deemed complete on the date of delivery to the overnight courier as specified in the airbill;

(C) Service or filing by hand delivery shall be deemed complete on the date of receipt as evidenced by a date stamp; and

(D) Service or filing by facsimile shall be deemed complete on the date specified in the document and on the written confirmation of transmission.

(b) Lapse of Application

(1) Absent a showing of good cause, an application filed under Rule 1013 or 1017 shall lapse if an Applicant fails to:

(A) respond fully within 15 business days after service of an initial or subsequent written request for information or documents under Rule 1013, within 30 days after service of an initial or subsequent written request for information or documents under Rule 1017, or within such other time period agreed to by the Department and the Applicant;

(B) appear at or otherwise participate in a scheduled membership interview pursuant to Rule 1013(b) or 1017(f), if required; or

(C) file an executed membership agreement under Rule 1014(d) or 1017(g)(4) within 25 days after service of the agreement, or within such other period agreed to by the Department and the Applicant.

(2) If an Applicant wishes to continue to seek membership or approval of a change in ownership, control, or business operations, then the Applicant shall be required to submit a new application under Rule 1013 or 1017, respectively, and any required fee. The Exchange shall not refund any fee for a lapsed application.

(c) Ex Parte Communications

(1) The prohibitions against ex parte communications shall become effective when Exchange staff has knowledge that an Applicant intends to file a written request for review by the Exchange Review Council under Rule 1015.

(2) Unless on notice and opportunity for an Applicant and Interested Staff to participate, or to the extent required for the disposition of ex parte matters as authorized by the Equity Rules:

(A) an Applicant, a counsel or representative of an Applicant, or an Interested Staff shall not make or knowingly cause to be made an ex parte communication relevant to the merits of a membership proceeding under the Rule 1010 Series to a Director, a member of the Exchange Review Council or a Subcommittee thereof, or an Exchange employee who is participating or advising in a decision of such a person with respect to that proceeding; and

(B) a Director, a member of the Exchange Review Council or a Subcommittee thereof, or an Exchange employee who is participating or advising in the decision of such a person with respect to a membership proceeding shall not make or knowingly cause to be made to an Applicant, a counsel or representative of the Applicant, or an Interested Staff an ex parte communication relevant to the merits of that proceeding.

(3) A Director, a member of the Exchange Review Council or a Subcommittee thereof, or an Exchange employee participating or advising in the decision of such a person, who receives, makes, or knowingly causes to be made a communication prohibited by this paragraph shall place in the record of the membership proceeding:

(A) all such written communications;

(B) memoranda stating the substance of all such oral communications; and

(C) all written responses and memoranda stating the substance of all oral responses to all such communications.

(d) Recusal or Disqualification

A Director or a member of the Exchange Review Council or a Subcommittee thereof shall not participate in a matter governed by the Rule 1010 Series as to which that person has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In such a case, the person shall recuse himself or shall be disqualified as follows:

(1) The Chair of the Exchange Board shall have authority to direct the disqualification of a Director, and a majority of the Directors of the Exchange Board excluding the Chair shall have authority to direct the disqualification of the Chair of the Exchange Board.

(2) The Chair of the Exchange Review Council shall have authority to direct the disqualification of a member of the Exchange Review Council or a member of a Subcommittee appointed pursuant to Rule 1015, and the Vice Chair of the Exchange Review Council shall have authority to direct the disqualification of the Chair of the Exchange Review Council.

(e) Computation of Time

(1) Calendar Day

In the Rule 1010 Series, "day" means calendar day, unless otherwise specified.

(2) Formula

In computing a period of time under the Rule 1010 Series, the day of the act, event, default, or lapse from which the period of time designated begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall be excluded from the computation when the period prescribed is ten days or less or when the term "business day" is used.

(f) Similarity of Membership Names

(1) No person or firm shall be admitted to or continued in membership in the Exchange if such person or firm has a name that is identical to the name of another Exchange member appearing in the membership role of the Exchange or a name so similar to any such name as to tend to confuse or mislead.

(2) No Exchange member may change its name without prior approval of the Exchange.

(g) Resignation of Exchange Members

Membership in the Exchange may be voluntarily terminated only by formal resignation. Resignations of Exchange members must be filed via electronic process or such other process as the Exchange may prescribe and addressed to the Exchange. Any Exchange member may resign from the Exchange at any time. Such resignation shall not take effect until 30 days after receipt thereof by the Exchange and until all indebtedness due the Exchange from such Exchange member shall have been paid in full and so long as any complaint or action is pending against the Exchange member under the Rules of the Exchange. The Exchange, however, may in its discretion declare a resignation effective at any time.

(h) Retention of Jurisdiction

A resigned Exchange member or an Exchange member that has had its membership canceled or revoked shall continue to be subject to the filing of a complaint under the Rules of the Exchange based upon conduct that commenced prior to the effective date of the Exchange member's resignation from the Exchange or the cancellation or revocation of its membership. Any such complaint, however, shall be filed within two years after the effective date of resignation, cancellation, or revocation.

(i) Transfer and Termination of Membership

(1) Except as provided hereinafter, no member of the Exchange may transfer its membership or any right arising therefrom; the membership of a corporation, partnership, or any other business organization that is a member of the Exchange shall terminate upon its liquidation, dissolution, or winding up; and the membership of a sole proprietorship that is an Exchange member shall terminate at death, provided that all obligations of membership under the Rules of the Exchange have been fulfilled.

(2) The consolidation, reorganization, merger, change of name, or similar change in any corporate member of the Exchange shall not terminate the membership of such corporate member, provided that the Exchange member or surviving corporation, if any, shall be deemed a successor to the business of the corporate Exchange member, and the Exchange member or the surviving organization shall continue in the investment banking or securities business, and shall possess the qualifications for membership in the Exchange. The death, change of name, withdrawal of any partner, the addition of any new partner, reorganization, consolidation, or any change in the legal structure of a partnership member of the Exchange shall not terminate the membership of such partnership member, provided that the Exchange member or surviving organization, if any, shall be deemed a successor to the business of the partnership member, and the Exchange member or surviving organization shall possess the qualifications for membership in the Exchange. If the business of any predecessor Exchange member is to be carried on by an organization deemed to be a successor organization by the Exchange, the membership of such predecessor Exchange

member shall be extended to the successor organization subject to the notice and application requirements of the Equity Rules and the right of the Exchange to place restrictions on the successor organization pursuant to the Equity Rules; otherwise, any surviving organization shall be required to satisfy all of the membership application requirements of the Equity Rules.

(j) Registration of Branch Offices.

(1) Each branch office of a member of the Exchange shall be registered with and listed upon the membership roll of the Exchange, and shall pay such dues, assessments, and other charges as shall be fixed from time to time under the Equity Rules.

(2) Each member of the Exchange shall promptly advise the Exchange via electronic process or such other process as the Exchange may prescribe of the opening, closing, relocation, change in designated supervisor, or change in designated activities of any branch office of such Exchange member not later than 30 days after the effective date of such change.

(A) Exchange members that are also FINRA members shall be deemed to have complied with Equity Rule 1012(j) if they are in compliance with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws. Exchange Members that are FINRA members shall comply with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 1012(j) by complying with NASD IM-1000-4 and Article IV, Section 8 of the NASD By-Laws as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 1012(j) are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD IM-1000-4 or Article IV, Section 8 of the NASD By-Laws are transferred into the FINRA rulebook, then Equity Rule 1012(j) shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD IM-1000-4 or Article IV, Section 8 of the NASD By-Laws (regardless of whether such rules are renumbered or amended) as if such rules were part of the Rules of the Exchange.

(B) Exchange members that are not FINRA members shall promptly advise the Exchange of the opening, closing, relocation, change in designated supervisor, or change in designated activities of any branch



office of such Exchange member by submitting a written filing to the Exchange in such form as the Exchange may prescribe.

### **1013. New Member Application**

#### (a) Filing of Application

##### (1) Where to File; Contents

An Applicant for Exchange membership shall file its application with the Department in accordance with this Rule. An Applicant shall submit an application that includes:

(A) a copy of the Applicant's current Form BD;

(B) an original Exchange-approved fingerprint card for each Associated Person who will be subject to SEC Rule 17f-2 and for whom a fingerprint card has not been filed with another self-regulatory organization;

(C) a check for such fee as may be required under the Equity Rules;

(D) a description of the Applicant's proposed trading activities on the Exchange, such as the types of securities it will trade, whether it will be a market maker, an order entry firm, and/or engage in block trading activities, and the extent to which the Applicant is conducting such activities as a member of other SRO(s);

(E) a copy of the Applicant's most recent audited financial statements and a description of any material changes in the Applicant's financial condition since the date of the financial statements;

(F) an organizational chart;

(G) the intended location of the Applicant's principal place of business and all other offices, if any, whether or not such offices would be required to be registered under the Equity Rules, and the names of the persons who will be in charge of each office;

(H) a description of the communications and operational systems the Applicant will employ to conduct business and the plans and procedures the Applicant will employ to ensure business continuity, including: system capacity to handle the anticipated level of usage; contingency plans in the event of systems or other technological or

communications problems or failures; system redundancies; disaster recovery plans; and system security;

(I) a copy of any decision or order by a federal or state authority or self-regulatory organization taking permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person;

(J) a statement indicating whether the Applicant is currently, or has been in the last ten years, the subject of any investigation or disciplinary proceeding conducted by any self-regulatory organization, the foreign equivalent of a self-regulatory organization, a foreign or international securities exchange, a contract market designated pursuant to the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, a futures association registered under the Commodity Exchange Act or any substantially similar foreign statute or regulation, the Commission or any other “appropriate regulatory agency” (as defined in the Act), the Commodity Futures Trading Commission, or any state financial regulatory agency regarding the Applicant’s activities that has not been reported to the Central Registration Depository, together with all relevant details, including any sanctions imposed;

(K) a statement indicating whether any person listed on Schedule A of the Applicant’s Form BD is currently, or has been in the last ten years, the subject of any investigation or disciplinary proceeding conducted by any self-regulatory organization, the foreign equivalent of a self-regulatory organization, a foreign or international securities exchange, a contract market designated pursuant to the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, a futures association registered under the Commodity Exchange Act or any substantially similar foreign statute or regulation, the Commission or any other “appropriate regulatory agency”, the Commodity Futures Trading Commission, or any state financial regulatory agency regarding the Applicant’s activities that has not been reported to the Central Registration Depository, together with all relevant details, including any sanctions imposed;

(L) a copy of any contract or agreement with another broker-dealer, a bank, a clearing entity, a service bureau or a similar entity to provide the Applicant with services regarding the execution or clearance and settlement of transactions effected on the Exchange;

(M) if the Applicant proposes to make markets on the Exchange, a description of the source and amount of Applicant’s capital to support its market making activities on the Exchange, and the source of any additional capital that may become necessary;

(N) a description of the financial controls to be employed by the Applicant with respect to Equity Rule 3011;

(O) a copy of the Applicant's written supervisory procedures with respect to the activities identified in paragraph (a)(1)(D);

(P) a list of the persons conducting the Applicant's market making and other trading activities, and a list of the persons responsible for such persons' supervision, together with the CRD number (if applicable) or a copy of Form U-4 for each such person;

(Q) if not previously provided to FINRA, a FINRA Entitlement Program Agreement and Terms of Use and an Account Administration Entitlement Form;

(R) a copy of the Applicant's most recent "FOCUS Report" (Form X-17A-5) filed with the SEC pursuant to SEC Rule 17a-5 (the most current Parts I, II, and III, as applicable);

(S) all examination reports and corresponding responses regarding the Applicant for the previous two years from the self-regulatory organizations of which it is a member;

(T) an agreement to comply with the federal securities laws, the rules and regulations thereunder, the Rules of the Exchange, and all rulings, orders, directions, and decisions issued and sanctions imposed under the Rules of the Exchange;

(U) an agreement to pay such dues, assessments, and other charges in the manner and amount as from time to time shall be fixed pursuant to the Rules of the Exchange; and

(V) such other reasonable information with respect to the applicant as the Exchange may require.

Each Applicant and Exchange member shall ensure that its membership application with the Exchange is kept current at all times by supplementary amendments via electronic process or such other process as the Exchange may prescribe. Such amendments to the application shall be filed with the Exchange not later than 15 business days after the applicant or the Exchange member knew or should have known of the facts or circumstances giving rise to the need for the amendment. The Applicant shall promptly notify the Department in writing of any material adverse change in its financial condition.

(2) Uniform Registration Forms

Upon approval of the Applicant's Account Administrator Entitlement Form, the Applicant shall submit its Forms U4 for each Associated Person who is required to be registered under the Rules, any amendments to its Forms BD or U4, and any Form U5 electronically via Web CRD.

(3) Rejection of Application That Is Not Substantially Complete

If the Department determines within 15 business days after the filing of an application that the application is not substantially complete, the Department may reject the application and deem it not to have been filed. In such case, within the 15 day period, the Department shall serve a written notice on the Applicant of the Department's determination and the reasons therefor. The Exchange shall refund the application fees, if any, in accordance with the provisions of the Equity Rules governing such fees. If the Applicant determines to continue to seek membership, the Applicant shall submit a new application and any required fee under this Rule.

(4) Additional Documents Or Information

Within 15 business days after the filing of an application, the Department shall serve an initial request for any additional information or documents necessary to render a decision on the application. The Department may serve subsequent requests for additional information or documents at any time during the membership application process.

Unless otherwise agreed by the Department and the Applicant, the Applicant shall file any additional information and documents with the Department within 15 business days after service of the Department's request.

(5) Applicants That Are Members of an Association or Another Exchange

(A) Applicants for Exchange membership that are also simultaneously applying for FINRA membership may file one application with FINRA in compliance with the NASD Rule 1010 Series; however, the Exchange will not take action on the application for Exchange membership until the applicant is an active member of FINRA.

(B) Applicants that are members of another registered national securities exchange or association must submit a complete application form containing all of the required items of information listed in Rule 1013(a)(1).

(C) An applicant that is an approved FINRA or NASDAQ member shall have the option to apply to become a member of the Exchange and to register with the Exchange all associated persons of the firm whose

registrations with the firm are approved with FINRA or NASDAQ in categories recognized by the Rules of the Exchange through an expedited process by submitting a Short Form Membership Application Form and a Membership Agreement. The Short Form Membership Application Form shall contain information sufficient to establish the identity of the applicant as an approved FINRA or NASDAQ member, its proposed activity on the Exchange, and certain contact personnel, and shall be available on a website maintained by the Exchange.

(b) Membership Interview

(1) Optional Interview

Before the Department serves its decision on an application for new membership in the Exchange, the Department may conduct a membership interview with a representative or representatives of the Applicant if the Department determines that an interview is necessary to clarify aspects of an application.

(2) Service of Notice

At least seven days before a membership interview, the Department shall serve on the Applicant a written notice that specifies the date and time of the interview and the representative or representatives of the Applicant who are required to participate in the interview. The Department shall serve the notice by facsimile or overnight courier. The Applicant and the Department may agree to a shorter or longer period for notice or a different method of service under this subparagraph.

(3) Time

Unless the Department directs otherwise for good cause shown, any membership interview shall be scheduled to occur within 60 days after the filing of an application or within 15 business days after the filing of all additional information or documents requested, whichever is later.

(4) Place

The membership interview shall be conducted in a location specified by the Exchange.

(5) Review of Standards for Admission

During any membership interview, the Department shall review the application and the bases for denial of membership with the Applicant's representative or representatives.

#### (6) Information From Other Sources

During any membership interview, the Department shall provide to the Applicant's representative or representatives any information or document that the Department has obtained from the Central Registration Depository or a source other than the Applicant and upon which the Department intends to base its decision under Rule 1014. If the Department does not conduct a membership interview, receives such information or document after the membership interview, or decides to base its decision on such information after the membership interview, the Department shall promptly serve the information or document and an explanation thereof on the Applicant. The Applicant may submit such materials as it may deem relevant with respect to such information or document at any time prior to the service of a decision under Rule 1014.

### **1014. Department Decision**

#### **(a) Bases for Denial of Membership**

After considering the completed application, other information and documents provided by the Applicant, other information and documents obtained by the Department, and the public interest and the protection of investors, the Department shall approve an application under Rules 1013 or 1017 by an Applicant that is not, and is not required to become, a FINRA member unless the Department determines that such information or documents provide a basis for denial of membership:

(1) The Department may deny (or condition) approval of an Applicant for the same reasons that the Securities and Exchange Commission may deny or revoke a broker or dealer registration and for those reasons required or allowed under the Act;

(2) Without limiting the generality of the foregoing, the Department may deny (or condition) approval of an Applicant when the Applicant directly or indirectly:

(A) is unable to satisfactorily demonstrate its present capacity to adhere to all applicable Exchange and Commission policies, rules, and regulations, including, without limitation, those concerning recordkeeping, reporting, finance, and trading procedures;

(B) has previously violated, and there is a reasonable likelihood such Applicant will again engage in acts or practices violative of, any applicable Exchange or Commission policies, rules and regulations, including, without limitation, those concerning record-keeping, reporting,

finance and trading procedures or those rules of other self-regulatory organizations of which such Applicant is or was a member;

(C) has engaged, and there is a reasonable likelihood such Applicant will again engage, in acts or practices inconsistent with just and equitable principles of trade;

(D) is not in compliance with the SEC's net capital rule (17 C.F.R. 240.15c3-1), or has financial difficulties involving an amount that is more than 5% of the Applicant's net worth;

(E) has been itself, or is the successor to an entity which has been subject to any bankruptcy proceeding, receivership or arrangement for the benefit of creditors within the past three years;

(F) has engaged in an established pattern of failure to pay just debts;

(G) does not have such licenses and registrations as are required by governmental authorities and self-regulatory organizations; or

(H) is unable satisfactorily to demonstrate reasonably adequate systems capacity and capability.

(3) The Department will not approve an Applicant unless the Applicant is a member of another registered securities exchange or association that is not registered solely under Section 6(g) or Section 15A(k) of the Securities Exchange Act of 1934. An Applicant that will transact business with the public must be a member of FINRA.

(b) Granting or Denying Application

(1) Unless the Department determines that there is a basis for denying (or conditioning) approval of the application under the bases for denial in paragraph (a), the Department shall approve the application for membership. If the Department does not approve the application, the Department shall:

(A) grant the application subject to one or more restrictions reasonably designed to address a specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concern;  
or

(B) deny the application.

(c) Decision

(1) Time

The Department shall serve a written decision on the membership application within 15 business days after the conclusion of the membership interview (if any) or after the filing of all required information or documents, whichever is later.

(2) Content

If the Department denies the application or grants the application subject to restrictions, the decision shall explain in detail the reason for denial or restriction, referencing the applicable bases in paragraph (a).

(3) Failure to Serve Decision

If the Department fails to serve a decision within 90 days after the filing of an application (or 120 days if the Department has opted to conduct a membership interview) or such later date as the Department and the Applicant have agreed in writing, the Applicant may file a written request with the Exchange Board requesting that the Exchange Board direct the Department to serve a decision. Within seven days after the filing of such a request, the Exchange Board shall direct the Department to serve its written decision immediately or to show good cause for an extension of time. If the Department shows good cause for an extension of time, the Exchange Board may extend the 90-day (or 120-day) time limit by not more than 45 days.

(d) Submission of Membership Agreement

If the Department grants an application, with or without restriction, the Applicant's approval for membership shall be contingent upon the Applicant's filing of an executed written membership agreement, satisfactory to the Department, undertaking to:

(1) abide by any restriction specified in the Department's decision; and

(2) obtain the Department's approval of a change in ownership, control, or business operations pursuant to Rule 1017, including the modification or removal of a membership agreement restriction.

The Applicant shall not waive the right to file a written request for review under Rule 1015 by executing a membership agreement under this paragraph.

(e) Service and Effectiveness of Decision

The Department shall serve its decision and the membership agreement on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision



constituting final action of the Exchange is issued under Rule 1015 or 1016, unless otherwise directed by the Exchange Review Council, the Exchange Board, or the Commission.

(f) Effectiveness of Restriction

A restriction imposed under this Rule shall remain in effect and bind the Applicant and all successors to the ownership or control of the Applicant unless:

(1) removed or modified by a decision constituting final action of the Exchange issued under Rule 1015, 1016, or 1017; or

(2) stayed by the Exchange Review Council, the Exchange Board, or the Commission.

(g) Final Action

Unless the Applicant files a written request for a review under Rule 1015, the Department's decision shall constitute final action by the Exchange.

**1015. Review by the Exchange Review Council**

(a) Initiation of Review by Applicant

Within 25 days after service of a decision under Rule 1014 or 1017, an Applicant may file a written request for review with the Exchange Review Council. A request for review shall state with specificity why the Applicant believes that the Department's decision is inconsistent with the bases for denial set forth in Rule 1014, or otherwise should be set aside, and state whether a hearing is requested. The Applicant simultaneously shall file by first-class mail a copy of the request with the Department.

(b) Transmission of Documents

Within ten days after the filing of a request for review, the Department shall:

(1) transmit to the Exchange Review Council copies of all documents that were considered in connection with the Department's decision and an index to the documents; and

(2) serve on the Applicant a copy of such documents (other than those documents originally submitted by Applicant) and a copy of the index.

(c) Membership Application Docket

The Department shall promptly record in the Exchange's membership application docket each request for review filed with the Exchange Review Council under this Rule and each material subsequent event, filing, and change in the status of a membership proceeding.

(d) Appointment of Subcommittee

The Exchange Review Council or the Review Subcommittee defined in Rule 9120 shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more persons who shall be current or past members of the Exchange Review Council or former Directors.

(e) Powers of Subcommittee

If a hearing is requested, the Subcommittee shall conduct the hearing. If a hearing is not requested, the Subcommittee may serve a notice directing that a hearing be held. If a hearing is not requested or directed, the Subcommittee shall conduct its review on the basis of the record developed before the Department and any written submissions made by the Applicant or the Department in connection with the request for review.

(f) Hearing

(1) Notice

If a hearing is requested or directed, the hearing shall be held within 45 days after the filing of the request with the Exchange Review Council or service of the notice by the Subcommittee. The Exchange Review Council shall serve written notice of the date and time of the hearing to the Applicant by facsimile or overnight courier not later than 14 days before the hearing.

(2) Counsel

The Applicant and the Department may be represented by counsel at a hearing conducted pursuant to this Rule.

(3) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than five days before the hearing, the Applicant and the Department shall exchange copies of their proposed hearing exhibits and witness lists and provide copies of the same to the Exchange Review Council. If the Applicant or the Department fails to provide copies of its proposed hearing exhibits or witness list within such time, the Subcommittee shall exclude the evidence or witnesses from the proceeding, unless the Subcommittee determines that good cause is shown for failure to comply with the production date set forth in this subparagraph.

(4) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. A transcript of the hearing shall be available for purchase from the court reporter at prescribed rates. The Applicant, the Department, or a witness may seek to correct the transcript. A proposed correction of the transcript shall be submitted to the Subcommittee within a reasonable period of time prescribed by the Subcommittee. Upon notice to the Applicant and the Department, the Subcommittee may direct the correction to the transcript as requested or sua sponte.

(g) Additional Information, Briefs

At any time during its consideration, the Subcommittee or the Exchange Review Council may direct the Applicant or the Department to file additional information or briefs. Any additional information or brief filed shall be provided to all parties before the Exchange Review Council renders its decision.

(h) Abandonment of Request for Review

If an Applicant fails to specify the grounds for its request for review under Rule 1015(a)(1), appear at a hearing for which it has notice, or file information or briefs as directed, the Exchange Review Council or the Review Subcommittee may dismiss the request for review as abandoned, and the decision of the Department shall become the final action of the Exchange. Upon a showing of good cause, the Exchange Review Council or the Review Subcommittee may withdraw a dismissal entered pursuant to this paragraph.

(i) Subcommittee Recommendation

The Subcommittee shall present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing held pursuant to paragraph (f), and not later than seven days before the meeting of the Exchange Review Council at which the membership proceeding shall be considered.

(j) Decision

(1) Proposed Written Decision

After considering all matters presented in the review and the Subcommittee's recommended written decision, the Exchange Review Council may affirm, modify, or reverse the Department's decision or remand the membership proceeding with instructions. The Exchange Review Council shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents

The decision shall include:

(A) a description of the Department's decision, including its rationale;

(B) a description of the principal issues raised in the review;

(C) a summary of the evidence on each issue; and

(D) a statement whether the Department's decision is affirmed, modified, or reversed, and a rationale therefor that references the bases for denial in Rule 1014.

(3) Issuance of Decision After Expiration of Call for Review Periods

The Exchange Review Council shall provide its proposed written decision to the Exchange Board. The Exchange Board may call the membership proceeding for review pursuant to Rule 1016. If the Exchange Board does not call the membership proceeding for review, the proposed written decision of the Exchange Review Council shall become final. The Exchange Review Council shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that the final written decision will be served within 15 days after such date. The Exchange Review Council shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Review Council remands the membership proceeding.

(4) Failure to Issue Decision

If the Exchange Review Council fails to serve its final written decision within the time prescribed in subparagraph (3), the Applicant may file a written request with the Exchange Board requesting that the Exchange Board direct the Exchange Review Council to serve its decision immediately or to show good cause for an extension of time. Within seven days after the filing of such a request, the Board shall direct the Exchange Review Council to serve its written decision immediately or to show good cause for an extension of time. If the Exchange Review Council shows good cause for an extension of time, the Exchange Board may extend the 15-day time limit by not more than 15 days.

## **1016. Discretionary Review by the the Exchange Board**

(a) Call for Review by Director

A Director may call a membership proceeding for review by the Exchange Board if the call for review is made within the period prescribed in paragraph (b).

(b) 15 Day Period; Waiver

A Director shall make his or her call for review at the next meeting of the Exchange Board that is at least 15 days after the date on which the Exchange Board receives the proposed written decision of the Exchange Review Council. By unanimous vote of the Exchange Board, the Exchange Board may shorten the period to less than 15 days. By an affirmative vote of the majority of the Exchange Board then in office, the Exchange Board may, during the 15 day period, vote to extend the period to more than 15 days.

(c) Review At Next Meeting

If a Director calls a membership proceeding for review within the time prescribed in paragraph (b), the Exchange Board shall review the membership proceeding not later than the next meeting of the Exchange Board. The Exchange Board may order the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

(d) Decision of the Exchange Board, Including Remand

After review, the Exchange Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council. Alternatively, the Exchange Board may remand the membership proceeding with instructions. The Exchange Board shall prepare a written decision that includes all of the elements described in Rule 1015(j)(2).

(e) Issuance of Decision

The Exchange Board shall serve its written decision on the Applicant within 15 days after the meeting at which it conducted its review. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Board remands the membership proceeding.

**1017. Application for Approval of Change in Ownership, Control, or Business Operations**

(a) Events Requiring Application

A member shall file an application for approval of any of the following changes to its ownership, control, or business operations:

(1) a merger of the member with another member, unless both are members of the New York Stock Exchange, Inc. or the surviving entity will continue to be a member of the New York Stock Exchange, Inc.;

(2) a direct or indirect acquisition by the member of another member, unless the acquiring member is a member of the New York Stock Exchange, Inc.;

(3) direct or indirect acquisitions or transfers of 25% or more in the aggregate of the member's assets or any asset, business or line of operation that generates revenues comprising 25% or more in the aggregate of the member's earnings measured on a rolling 36-month basis, unless both the seller and acquirer are members of the New York Stock Exchange, Inc.;

(4) a change in the equity ownership or partnership capital of the member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital; or

(5) a material change in business operations as defined in Rule 1011.

(b) Filing and Content of Application

(1) The member shall file the application with the Department.

(2) The application shall describe in detail the change in ownership, control, or business operations and include a business plan, pro forma financials, an organizational chart, and written supervisory procedures reflecting the change.

(A) If the application requests approval of a change in ownership or control, the application also shall include the names of the new owners, their percentage of ownership, and the sources of their funding for the purchase and recapitalization of the member.

(B) If the application requests the removal or modification of a membership agreement restriction, the application also shall:

(i) present facts showing that the circumstances that gave rise to the restriction have changed; and

(ii) state with specificity why the restriction should be modified or removed in light of the applicable bases for denial or standards for approval set forth in Rule 1014 or 1017 and the articulated rationale for the imposition of the restriction.

(C) If the application requests approval of an increase in Associated Persons involved in sales, offices, or markets made, the application shall set forth the increases in such areas during the preceding 12 months.

(c) Effecting Change and Imposition of Interim Restrictions

(1) A member shall file an application for approval of a change in ownership or control at least 30 days prior to such change. A member may effect a change in ownership or control prior to the conclusion of the proceeding, but the Department may place new interim restrictions on the member based on the applicable bases for denial or standards for approval in Rule 1014 or 1017, pending final Department action.

(2) A member may file an application to remove or modify a membership agreement restriction at any time. An existing restriction shall remain in effect during the pendency of the proceeding.

(3) A member may file an application for approval of a material change in business operations, other than the modification or removal of a restriction, at any time, but the member may not effect such change until the conclusion of the proceeding, unless the Department and the member otherwise agree.

(d) Rejection Of Application That Is Not Substantially Complete

If the Department determines within 30 days after the filing of an application that the application is not substantially complete, the Department may reject the application and deem it not to have been filed. In such case, within the 30 day period, the Department shall serve a written notice on the Applicant of the Department's determination and the reasons therefor. If the Applicant determines to continue to apply for approval of a change in ownership, control, or business operations, the Applicant shall submit a new application under this Rule.

(e) Request for Additional Documents and Information

Within 30 days after the filing of an application, the Department shall serve a request for any additional information or documents necessary to render a decision on the application. The Department may request additional information or documents at any time during the application process. Unless otherwise agreed to by the Department and the Applicant, the Applicant shall file such additional information or documents with the Department within 30 days after the Department's request.

(f) Membership Interview

(1) The Department may require the Applicant to participate in a membership interview within 30 days after the filing of the application, or if the Department requests additional information or documents, within 30 days after the filing of the additional information or documents by the Applicant.

(2) At least seven days before the membership interview, the Department shall serve on the Applicant a written notice that specifies the date and time of the interview and persons who are required to participate in the interview. The Department shall serve the notice by facsimile or overnight courier. The

Applicant and the Department may agree to a shorter or longer period for notice or a different method of service.

(3) The membership interview shall be conducted in a location specified by the Exchange.

(4) During the membership interview, the Department shall review the application and the considerations for the Department's decision set forth in paragraph (g)(1) with the Applicant's representative or representatives. The Department shall provide to the Applicant's representative or representatives any information or document that the Department has obtained from the Central Registration Depository or a source other than the Applicant and upon which the Department intends to base its decision under paragraph (g). If the Department receives such information or document after the membership interview or decides to base its decision on such information after the membership interview, the Department shall promptly serve the information or document and an explanation thereof on the Applicant.

(g) Department Decision

(1) The Department shall consider the application, the membership interview, other information and documents provided by the Applicant or obtained by the Department, the public interest, and the protection of investors.

(A) In rendering a decision on an application submitted under Rule 1017(a) by an Exchange member that is not, and is not required to become, a member of FINRA, the Department shall approve the application unless the Department determines that there is a basis for denying (or conditioning) approval of the Applicant under the bases for denial in Rule 1014(a).

(B) In rendering a decision on an application submitted under Rule 1017(a) by an Exchange member that is also a member of FINRA, the Department shall consider whether the Applicant and its Associated Persons meet each of the standards in NASD Rule 1014(a). For purposes of this rule:

(i) the provisions of NASD Rule 1014(a) shall apply to Exchange members as if such Rule were part of the Equity Rules;

(ii) references to "NASD Rules" shall be construed as references to the "Equity Rules";

(iii) the reference to "Rule 1013(a)(2)(E)(xii)" shall be construed as a reference to "NASD Rule 1013(a)(1)(F)(xii)";



(iv) the reference to “information filed under Rule 1013(b)(5)” shall be construed as a reference to “the most up-to-date financial information available to the Department”;

(v) references to “NASD” or “FINRA” shall be construed as references to “the Exchange”;

(vi) the reference to “Notice to Members 97-19” shall be construed as a reference to “NASD Notice to Members 97-19 as incorporated by reference into the Equity Rules by IM-3010”; and

(vii) where the Department determines that the Applicant or its Associated Person are the subject of any of the events set forth in NASD Rule 1014(a)(3)(A) and (C) through (E), a presumption exists that the application should be denied. The Applicant may overcome the presumption by demonstrating that it can meet each of the standards in NASD Rule 1014(a), notwithstanding the existence of any of the events set forth in Rule NASD 1014(a)(3)(A) and (C) through (E).

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 1014(a) are transferred into the FINRA rulebook, then Equity Rule 1017 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 1014(a) (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(C) In rendering a decision on an application for approval of a change in ownership or control, or an application for approval of a material change in business operations that does not involve modification or removal of a membership agreement restriction, the Department shall determine (i) if there would be a basis for denying (or conditioning) approval of the Applicant under the bases for denial in Rule 1014(a) upon approval of the application in the case of an Exchange member that is not, and is not required to become, a member of FINRA, and (ii) if the Applicant would continue to meet the standards in NASD Rule 1014(a) upon approval of the application in the case of an Exchange member that is a member of FINRA.

(D) In rendering a decision on an application requesting the modification or removal of a membership agreement restriction, the Department shall consider whether maintenance of the restriction is appropriate in light of:

(i) the applicable bases for denial or standards for approval set forth in Rules 1014 and 1017;

(ii) the circumstances that gave rise to the imposition of the restriction;

(iii) the Applicant's operations since the restriction was imposed;

(iv) any change in ownership or control or supervisors and principals; and

(v) any new evidence submitted in connection with the application.

(2) The Department shall serve a written decision on the application within 30 days after the conclusion of the membership interview or the filing of additional information or documents, whichever is later. If the Department does not require the Applicant to participate in a membership interview or request additional information or documents, the Department shall serve a written decision within 45 days after the filing of the application under paragraph (a). The decision shall state whether the application is granted or denied in whole or in part, and shall provide a rationale for the Department's decision, referencing the applicable bases or standards in Rules 1014 or 1017.

(3) If the Department fails to serve a decision within 180 days after filing of an application or such later date as the Department and the Applicant have agreed in writing, the Applicant may file a written request with the Exchange Board requesting that the Exchange Board direct the Department to issue a decision. Within seven days after the filing of such a request, the Exchange Board shall direct the Department to issue a written decision immediately or to show good cause for an extension of time. If the Department shows good cause for an extension of time, the Exchange Board may extend the time limit for issuing a decision by not more than 30 days.

(4) Notwithstanding anything in this Rule 1017 to the contrary, in the event that a proposed change in ownership, control, or business operations by an Exchange member requires such member to become a member of FINRA, the Department shall not be required to serve a written decision under this rule until 10 business days after the Exchange member becomes a FINRA member.

(5) If the Department approves an application under this Rule in whole or part, the Department may require an Applicant to file an executed membership agreement.

(h) Service and Effectiveness of Decision

The Department shall serve its decision on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Exchange is issued under Rule 1015 or 1016, unless otherwise directed by the Exchange Review Council, the Exchange Board, or the Commission.

(i) Request for Review; Final Action

An Applicant may file a written request for review of the Department's decision with the Exchange Review Council pursuant to Rule 1015. The procedures set forth in Rule 1015 shall apply to such review, and the Exchange Review Council's decision shall be subject to discretionary review by the Exchange Board pursuant to Rule 1016. If the Applicant does not file a request for a review, the Department's decision shall constitute final action by the Exchange.

(j) Removal or Modification of Restriction on Department's Initiative

The Department shall modify or remove a restriction on its own initiative if the Department determines such action is appropriate in light of the considerations set forth in paragraph (g)(1). The Department shall notify the member in writing of the Department's determination and inform the member that it may apply for further modification or removal of a restriction by filing an application under paragraph (a).

(k) Lapse or Denial of Application for Approval of Change in Ownership

If an application for approval of a change in ownership lapses, or is denied and all appeals are exhausted or waived, the member shall, no more than 60 days after the lapse or exhaustion or waiver of appeal:

- (1) submit a new application;
- (2) unwind the transaction; or
- (3) file a Form BDW.

For the protection of investors, the Department may shorten the 60-day period. For good cause shown by the member, the Department may lengthen the 60-day period. The Department shall serve written notice on the Applicant of any change in the 60-day period and the reasons therefor. During the 60-day or other imposed period, the Department may continue to place interim restrictions on the member for the protection of investors.

**1018. Reserved**

**1019. Application to Commission for Review**

A person aggrieved by final action of the Exchange under the Equity Rule 1010 Series may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing of an application for review shall not stay the effectiveness of a decision constituting final action of the Exchange, unless the Commission otherwise orders.

## **1020. Registration of Principals**

### **1021. Registration Requirements**

#### **(a) Registration of Principals**

All persons engaged or to be engaged in the investment banking or securities business of a member who are to function as principals shall be registered as such with the Exchange in the category of registration appropriate to the function to be performed as specified in Rule 1022. Before their registration can become effective, they shall pass a Qualification Examination for Principals appropriate to the category of registration as specified by the Exchange Board. A member shall not maintain a principal registration with the Exchange for any person (1) who is no longer active in the member's investment banking or securities business, (2) who is no longer functioning as a principal, or (3) where the sole purpose is to avoid the examination requirement prescribed in paragraph (c). A member shall not make application for the registration of any person as principal where there is no intent to employ such person in the member's investment banking or securities business. A member may, however, maintain or make application for the registration as a principal of a person who performs legal, compliance, internal audit, back-office operations, or similar responsibilities for the member or a person engaged in the investment banking or securities business of a foreign securities affiliate or subsidiary of the member.

#### **(b) Definition of Principal**

Persons associated with a member, enumerated in subparagraphs (1) through (5) hereafter, who are actively engaged in the management of the member's investment banking or securities business, including supervision, solicitation, conduct of business or the training of persons associated with a member for any of these functions are designated as principals. Such persons shall include:

(1) Sole Proprietors

(2) Officers

(3) Partners

(4) Managers of Offices of Supervisory Jurisdiction, and

(5) Directors of Corporations.

(c) Requirements for Examination on Lapse of Registration

Any person whose registration has been revoked pursuant to Rule 8310 or whose most recent registration as a principal has been terminated for a period of two or more years immediately preceding the date of receipt by the Exchange of a new application shall be required to pass a Qualification Examination for Principals appropriate to the category of registration as specified in Rule 1022 hereof.

(d) Application for Principal Status

(1) Any person associated with a member as a Registered Representative whose duties are changed by the member so as to require registration in any principal classification shall be allowed a period of 90 calendar days following the change in his or her duties during which to pass the appropriate Qualification Examination for Principals. Upon elevation, the member shall submit to the Exchange an amended "Uniform Application for Securities Industry Registration or Transfer" and any applicable fees. In no event may a person function as a Principal beyond the initial 90 calendar day period following the change in his or her duties without having successfully passed the appropriate Qualification Examination. This provision shall apply to (A) a person associated with a member of another registered national securities exchange or association who is required to register in a principal classification under the Exchange Rules but who is not required to be so registered under the rules of the other exchange or association, or (B) a person associated with an Exchange member who was not required to register with the Exchange as a Principal prior to the adoption of this Rule 1021 by the Exchange.

(2) Any person not presently associated with a member as a Registered Representative seeking registration as a Principal shall submit the appropriate application for registration and any required registration and examination fees. Such person shall be allowed a period of 90 days after all applicable prerequisites are fulfilled to pass the appropriate Qualification Examination for Principals. In no event may a person previously unregistered in any capacity applying for principal status function as a Principal until fully qualified.

(e) Requirement of Two Registered Principals for Members

(1) An Exchange member, except a sole proprietorship, shall have at least two officers or partners who are registered as principals with respect to each aspect of the member's investment banking and securities business pursuant to the applicable provisions of Rule 1022; provided, however, that a proprietary trading firm with 25 or fewer registered representatives shall only be required to have one officer or partner who is registered as a principal. This requirement applies to persons seeking admission as members and existing members.

(2) Pursuant to the Rule 9600 Series, the Exchange may waive the provisions of subparagraph (1) in situations that indicate conclusively that only one person associated with an applicant for membership should be required to register as a principal.

(3) In addition to the provisions of subparagraph (1) above, an applicant for membership, if the nature of its business so requires, shall have at least one person qualified for registration pursuant to Rule 1022(b).

## **1022. Categories of Principal Registration**

### (a) General Securities Principal

(1) Each person associated with a member who is included within the definition of principal in Rule 1021, and each person designated as a Chief Compliance Officer on Schedule A of Form BD, shall be required to register with the Exchange as a General Securities Principal and shall pass an appropriate Qualification Examination before such registration may become effective unless such person's activities are so limited as to qualify such person for one or more of the limited categories of principal registration specified hereafter. A person whose activities in the investment banking or securities business are so limited is not, however, precluded from attempting to become qualified for registration as a General Securities Principal, and if qualified, may become so registered. Each person seeking to register and qualify as a General Securities Principal must, prior to or concurrent with such registration, become registered, pursuant to the Rule 1030 Series, as a General Securities Representative. A person who has been designated as a Chief Compliance Officer on Schedule A of Form BD for at least two years immediately prior to January 1, 2002, and who has not been subject within the last ten years to any statutory disqualification as defined in Section 3(a)(39) of the Act; a suspension; or the imposition of a fine of \$5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding shall be exempt from the requirement to pass the appropriate Qualification Examination.

### (2) Reserved

(3) Except as provided in Rule 1021(c), a person who was registered with FINRA as a Principal, shall not be required to pass a Qualification Examination for General Securities Principal and shall be qualified as a General Securities Principal.

(4) A person registered solely as a General Securities Principal shall not be qualified to function as a Limited Principal—Financial and Operations or Limited

Principal—General Securities Sales Supervisor unless that person is also qualified and registered as such.

**(b) Limited Principal—Financial and Operations**

(1) Every member of the Exchange that is operating pursuant to the provisions of SEC Rule 15c3-1(a)(1)(ii), (a)(2)(i) or (a)(8), shall designate as Limited Principal—Financial and Operations those persons associated with it, at least one of whom shall be its chief financial officer, who performs the duties described in subparagraph (2) hereof. Each person associated with a member who performs such duties shall be required to register as a Limited Principal – Financial and Operations with the Exchange and shall pass an appropriate Qualification Examination before such registration may become effective.

(2) The term "Limited Principal—Financial and Operations" shall mean a person associated with a member whose duties include:

(A) final approval and responsibility for the accuracy of financial reports submitted to any duly established securities industry regulatory body;

(B) final preparation of such reports;

(C) supervision of individuals who assist in the preparation of such reports;

(D) supervision of and responsibility for individuals who are involved in the actual maintenance of the member's books and records from which such reports are derived;

(E) supervision and/or performance of the member's responsibilities under all financial responsibility rules promulgated pursuant to the provisions of the Act;

(F) overall supervision of and responsibility for the individuals who are involved in the administration and maintenance of the member's back office operations; or

(G) any other matter involving the financial and operational management of the member.

(3) A person registered solely as a Limited Principal—Financial and Operations shall not be qualified to function in a principal capacity with responsibility over any area of business activity not described in subparagraph (2) hereof.

**(c) Reserved**

**(d) Reserved**

**(e) Reserved**

**(f) Reserved**

**(g) Limited Principal—General Securities Sales Supervisor**

(1) Each person associated with a member who is included in the definition of principal in Rule 1021 may register with the Exchange as a Limited Principal—General Securities Sales Supervisor if:

(A) his or her supervisory responsibilities in the investment banking and securities business are limited to the securities sales activities of a member, including the training of sales and sales supervisory personnel and the maintenance of records of original entry and/or ledger accounts of the member required to be maintained in branch offices by SEC record keeping rules;

(B) he or she is registered pursuant to the Rule 1030 series as a General Securities Representative; and

(C) he or she is qualified to be so registered by passing an appropriate examination.

(2) A person registered in this category solely on the basis of having passed the Qualification Examination for Limited Principal—General Securities Sales Supervisor shall NOT be qualified to:

(A) function in a principal capacity with responsibility over any area of business activity not described in subparagraph (1);

(B) be included for purposes of the principal numerical requirements of Rule 1021(e)(1); or

(C) perform for a member any or all of the following activities:

(i) supervision of the origination and structuring of underwritings;

(ii) supervision of market making commitments;

(iii) final approval of advertisements as these are defined in Rule 2210;



(iv) supervision of the custody of firm or customer funds and/or securities for purposes of SEC Rule 15c3-3; or

(v) supervision of overall compliance with financial responsibility rules for broker/dealers promulgated pursuant to the provisions of the Act.

**(h) Reserved**

**IM-1022-1. Reserved**

**IM-1022-2. Limited Principal—General Securities Sales Supervisor**

Limited Principal—General Securities Sales Supervisor is an alternate category of registration designed to lessen the qualification burdens on principals of general securities firms who supervise sales. Without this category of limited registration, such principals could be required to separately qualify pursuant to the rules of multiple exchanges. While persons may continue to separately qualify with all relevant self-regulatory organizations, the Limited Principal—General Securities Sales Supervisor Examination permits qualification as a supervisor of sales of all securities by one examination. Persons registered as Limited Principals—General Securities Sales Supervisor may also qualify in any other category of principal registration. Persons who are already qualified in one or more categories of principal registration may supervise sales activities of all securities by also qualifying as Limited Principals—General Securities Sales Supervisor.

Functions that may be performed by Limited Principals—General Securities Sales Supervisors. Any person required to be registered as a principal who supervises sales activities in corporate, municipal and option securities, investment company products, variable contracts, direct participation programs, and security futures may be registered solely as a Limited Principal—General Securities Sales Supervisor. In addition to branch office managers, other persons such as regional and national sales managers may also be registered solely as Limited Principals—General Securities Sales Supervisor as long as they supervise only sales activities. Qualification as a General Securities Representative is a prerequisite for registration as a Limited Principal—General Securities Sales Supervisor.

Functions that may not be performed by Limited Principals—General Securities Sales Supervisors. Certain functions may not be performed by persons registered solely as Limited Principal—General Securities Sales Supervisor. These include supervisory responsibility for the origination and structuring of underwritings, market-making, final approval of advertising, custody of firm or customer funds and/or securities for purposes of SEC Rule 15c3-3 and overall compliance with financial responsibility rules for broker/dealers. Persons responsible for any of these activities are still required to qualify in the appropriate categories of principal registration. Moreover, persons qualified only as

Limited Principals—General Securities Sales Supervisor are not included for purposes of the two principal requirements of Rule 1021(e)(1).

### **1030. Registration of Representatives**

#### **1031. Registration Requirements**

##### **(a) All Representatives Must Be Registered**

All persons engaged or to be engaged in the investment banking or securities business of a member who are to function as representatives shall be registered as such with the Exchange in the category of registration appropriate to the function to be performed as specified in Rule 1032. Before their registration can become effective, they shall pass a Qualification Examination for Representatives appropriate to the category of registration as specified by the Exchange Board. A member shall not maintain a representative registration with the Exchange for any person (1) who is no longer active in the member's investment banking or securities business, (2) who is no longer functioning as a representative, or (3) where the sole purpose is to avoid the examination requirement prescribed in paragraph (c). A member shall not make application for the registration of any person as representative where there is no intent to employ such person in the member's investment banking or securities business. A member may, however, maintain or make application for the registration as a representative of a person who performs legal, compliance, internal audit, back-office operations, or similar responsibilities for the member, or a person who performs administrative support functions for registered personnel, or a person engaged in the investment banking or securities business of a foreign securities affiliate or subsidiary of the member.

##### **(b) Requirement for Examination on Lapse of Registration**

Any person whose registration has been revoked pursuant to Rule 8310 or whose most recent registration as a representative or principal has been terminated for a period of two (2) or more years immediately preceding the date of receipt by the Exchange of a new application shall be required to pass a Qualification Examination for Representatives appropriate to the category of registration as specified in Rule 1032.

##### **(c) Qualification Requirements**

No Exchange member shall permit any person associated with the Exchange member to engage in the investment banking or securities business unless the Exchange member determines that such person satisfies the qualification requirements established by the Exchange Board and is not subject to statutory disqualification.

##### **(d) Application for Registration**

(1) Application by any person for registration with the Exchange, properly signed by the applicant, shall be made to the Exchange via electronic process or

such other process as the Exchange may prescribe, on the form proscribed by the Exchange, and shall contain:

(A) an agreement to comply with the federal securities laws, the rules and regulations thereunder, the Rules of the Exchange, and all rulings, orders, directions, and decisions issued and sanctions imposed under the Rules of the Exchange; and

(B) such other reasonable information with respect to the applicant as the Exchange may require.

(2) the Exchange shall not approve an application for registration of any person who is not eligible to be an associated person of an Exchange member under the provisions of Equity Rule 1002(b).

(3) Every application for registration filed with the Exchange shall be kept current at all times by supplementary amendments via electronic process or such other process as the Exchange may prescribe. Such amendments to the application shall be filed with the Exchange not later than 30 days after the applicant learns of the facts or circumstances giving rise to the amendment. If such amendment involves a statutory disqualification, such amendment shall be filed not later than ten days after such disqualification occurs.

**(e) Notification by Member to the Exchange and Associated Person of Termination; Amendment to Notification**

(1) Following the termination of the association with an Exchange member of a person who is registered with it, such Exchange member shall, not later than 30 days after such termination, give notice of the termination of such association to the Exchange via electronic process or such other process as the Exchange may prescribe, on a form designated by the Exchange, and concurrently shall provide to the person whose association has been terminated a copy of said notice as filed with the Exchange. An Exchange member that does not submit such notification and provide a copy to the person whose association has been terminated, within the time period prescribed, shall be assessed any late filing fee that is specified by the Equity Rules. Termination of registration of such person associated with an Exchange member shall not take effect so long as any complaint or action under the Rules of the Exchange is pending against an Exchange member and to which complaint or action such person associated with an Exchange member is also a respondent, or so long as any complaint or action is pending against such person individually under the Rules of the Exchange. The Exchange, however, may in its discretion declare the termination effective at any time.

(2) The Exchange member shall notify the Exchange, via electronic process or such other process as the Exchange may prescribe, by means of an

amendment to the notice filed pursuant to paragraph (1) in the event that the Exchange member learns of facts or circumstances causing any information set forth in said notice to become inaccurate or incomplete. Such amendment shall be filed with the Exchange via electronic process or such other process as the Exchange may prescribe, and a copy provided to the person whose association with the Exchange member has been terminated not later than 30 days after the Exchange member learns of the facts or circumstances giving rise to the amendment.

**(f) Retention of Jurisdiction**

(1) A person whose association with an Exchange member has been terminated and who is no longer associated with any member of the Exchange or a person whose registration has been revoked or canceled shall continue to be subject to the filing of a complaint under the Rules of the Exchange based upon conduct which commenced prior to the termination, revocation, or cancellation or upon such person's failure, while subject to the Exchange's jurisdiction as provided herein, to provide information requested by the Exchange pursuant to the Rules of the Exchange, but any such complaint shall be filed within:

(A) two years after the effective date of termination of registration pursuant to subsection (c); provided, however, that any amendment to a notice of termination filed pursuant to paragraph (c)(2) that is filed within two years of the original notice that discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period under this subsection;

(B) two years after the effective date of revocation or cancellation of registration pursuant to the Rules of the Exchange; or

(C) in the case of an unregistered person, within two years after the date upon which such person ceased to be associated with the Exchange member.

(2) A person whose association with a member has been terminated and is no longer associated with any Exchange member shall continue to be subject to a proceeding to suspend, consistent with Section 12.2 of the Exchange By-Laws, his or her ability to associate with a member based on such person's failure to comply with an arbitration award or a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Rules of the Exchange, provided that such proceeding is instituted within two years after the date of entry of such award or settlement.

**1032. Categories of Representative Registration**

**(a) General Securities Representative**

Each person associated with a member who is included within the definition of a Representative in Rule 1011 shall be required to register with the Exchange as a General Securities Representative and shall pass an appropriate Qualification Examination before such registration may become effective unless his or her activities are so limited as to qualify him for one or more of the limited categories of representative registration specified hereafter. A person whose activities in the investment banking or securities business are so limited is not, however, precluded from attempting to become qualified for registration as a General Securities Representative, and if qualified, may become so registered.

**(b) Reserved****(c) Reserved****(d) Reserved****(e) Reserved****(f) Reserved****(g) Reserved****(h) Reserved****1040. Reserved****1041. Reserved****1042. Reserved****1043. Reserved****1050. Research Analysts**

An Exchange member that employs a research analyst or publishes or otherwise distributes a research report shall also be a member of FINRA or the New York Stock Exchange and shall comply with NASD Rules 2711, 1050, 1022, 1120 (and any other NASD rules that apply to research analysts or research reports), as amended, or New York Stock Exchange Rules 472, 344, 345A, 351 (and any other New York Stock Exchange rules that apply to research analysts or research reports), as amended. For purposes of this Rule 1050, (i) "research analyst" shall mean an associated person who is primarily responsible for, and any associated person who reports directly or indirectly to such research analyst in connection with, the preparation of the substance of a research report, whether or not any such person has the job title of "research analyst," and (ii)

"research report" shall mean a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.

### **1060. Persons Exempt from Registration**

(a) The following persons associated with a member are not required to be registered with the Exchange:

(1) persons associated with a member whose functions are solely and exclusively clerical or ministerial;

(2) persons associated with a member who are not actively engaged in the investment banking or securities business;

(3) persons associated with a member whose functions are related solely and exclusively to the member's need for nominal corporate officers or for capital participation; and

(4) persons associated with a member whose functions are related solely and exclusively to:

(A) effecting transactions on the floor of another national securities exchange and who are registered as floor members with such exchange;

(B) transactions in municipal securities;

(C) transactions in commodities;

(D) transactions in security futures, provided that any such person is registered with FINRA or a registered futures association; or

(E) transactions in variable contracts and insurance premium funding programs and other contracts issued by an insurance company;

(F) transactions in direct participation programs;

(G) Reserved

(H) transactions in government securities; or

(I) effecting sales as part of a primary offering of securities not involving a public offering pursuant to Section 3(b), 4(2), or 4(6) of the Securities Act of 1933 and the rules and regulations thereunder.

For purposes of Rule 1060(a)(4), the term "direct participation program" shall have the meaning assigned to such term by NASD Rule 1022(e)(2), and the definition contained in such NASD rule shall apply to Exchange members as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 1022(e)(2) are transferred into the FINRA rulebook, then Equity Rule 1060 shall be construed to apply the definition contained in the FINRA rule corresponding to NASD Rule 1022(e)(2) (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(5) persons associated with a member that are not citizens, nationals, or residents of the United States or any of its territories or possessions and that will conduct all of their securities activities in areas outside the jurisdiction of the United States and will not engage in any securities activities with or for any citizen, national or resident of the United States.

(b) Member firms, and persons associated with a member, may pay to nonregistered foreign persons transaction-related compensation based upon the business of customers they direct to member firms if the following conditions are met:

(1) the member firm has assured itself that the nonregistered foreign person who will receive the compensation (the "finder") is not required to register in the U.S. as a broker/dealer nor is subject to a disqualification as defined in the the Exchange Rules, and has further assured itself that the compensation arrangement does not violate applicable foreign law;

(2) the finders are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad;

(3) the customers are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad transacting business in either foreign or U.S. securities;

(4) customers receive a descriptive document, similar to that required by Rule 206(4)-3(b) of the Investment Advisers Act of 1940, that discloses what compensation is being paid to finders;

(5) customers provide written acknowledgment to the member firm of the existence of the compensation arrangement and that such acknowledgment is retained and made available for inspection by the Exchange;

(6) records reflecting payments to finders are maintained on the member firm's books and actual agreements between the member firm and persons compensated are available for inspection by the Exchange; and

(7) the confirmation of each transaction indicates that a referral or finders fee is being paid pursuant to an agreement.

### **1070. Qualification Examinations and Waiver of Requirements**

(a) Qualification Examinations specified in this Rule 1000 Series shall consist of a series of questions based upon topics contained in study outlines provided by the Exchange, a list of which is available from the Department.

(b) Examinations shall be given at such times and places and under such conditions as shall be prescribed by the Exchange Board and shall be graded according to the procedure prescribed by the Board.

(c) Examination results shall be reported to member firms and may be accompanied by an analysis of the candidate's performance on the examination. Passing scores assigned to each examination series shall be determined by the Exchange Board, or its designee.

(d) Pursuant to the Rule 9600 Series, the Exchange may, in exceptional cases and where good cause is shown, waive the applicable Qualification Examination and accept other standards as evidence of an applicant's qualifications for registration. Advanced age or physical infirmity will not individually of themselves constitute sufficient grounds to waive a Qualification Examination. Experience in fields ancillary to the investment banking or securities business may constitute sufficient grounds to waive a Qualification Examination.

(e) Any person associated with a member who fails to pass a qualification examination prescribed by the Exchange shall be permitted to take the examination again after either a period of 30 calendar days has elapsed from the date of the prior examination or the next administration of an examination administered on a monthly basis, except that any person who fails to pass an examination three or more times in succession shall be prohibited from again taking such examination either until a period of 180 calendar days has elapsed from the date of such person's last attempt to pass the examination or until the sixth subsequent administration of an examination administered on a monthly basis.

### **1080. Confidentiality of Examinations**

The Exchange considers all of its Qualification Examinations to be highly confidential. The removal from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such Qualification Examination, whether of a present or past series, or any other use which would compromise the effectiveness of the Examinations and the use in any manner and at any time of the questions or answers to the Examinations are prohibited and are deemed to be a violation of Rule 2110. An applicant cannot receive assistance while



taking the examination. Each applicant shall certify to the Board that no assistance was given to or received by him during the examination.

### **1090. Foreign Members**

A member which does not maintain an office in the United States responsible for preparing and maintaining financial and other reports required to be filed with the Commission and the Exchange must:

(a) prepare all such reports, and maintain a general ledger chart of account and any description thereof, in English and U.S. dollars;

(b) reimburse the Exchange for any expenses incurred in connection with examinations of the member to the extent that such expenses exceed the cost of examining a member located within the continental United States in the geographic location most distant from the Exchange;

(c) ensure the availability of an individual fluent in English and knowledgeable in securities and financial matters to assist representatives of the Exchange during examinations; and

(d) utilize, either directly or indirectly, the services of a broker/dealer registered with the Commission, a bank or a clearing agency registered with the Commission located in the United States in clearing all transactions involving members of the Exchange, except where both parties to a transaction agree otherwise.

### **1100. Reserved**

### **1110. Reserved**

### **1120. Continuing Education Requirements**

This Rule prescribes requirements regarding the continuing education of certain registered persons subsequent to their initial qualification and registration with the Exchange. The requirements shall consist of a Regulatory Element and a Firm Element as set forth below.

#### **(a) Regulatory Element**

##### **(1) Requirements**

No member shall permit any registered person to continue to, and no registered person shall continue to, perform duties as a registered person unless such person has complied with the requirements of paragraph (a) hereof.

Each registered person shall complete the Regulatory Element on the occurrence of their second registration anniversary date and every three years thereafter, or as otherwise prescribed by the Exchange. On each occasion, the Regulatory Element must be completed within 120 days after the person's registration anniversary date. A person's initial registration date, also known as the "base date," shall establish the cycle of anniversary dates for purposes of this Rule. The content of the Regulatory Element shall be determined by the Exchange and shall be appropriate to either the registered representative or principal status of person subject to the Rule.

### **(2) Failure to Complete**

Unless otherwise determined by the Exchange, any registered persons who have not completed the Regulatory Element within the prescribed time frames will have their registrations deemed inactive until such time as the requirements of the program have been satisfied. Any person whose registration has been deemed inactive under this Rule shall cease all activities as a registered person and is prohibited from performing any duties and functioning in any capacity requiring registration. A registration that is inactive for a period of two years will be administratively terminated. A person whose registration is so terminated may reactivate the registration only by reapplying for registration and meeting the qualification requirements of the applicable provisions of the Rule 1020 Series and the Rule 1030 Series. The Exchange may, upon application and a showing of good cause, allow for additional time for a registered person to satisfy the program requirements.

### **(3) Disciplinary Actions**

Unless otherwise determined by the Exchange, a registered person will be required to retake the Regulatory Element and satisfy all of its requirements in the event such person:

(A) is subject to any statutory disqualification as defined in Section 3(a)(39) of the Act;

(B) is subject to suspension or to the imposition of a fine of \$5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding; or

(C) is ordered as a sanction in a disciplinary action to retake the Regulatory Element by any securities governmental agency or self-regulatory organization.

The retaking of the Regulatory Element shall commence with participation within 120 days of the registered person becoming subject to the statutory disqualification, in the case of (A) above, or the disciplinary action becoming final, in the case of (B) and (C) above. The date of the disciplinary action shall be treated as such person's new base date with the Exchange.

#### **(4) Reassociation in a Registered Capacity**

Any registered person who has terminated association with a member and who has, within two years of the date of termination, become reassociated in a registered capacity with a member shall participate in the Regulatory Element at such intervals that may apply (second anniversary and every three years thereafter) based on the initial registration anniversary date rather than based on the date of reassociation in a registered capacity.

#### **(5) Definition of Registered Person**

For purposes of this Rule, the term "registered person" means any person registered with the Exchange as a representative or principal pursuant to the Rule 1020, 1030, and 1110 Series.

#### **(6) In-Firm Delivery of the Regulatory Element**

Exchange Members that are also FINRA members will be permitted to administer the continuing education Regulatory Element program to their registered persons by instituting an in-firm program to the extent such program has been deemed acceptable to FINRA in accordance with NASD Rule 1120(a)(6). Such a program shall be administered by persons eligible to serve as principals and proctors under NASD Rules 1043 and 1120(a)(6). Exchange Members that are FINRA members and that institute in-firm delivery of the Regulatory Element program shall comply with NASD Rules 1120(a)(6) and 1043 as if such Rules were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with the Equity Rule 1120(a)(6) by complying with NASD Rules 1120(a)(6) and 1043 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 1120(a)(6) are being performed by FINRA on behalf of the Exchange. Exchange Members that are not FINRA members will not be permitted to institute in-firm delivery of the Regulatory Element program.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 1120(a)(6) or 1043 are transferred into the FINRA rulebook, then Equity Rule 1120 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD

Rules 1120(a)(6) or 1043 (regardless of whether such rules are renumbered or amended) as if such rules were part of the Rules of the Exchange.

### **(7) Regulatory Element Contact Person**

Each member shall designate and identify to the Exchange (by name and e-mail address) an individual or individuals responsible for receiving e-mail notifications provided via the Central Registration Depository regarding when a registered person is approaching the end of his or her Regulatory Element time frame and when a registered person is deemed inactive due to failure to complete the requirements of the Regulatory Element program. Each member shall identify, review, and, if necessary, update the information regarding its Regulatory Element contact person(s) in the manner prescribed by Equity Rule 1160.

### **(b) Firm Element**

#### **(1) Persons Subject to the Firm Element**

The requirements of this subparagraph shall apply to any person registered with a member who has direct contact with customers in the conduct of the member's securities sales, trading and investment banking activities, and to the immediate supervisors of such persons (collectively, "covered registered persons"). "Customer" shall mean any natural person and any organization, other than another broker or dealer, executing securities transactions with or through or receiving investment banking services from a member.

#### **(2) Standards for the Firm Element**

(A) Each member must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skill, and professionalism. At a minimum, each member shall at least annually evaluate and prioritize its training needs and develop a written training plan. The plan must take into consideration the member's size, organizational structure, and scope of business activities, as well as regulatory developments and the performance of covered registered persons in the Regulatory Element. If a member's analysis establishes the need for supervisory training for persons with supervisory responsibilities, such training must be included in the member's training plan.

(B) Minimum Standards for Training Programs — Programs used to implement a member's training plan must be appropriate for the business of the member and, at a minimum must cover the following matters concerning securities products, services, and strategies offered by the member:

- (i) General investment features and associated risk factors;
- (ii) Suitability and sales practice considerations; and
- (iii) Applicable regulatory requirements.

(C) Administration of Continuing Education Program — A member must administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by covered registered persons.

### **(3) Participation in the Firm Element**

Covered registered persons included in a member's plan must take all appropriate and reasonable steps to participate in continuing education programs as required by the member.

### **(4) Specific Training Requirements**

The Exchange may require a member, individually or as part of a larger group, to provide specific training to its covered registered persons in such areas as the Exchange deems appropriate. Such a requirement may stipulate the class of covered registered persons for which it is applicable, the time period in which the requirement must be satisfied and, where appropriate, the actual training content.

## **1130. Reliance on Current Membership List**

The Secretary of the Exchange shall keep a currently accurate and complete membership roll, containing the name and address of each Exchange member, and the name and address of the executive representative of each Exchange member. In any case where a membership has been terminated, such fact shall be recorded together with the date on which the membership ceased. The membership roll of the Exchange shall at all times be available to all members of the Exchange, to all governmental authorities, and to the general public; provided, however, that the names and address of executive representatives shall not be available to the general public. For the purpose of complying with pertinent Rules, a member shall be entitled to rely on such membership roll.

## **1140. Electronic Filing Rules**

### **(a) Filing Requirement**

Except as provided in Rule 1013(a)(2), all forms required to be filed under the Rule 1000 Series shall be filed through an electronic process or such other process as the Exchange may prescribe to the Central Registration Depository.

**(b) Supervisory Requirements**

(1) In order to comply with the supervisory procedures requirement in Rule 3010, each member shall identify a Registered Principal(s) or corporate officer(s) who has a position of authority over registration functions, to be responsible for supervising the electronic filing of appropriate forms pursuant to this Rule.

(2) The Registered Principal(s) or corporate officer(s) who has or have the responsibility to review and approve the forms filed pursuant to this Rule shall be required to acknowledge, electronically, that he is filing this information on behalf of the member and the member's associated persons.

**(c) Form U4 Filing Requirements**

(1) Every initial and transfer electronic Form U4 filing shall be based on a signed Form U4 provided to the member or applicant for membership by the person on whose behalf the Form U4 is being filed. As part of the member's recordkeeping requirements, it shall retain the person's signed Form U4 and make it available promptly upon regulatory request. An applicant for membership also must retain every signed Form U4 it receives during the application process and make them available promptly upon regulatory request.

**(2) Fingerprint Cards**

Upon filing an electronic Form U4 on behalf of a person applying for registration, a member shall promptly submit a fingerprint card for that person. The Exchange may make a registration effective pending receipt of the fingerprint card. If a member fails to submit a fingerprint card within 30 days after the Exchange receives the electronic Form U4, the person's registration shall be deemed inactive. In such case, the Exchange shall notify the member that the person must immediately cease all activities requiring registration and is prohibited from performing any duties and functioning in any capacity requiring registration. The Exchange shall administratively terminate a registration that is inactive for a period of two years. A person whose registration is administratively terminated may reactivate the registration only by reapplying for registration and meeting the qualification requirements of the applicable provisions of the Rule 1020 Series and the Rule 1030 Series. Upon application and a showing of good cause, the Exchange may extend the 30-day period.

**(d) Form U5 Filing Requirements**

Initial filings and amendments of Form U5 shall be submitted electronically. As part of the member's recordkeeping requirements, it shall make such records available upon regulatory request.

**(e) Third Party Filing**

A member may employ a third party to file the required forms electronically on its behalf.

**1150. Executive Representative**

Each Exchange member shall appoint and certify to the Secretary of the Exchange one "executive representative" who shall represent, vote, and act for the Exchange member in all the affairs of the Exchange; provided, however, that other representatives of an Exchange member may also serve on the Exchange Board or committees of the Exchange or otherwise take part in the affairs of the Exchange. If an Exchange member is also a member of FINRA or Nasdaq, the Exchange executive representative shall be the same person appointed to serve as the FINRA or Nasdaq executive representative. An Exchange member may change its executive representative or appoint a substitute for its executive representative upon giving notice thereof to the Exchange Secretary via electronic process or such other process as the Exchange may prescribe. An executive representative of an Exchange member or a substitute shall be a member of senior management. Each executive representative shall maintain an Internet electronic mail account for communication with the Exchange and shall update firm contact information as prescribed by the Exchange. Each member shall review and, if necessary, update its executive representative designation and contact information in the manner prescribed by Equity Rule 1160.

**1160. Contact Information Requirements**

(a) Each member shall report to the Exchange all contact information required by the Exchange via the NASD Contact System (in the case of Exchange members that are FINRA members) or via electronic mail or paper mail (in the case of Exchange members that are not FINRA members).

(b) Each member shall update its required contact information promptly, but in any event not later than 30 days following any change in such information. In addition, each member shall review and, if necessary, update its required contact information, via such means as the Exchange may specify, within 17 business days after the end of each calendar year.

(c) Each member shall comply with any Exchange request for such information promptly, but in any event not later than 15 days following the request, or such longer period that may be agreed to by Exchange staff.

**2000. Business Conduct**

**2100. General Standards****2110. Standards of Commercial Honor and Principles of Trade**

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

**IM-2110-1. Reserved****IM-2110-2. Trading Ahead of Customer Limit Order**

(a) Exchange members and persons associated with a member shall comply with NASD Interpretive Material 2110-2 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2110-2 are transferred into the FINRA rulebook, then Equity Interpretive Material 2110-2 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2110-2 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) the reference to "NASD Rules" in NASD Interpretive Material 2110-2(a) shall be construed as a reference to "the Rules of the Exchange",

(2) references to "NASD's Board of Governors" shall be construed as references to "the Exchange Board",

(3) references to Rule 2110, Rule 2320, and Rule 3110, shall be construed as references to Equity Rule 2210, Equity Rule 2320, and Equity Rule 3110,

(4) references to "NASD" shall be construed as references to "the Exchange", and

(5) references to Rule 6610 shall be construed as references to NASD Rule 6610.

(6) Exchange members and persons associated with a member relying upon the exemption set forth in NASD Interpretive Material 2110-2(c) shall comply with the provisions of the NASD Rule 4600 Series cited therein as if such Rules were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange



members are complying with Equity Interpretive Material 2110-2 by complying with NASD Interpretive Material 2110-2 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Interpretive Material 2110-2 are being performed by FINRA on behalf of the Exchange.

### **IM-2110-3. Front Running Policy**

Exchange members and persons associated with a member shall comply with NASD Interpretive Material 2110-3 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2110-3 are transferred into the FINRA rulebook, then Equity Interpretive Material 2110-3 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2110-3 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **IM-2110-4. Trading Ahead of Research Reports**

The Exchange, under its statutory obligation to protect investors and enhance market quality, is issuing an interpretation to the Equity Rules regarding a member firm's trading activities that occur in anticipation of a firm's issuance of a research report regarding a security. The Exchange is concerned with activities of member firms that purposefully establish or adjust the firm's inventory position in securities listed on the Exchange, other exchange-listed securities traded on the Exchange pursuant to unlisted trading privileges, or a derivative security based primarily on a specific security listed on the Exchange or another exchange in anticipation of the issuance of a research report in that same security. For example, a firm's research department may prepare a research report recommending the purchase of a particular security listed on the Exchange. Prior to the publication and dissemination of the report, however, the trading department of the member firm might purposefully accumulate a position in that security to meet anticipated customer demand for that security. After the firm had established its position, the firm would issue the report, and thereafter fill customer orders from the member firm's inventory positions.

The Exchange believes that such activity is conduct which is inconsistent with just and equitable principles of trade, and not in the best interests of the investors. Thus, this interpretation prohibits a member from purposefully establishing, creating or changing the firm's inventory position in a security listed on the Exchange, another exchange-listed security traded on the Exchange pursuant to unlisted trading privileges, or a derivative security related to the underlying equity security, in anticipation of the issuance of a research report regarding such security by the member firm.

Rule 2110 states that:

A member in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

\* \* \* \*

The Exchange is issuing the following interpretation of Equity Rule 2110:

Trading activity purposefully establishing, increasing, decreasing, or liquidating a position in a security listed on the Exchange, another exchange-listed security traded on the Exchange pursuant to unlisted trading privileges, or a derivative security based primarily upon a specific security listed on the Exchange or another exchange, in anticipation of the issuance of a research report in that security, is inconsistent with just and equitable principles of trade and is a violation of Equity Rule 2110.

For the purposes of this interpretation, a "purposeful" change in the firm's inventory position means any trading activities undertaken with the intent of altering a firm's position in a security in anticipation of accommodating investor interest once the research report has been published. Hence, the interpretation does not apply to changes in an inventory position related to unsolicited order flow from a firm's retail or broker/dealer client base or to research done solely for in-house trading and not in any way used for external publication.

Under this interpretation, the Exchange recommends, but does not require, that member firms develop and implement policies and procedures to establish effective internal control systems and procedures that would isolate specific information within research and other relevant departments of the firm so as to prevent the trading department from utilizing the advance knowledge of the issuance of a research report. Firms that choose not to develop "information barrier" procedures bear the burden of demonstrating that the basis for changes in inventory positions in advance of research reports was not purposeful.

#### **IM-2110-5. Anti-Intimidation / Coordination**

The Exchange is issuing this interpretation to codify a longstanding policy. It is conduct inconsistent with just and equitable principles of trade for any member or person associated with a member to coordinate the prices (including quotations), trades, or trade reports of such member with any other member or person associated with a member; to direct or request another member to alter a price (including a quotation); or to engage, directly or indirectly, in any conduct that threatens, harasses, coerces, intimidates, or otherwise attempts improperly to influence another member or person associated with a member. This includes, but is not limited to, any attempt to influence another member or person associated with a member to adjust or maintain a price or quotation, whether displayed on any facility operated by the Exchange or otherwise, or refusals to trade or other conduct that retaliates against or discourages the competitive activities of another market maker or market participant. Nothing in this interpretation respecting coordination

of quotes, trades, or trade reports shall be deemed to limit, constrain, or otherwise inhibit the freedom of a member or person associated with a member to:

(1) set unilaterally its own bid or ask in any security listed on the Exchange or other exchange-listed security traded on the Exchange pursuant to unlisted trading privileges, the prices at which it is willing to buy or sell any security listed on the Exchange or other exchange-listed security, and the quantity of shares of any security listed on the Exchange or other exchange-listed security that it is willing to buy or sell;

(2) set unilaterally its own dealer spread, quote increment, or quantity of shares for its quotations (or set any relationship between or among its dealer spread, inside spread, or the size of any quote increment) in any security listed on the Exchange or other exchange-listed security;

(3) communicate its own bid or ask, or the prices at or the quantity of shares in which it is willing to buy or sell any security listed on the Exchange or other exchange-listed security to any person, for the purpose of exploring the possibility of a purchase or sale of the security listed on the Exchange or other exchange-listed security, and to negotiate for or agree to such purchase or sale;

(4) communicate its own bid or ask, or the price at or the quantity of shares in which it is willing to buy or sell any security listed on the Exchange or other exchange-listed security, to any person for the purpose of retaining such person as an agent or subagent for the member or for a customer of the member (or for the purpose of seeking to be retained as an agent or subagent), and to negotiate for or agree to such purchase or sale;

(5) engage in any underwriting (or any syndicate for the underwriting) of securities to the extent permitted by the federal securities laws;

(6) take any unilateral action or make any unilateral decision regarding the market makers with which it will trade and the terms on which it will trade unless such action is prohibited by the second and third sentences of this Interpretation; and

(7) deliver an order to another member for handling,

provided, however, that the conduct described in (1) through (7) is otherwise in compliance with all applicable law.

#### **IM-2110-6. Confirmation of Callable Common Stock**

Exchange members and persons associated with a member shall comply with NASD Interpretive Material 2110-6 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2110-6 are transferred into the FINRA rulebook, then Equity Interpretive Material 2110-6 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2110-6 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **IM-2110-7. Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes**

(a) Exchange members and persons associated with a member shall comply with NASD Interpretive Material 2110-7 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2110-7 are transferred into the FINRA rulebook, then Equity Interpretive Material 2110-7 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2110-7 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 11870 shall be construed as references to Equity Rule 11870.

#### **2111. Trading Ahead of Customer Market Orders**

(a) Exchange members and persons associated with a member shall comply with NASD Rule 2111 as if such Rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to IM-2110-2, Rule 2320, and Rule 3110 shall be construed as references to Exchange IM-2110-2, Equity Rule 2320, and Equity Rule 3110.

(c) Exchange members and persons associated with a member relying upon the exemption set forth in NASD Rule 2111(f) shall comply with the provisions of the NASD Rule 4600 Series and 6400 Series cited therein as if such Rules were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 2111(f) by complying with NASD Rule 2111(f) as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 2111(f) are being performed by FINRA on behalf of the Exchange.

(d) FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2111 or the provisions of the NASD

Rule 4600 Series or 6400 Series cited therein are transferred into the FINRA rulebook, then Equity Rule 2111 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2111, the NASD Rule 4600 Series or the NASD Rule 6400 Series (regardless of whether such rules are renumbered or amended) as if such rules were part of the Rules of the Exchange.

### **2120. Use of Manipulative, Deceptive or Other Fraudulent Devices**

No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

### **2130. Nasdaq Ownership Restriction**

(a) No member or person associated with a member shall be the beneficial owner of greater than twenty percent (20%) of the then-outstanding voting securities of The NASDAQ OMX Group, Inc.

(b) For purposes of this rule, any calculation of the number of shares of common stock outstanding at any particular time shall be made in accordance with the last sentence of SEC Rule 13d-3(d)(1)(i)(D). The term "beneficial owner" shall have the meaning set forth in the Restated Certificate of Incorporation of The NASDAQ OMX Group, Inc.

### **2140. Restrictions on Affiliation**

(a) Except as provided in paragraph (b):

(1) the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in, or engage in a business venture with, an Exchange member or an affiliate of an Exchange member in the absence of an effective filing under Section 19(b) of the Act; and

(2) an Exchange member shall not be or become an affiliate of the Exchange, or an affiliate of an entity affiliated with the Exchange, in the absence of an effective filing under Section 19(b) of the Act.

The term "affiliate" shall have the meaning specified in Rule 12b-2 under the Act; provided, however, that for purposes of this Rule, one entity shall not be deemed to be an affiliate of another entity solely by reason of having a common director. The term "business venture" means an arrangement under which (A) the Exchange or an entity with which it is affiliated, and (B) an Exchange member or an affiliate of an Exchange member, engage in joint activities with an expectation of shared profit and a risk of shared loss from common entrepreneurial efforts.

(b) Nothing in this rule shall prohibit, or require a filing under Section 19(b) of the Act, for:

(1) an Exchange member or an affiliate of an Exchange member acquiring or holding an equity interest in The NASDAQ OMX Group, Inc. that is permitted by the ownership limitations contained in Equity Rule 2130, or

(2) the Exchange or an entity affiliated with the Exchange acquiring or maintaining an ownership interest in, or engaging in a business venture with, an affiliate of an Exchange member if:

(A) there are information barriers between the member and the Exchange and its facilities, such that the member

(i) will not be provided an informational advantage concerning the operation of the Exchange and its facilities, and will not be provided changes or improvements to the trading system that are not available to the industry generally or other Exchange members;

(ii) will not have any knowledge in advance of other Exchange members of proposed changes, modifications, or improvements to the operations or trading systems of the Exchange and its facilities, including advance knowledge of Exchange filings pursuant to Section 19(b) of the Act;

(iii) will be notified of any proposed changes, modifications, or improvements to the operations or trading systems of the Exchange and its facilities in the same manner as other Exchange members are notified; and

(iv) will not share employees, office space, or databases with the Exchange or its facilities, The NASDAQ OMX Group, Inc., or any entity that is controlled by The NASDAQ OMX Group, Inc.; and

(B) the Exchange's Regulatory Oversight Committee certifies, on an annual basis, to the Director of the Division of Trading & Markets that the Exchange has taken all reasonable steps to implement the requirements of this rule and is in compliance therewith.

(c) The NASDAQ OMX Group, Inc., which is the holding company owning both the Exchange and NASDAQ Execution Services, LLC, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result

of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound routing to the Exchange.

## **2200. Communications with Customers and the Public**

### **2210. Communications with the Public**

(a) Exchange members and persons associated with a member shall comply with NASD Rule 2210 (except NASD Rule 2210(c)) as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 2210 by complying with NASD Rule 2210 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 2210 are being performed by FINRA on the Exchange's behalf.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2210 are transferred into the FINRA rulebook, then Equity Rule 2210 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2210 (except NASD Rule 2210(c), but regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 2211 shall be construed as references to Equity Rule 2211.

### **IM-2210-1. Guidelines to Ensure That Communications With the Public Are Not Misleading**

Members and persons associated with a member shall comply with NASD Interpretive Material 2210-1 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2210-1 are transferred into the FINRA rulebook, then Equity Interpretive Material 2210-1 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2210-1 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **IM-2210-2. Reserved**

### **IM-2210-3. Reserved**

### **IM-2210-4. Limitations on Use of the Exchange's Name**

Members may indicate membership in the Exchange in any communication with the public, provided that the communication complies with the applicable standards of Equity Rule 2210 and neither states nor implies that the Exchange, or any other corporate name or facility affiliated with Exchange, or any other regulatory organization, endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security.

### **2211. Institutional Sales Material and Correspondence**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 2211 (except NASD Rule 2211(c) and (d)(3)) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2211 are transferred into the FINRA rulebook, then Equity Rule 2211 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2211 (except NASD Rule 2211(c) and (d)(3), but regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to an "NASD member" shall be construed as references to an "Exchange member", and

(2) references to Rule 2210 and Rule 3110 shall be construed as references to Equity Rule 2210 and Equity Rule 3110, and references to Rule 3010(d) shall be construed as references to NASD Rule 3010(d), as incorporated into the Rules of the Exchange by Equity Rule 3010.

### **2212. Telemarketing**

Exchange members and persons associated with a member shall comply with NASD Rule 2212 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2212 are transferred into the FINRA rulebook, then Equity Rule 2212 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2212 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **2220. Reserved**

### **2230. Reserved**



**2240. Disclosure of Control Relationship with Issuer**

Exchange Members shall comply with NASD Rule 2240 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2240 are transferred into the FINRA rulebook, then Equity Rule 2240 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2240 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

**2250. Disclosure of Participation or Interest in Primary or Secondary Distribution**

Exchange Members shall comply with NASD Rule 2250 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2250 are transferred into the FINRA rulebook, then Equity Rule 2250 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2250 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

**2260. Forwarding of Proxy and Other Materials**

(a) Exchange Members shall comply with NASD Rule 2260 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2260 are transferred into the FINRA rulebook, then Equity Rule 2260 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2260 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, the guidance of the NASD Board of Governors with respect to reasonable rates of reimbursement as provided in NASD Rule 2260(g) and NASD IM-2260 is hereby adopted as the guidance of the Exchange Board.

**IM-2260. Approved Rates of Reimbursement**

(a) Exchange Members shall comply with NASD Interpretive Material 2260 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2260 are transferred into the FINRA rulebook, then Equity Interpretive Material 2260 shall be construed to require

Exchange members to comply with the FINRA rule corresponding to NASD Interpretive Material 2260 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to NASD shall be construed as references to the Exchange, and

(2) references to Rule 2260 and Rule 2430 shall be construed as references to Equity Rule 2260 and Equity Rule 2430.

### **2270. Disclosure of Financial Condition to Customers**

Exchange Members shall comply with NASD Rule 2270 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2270 are transferred into the FINRA rulebook, then Equity Rule 2270 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2270 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **2280. Reserved**

### **2290. Fairness Opinions**

Exchange Members and persons associated with a member shall comply with NASD Rule 2290 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2290 are transferred into the FINRA rulebook, then Equity Rule 2290 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2290 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **2300. Transactions with Customers**

### **2310. Recommendations to Customers (Suitability)**

(a) Exchange members and associated persons of a member shall comply with NASD Rule 2310 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2310 are transferred into the FINRA rulebook,

then Equity Rule 2310 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2310 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 3110 shall be construed as references to Equity Rule 3110.

### **IM-2310-1. Reserved**

### **IM-2310-2. Fair Dealing with Customers**

(a) Exchange members and associated persons of a member shall comply with NASD Interpretive Material 2310-2 (except NASD IM-2310-2(e)(1)) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2310-2 are transferred into the FINRA rulebook, then Equity Interpretive Material 2310-2 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2310-2 (except NASD IM-2310-2(e)(1), but regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to "the Association's Rules" or "Association Rules" shall be construed as references to "the Rules of the Exchange",

(2) references to interpretations and actions of NASD District Business Conduct Committees and the NASD Board of Governors shall be construed to reflect the policy of the Exchange with respect to the application of Rule 2310,

(3) references to the "Association" shall be construed as references to the "Exchange", and

(4) references to the Rule 2840 Series shall be construed as references to the Equity Rule 2840 Series.

### **IM-2310-3. Suitability Obligations to Institutional Customers**

(a) Exchange members and associated persons of a member shall comply with NASD Interpretive Material 2310-3 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2310-3 are transferred into the FINRA rulebook, then Equity Interpretive Material 2310-3 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2310-3 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to the "Association" shall be construed as references to the "Exchange".

### **2320. Best Execution and Interpositioning**

(a) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Among the factors that will be considered in determining whether a member has used "reasonable diligence" are:

(1) The character of the market for the security, e.g., price, volatility, relative liquidity, and pressure on available communications;

(2) the size and type of transaction;

(3) the number of primary markets checked;

(4) accessibility of the quotation; and

(5) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

(b) In any transaction for or with a customer, no member or person associated with a member shall interject a third party between the member and the best available market except in cases where the member can demonstrate that to his or her knowledge at the time of the transaction the total cost or proceeds of the transaction, as confirmed to the member acting for or with the customer, was better than the prevailing market for the security. A member's obligations to his or her customer are generally not fulfilled when he or she channels transactions through another broker/dealer or some person in a similar position, unless he or she can show that by so doing he or she reduced the costs of the transactions to the customer.

(c) When a member cannot execute directly with a market maker but must employ a broker's broker or some other means in order to insure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the retail firm. Examples of acceptable circumstances are where a customer's order is "crossed" with another retail firm which has a corresponding order on the other side, or

where the identity of the retail firm, if known, would likely cause undue price movements adversely affecting the cost or proceeds to the customer.

(d) Failure to maintain or adequately staff an order room or other department assigned to execute customers' orders cannot be considered justification for executing away from the best available market; nor can channeling orders through a third party as described above as reciprocation for service or business operate to relieve a member of his or her obligations. However, the channeling of customers' orders through a broker's broker or third party pursuant to established correspondent relationships under which executions are confirmed directly to the member acting as agent for the customer, such as where the third party gives up the name of the retail firm, are not prohibited if the cost of such service is not borne by the customer.

(e) A member through whom a retail order is channeled, as described above, and who knowingly is a party to an arrangement whereby the initiating member has not fulfilled his or her obligations under this Rule, will also be deemed to have violated this Rule.

(f) The obligations described in paragraphs (a) through (e) above exist not only where the member acts as agent for the account of his or her customer but also where retail transactions are executed as principal and contemporaneously offset.

#### **IM-2320. Interpretive Guidance with Respect to Best Execution Requirements**

Rule 2320(a) requires, among other things, that a member or person associated with a member comply with Rule 2320(a) when customer orders are routed to it from another broker/dealer for execution. This Interpretive Material addresses certain interpretive questions concerning the applicability of the best execution rule.

For the purposes of Rule 2320, the term “market” or “markets” is to be construed broadly and it encompasses a variety of different venues, including, but not limited to, market centers that are trading a particular security. This expansive interpretation is meant to both inform broker/dealers as to the breadth of the scope of venues that must be considered in the furtherance of their best execution obligations and to promote fair competition among broker/dealers, exchange markets, and markets other than exchange markets, as well as any other venue that may emerge, by not mandating that certain trading venues have less relevance than others in the course of determining a firm’s best execution obligations.

A member’s duty to provide best execution in any transaction “for or with a customer of another broker/dealer” does not apply in instances when another broker/dealer is simply executing a customer order against the member’s quote. Stated in another manner, the duty to provide best execution to customer orders received from other broker/dealers arises only when an order is routed from the broker/dealer to the member for the purpose of order handling and execution. This clarification is intended to draw a distinction between those situations in which the member is acting solely as the

buyer or seller in connection with orders presented by a broker/dealer against the member's quote, as opposed to those circumstances in which the member is accepting order flow from another broker/dealer for the purpose of facilitating the handling and execution of such orders.

### **2330. Customers' Securities or Funds**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 2330 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2330 are transferred into the FINRA rulebook, then Equity Rule 2330 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2330 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) Nothing in NASD Rule 2330, as applied to Exchange members and their associated persons, shall be construed to authorize any Exchange member or associated person to act in a manner inconsistent with Section 11(a) of the Act.

### **IM-2330. Segregation of Customers' Securities**

(a) Exchange Members and persons associated with a member shall comply with NASD Interpretive Material 2330 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 2330 are transferred into the FINRA rulebook, then Equity Interpretive Material 2330 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 2330 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 2330 shall be construed as references to Equity Rule 2330.

### **2340. Customer Account Statements**

(a) Exchange Members shall comply with NASD Rule 2340 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2340 are transferred into the FINRA rulebook, then Equity Rule 2340 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2340 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 2810, Rule 3110, and Rule 11860 shall be construed as references to Equity Rule 2810, Equity Rule 3110, and Equity Rule 11860.

(c) Pursuant to the Rule 9600 Series, the Exchange may exempt any member from the provisions of this Rule for good cause shown.

#### **2341. Margin Disclosure Statement**

(a) Exchange Members shall comply with NASD Rule 2341 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2341 are transferred into the FINRA rulebook, then Equity Rule 2341 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2341 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 3110 shall be construed as references to Equity Rule 3110.

#### **2342. SIPC Information**

Exchange Members shall comply with NASD Rule 2342 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2342 are transferred into the FINRA rulebook, then Equity Rule 2342 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2342 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **2350. Reserved**

#### **2360. Approval Procedures for Day-Trading Accounts**

(a) Exchange Members shall comply with NASD Rule 2360 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2360 are transferred into the FINRA rulebook, then Equity Rule 2360 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2360 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 2361 and Rule 3110 shall be construed as references to Equity Rule 2361 and Equity Rule 3110.

### **2361. Day-Trading Risk Disclosure Statement**

(a) Exchange Members shall comply with NASD Rule 2361 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 2361 by complying with NASD Rule 2361 as written. Accordingly, Exchange members may submit an alternative disclosure statement to FINRA's Advertising Department as provided in the NASD Rule. Functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 2361 are being performed by FINRA on the Exchange's behalf.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2361 are transferred into the FINRA rulebook, then Equity Rule 2361 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2361 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 2360 and Rule 3110 shall be construed as references to Equity Rule 2360 and Equity Rule 3110.

### **2370. Borrowing From or Lending to Customers**

Exchange Members and persons associated with a member shall comply with NASD Rule 2370 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2370 are transferred into the FINRA rulebook, then Equity Rule 2370 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2370 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **2400. Commissions, Mark-Ups and Charges**

#### **2410. Reserved**

#### **2420. Reserved**

#### **2430. Charges for Services Performed**

Exchange Members shall comply with NASD Rule 2430 as if such Rule were part of the Rules of the Exchange.



FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2430 are transferred into the FINRA rulebook, then Equity Rule 2430 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2430 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **2440. Reserved**

#### **2441. Net Transactions with Customers**

(a) Exchange Members shall comply with NASD Rule 2441 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2441 are transferred into the FINRA rulebook, then Equity Rule 2441 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2441 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 3110 shall be construed as references to Equity Rule 3110.

#### **2450. Reserved**

#### **2460. Payments for Market Making**

(a) No member or person associated with a member shall accept any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith.

(b) The provisions of paragraph (a) shall not preclude a member from accepting:

(1) payment for bona fide services, including, but not limited to, investment banking services (including underwriting compensation and fees); and

(2) reimbursement of any payment for registration imposed by the Securities and Exchange Commission or state regulatory authorities and for listing of an issue of securities imposed by a self-regulatory organization.

(c) For purposes of this rule, the following terms shall have the stated meanings:

(1) "affiliate"

(A) The term "affiliate" shall mean a company which controls, is controlled by, or is under common control with a member;

(B) The term affiliate is presumed to include, but is not limited to, the following for purposes of subparagraph (A), above:

(i) a company will be presumed to control a member if the company beneficially owns 10 percent or more of the outstanding voting securities of a member which is a corporation, or beneficially owns a partnership interest in 10 percent or more of the distributable profits or losses of a member which is a partnership;

(ii) a member will be presumed to control a company if the member and persons associated with the member beneficially own 10 percent or more of the outstanding voting securities of a company which is a corporation, or beneficially own a partnership interest in 10 percent or more of the distributable profits or losses of a company which is a partnership;

(iii) a company will be presumed to be under common control with a member if:

a. The same natural person or company controls both the member and company by beneficially owning 10 percent or more of the outstanding voting securities of a member or company which is a corporation, or by beneficially owning a partnership interest in 10 percent or more of the distributable profits or losses of a member or company which is a partnership; or

b. A person having the power to direct or cause the direction of the management or policies of the member or the company also has the power to direct or cause the direction of the management or policies of the other entity in question.

(C) The provisions of subparagraphs (A) and (B) hereof notwithstanding, none of the following shall be presumed to be an affiliate of a member for purposes of this Rule:

(i) an investment company registered with the Commission pursuant to the Investment Company Act of 1940, as amended;

(ii) a "separate account" as defined in Section 2(a)(37) of the Investment Company Act of 1940, as amended;

(iii) a "real estate investment trust" as defined in Section 856 of the Internal Revenue Code;

(iv) a "direct participation program" as defined in Rule 2810; and

(v) a corporation, trust, partnership or other entity issuing financing instrument-backed securities which are rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories.

(2) "promoter" means any person who founded or organized the business or enterprise of an issuer, is a director or employee of an issuer, acts or has acted as a consultant, advisor, accountant or attorney to an issuer, is the beneficial owner of any of an issuer's securities that are considered "restricted securities" under Rule 144, or is the beneficial owner of five percent (5%) or more of the public float of any class of an issuer's securities, and any other person with a similar interest in promoting the entry of quotations or market making in an issuer's securities; and

(3) "quotation" shall mean any bid or offer at a specified price with respect to a security, or any indication of interest by a member in receiving bids or offers from others for a security, or an indication by a member that he wishes to advertise his general interest in buying or selling a particular security.

### **2500. Special Accounts**

#### **2510. Discretionary Accounts**

(a) Exchange Members shall comply with NASD Rule 2510 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2510 are transferred into the FINRA rulebook, then Equity Rule 2510 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 2510 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of applying this Rule, references to Rule 3010 and Rule 3110 shall be construed as references to Equity Rule 3010 and Equity Rule 3110.

#### **2520. Margin Requirements**

(a) A member that is not designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with the initial and maintenance margin requirements of Regulation T and the self-regulatory organization to which the member is designated for

oversight pursuant to SEC Rule 17d-1. Members shall comply with Regulation T and such self-regulatory organization rules, and shall submit to such self-regulatory organization any filings required thereunder, in each case as if such rules were part of the Rules of the Exchange.

(b) A member designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with the initial and maintenance margin requirements of Regulation T and the NASD Rule 2520 as if such Rules were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2520 are transferred into the FINRA rulebook, then Equity Rule 2520 shall be construed to require Exchange members designated to the Exchange for oversight pursuant to SEC Rule 17d-1 to comply with the FINRA rule corresponding to NASD Rule 2520 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(c) The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 2520 by complying with NASD Rule 2520 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 2520 are being performed by FINRA on behalf of the Exchange.

(d) Pursuant to the Rule 9600 Series, the Exchange may exempt any member from the requirements contained in paragraph (e)(3) of NASD Rule 2520, as applied to Exchange members through Equity Rule 2520, if the account referenced in paragraph (e)(3) of NASD Rule 2520 is confined exclusively to transactions and positions in exempted securities.

## **2600. Reserved**

## **2700. Reserved**

## **2800. Special Products**

### **2810. Direct Participation Programs**

(a) Exchange Members and their associated persons shall comply with NASD Rule 2810 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2810 are transferred into the FINRA rulebook, then Equity Rule 2810 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule

2810 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule 2810:

(1) references to amounts fixed by the NASD Board of Governors with respect to non-cash compensation arrangements shall be construed to reflect the policy of the Exchange with respect to the application of Rule 2810,

(2) references to "procedures established by the Association" and "Rules of the Association" shall be construed as references to "Rules of the Exchange", and

(3) for purposes of this Rule only, Exchange members and their associated persons shall comply with applicable provisions of NASD Rule 2710 as if such Rule were part of the Rules of the Exchange, and references to the "Corporate Financing Department" shall be construed as references to FINRA's Corporate Financing Department.

(c) Pursuant to the Rule 9600 Series, the Exchange may exempt any member from the provisions of this Rule for good cause shown.

## **2820. Reserved**

## **2830. Investment Company Securities**

(a) Exchange Members and their associated persons shall comply with NASD Rule 2830 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 2830 are transferred into the FINRA rulebook, then Equity Rule 2830 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 2830 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to "the Rules of the Association" shall be construed as references to "the Rules of the Exchange",

(2) references to Rule 2820 shall be deleted, and no comparable Exchange Rule shall apply to activities of Exchange Members in connection with contracts providing for benefits or values which may vary according to the investment experience of any separate or segregated account or accounts maintained by an insurance company,

(3) references to Rule 2420 shall be construed as a requirement that an Exchange member who is an underwriter of the securities of an investment company sell any such securities to a broker or dealer that is not an Exchange member at the same prices, for the same commission and fees, and on the same terms and conditions as are by such member accorded to the general public, and

(4) references to Rule 2230 shall be construed as references to SEC Rule 10b-10.

## **2840. Trading in Index Warrants, Currency Index Warrants, and Currency Warrants**

### **2841. General**

(a) Applicability — This Rule 2840 Series shall be applicable: (1) to the conduct of accounts, the execution of transactions, and the handling of orders in index warrants listed on the Exchange; and (2) to the extent appropriate unless otherwise stated herein, to the conduct of accounts, the execution of transactions, and the handling of orders in other exchange-listed stock index warrants, currency index warrants, and currency warrants by members who are not members of the exchange on which the warrant is listed or traded.

(b) Except to the extent that specific provisions in this Rule Series govern, or unless the context otherwise requires, the provisions of the Equity Rules and all other interpretations and policies shall also be applicable to transactions in index warrants, currency index warrants, and currency warrants.

(c) The Rules in this Rule 2840 Series are not applicable to stock index warrants, currency index warrants, and currency warrants listed on national securities exchanges prior to September 28, 1995.

### **2842. Definitions**

#### (a) "Control"

(1) The term "control" means the power or ability of an individual or entity to make investment decisions for an account or accounts, or influence directly or indirectly the investment decisions of any person or entity who makes investment decisions for an account. In addition, control will be presumed in the following circumstances:

(A) among all parties to a joint account who have authority to act on behalf of the account;

(B) among all general partners to a partnership account;

(C) when a person or entity:

(i) holds an ownership interest of 10 percent or more in an entity (ownership interest of less than 10 percent will not preclude aggregation), or

(ii) shares in 10 percent or more of profits and/or losses of an account;

(D) when accounts have common directors or management;

(E) where a person or entity has the authority to execute transactions in an account.

(2) Control, presumed by one or more of the above powers, abilities or circumstances, can be rebutted by proving the factor does not exist or by showing other factors which negate the presumption of control. The rebuttal proof must be submitted by affidavit and/or such other evidence as may be appropriate in the circumstances.

(3) The Exchange will also consider the following factors in determining if aggregation of accounts is required:

(A) similar patterns of trading activity among separate entities;

(B) the sharing of kindred business purposes and interests;

(C) whether there is common supervision of the entities which extends beyond assuring adherence to each entity's investment objectives and/or restrictions;

(D) the degree of contact and communication between directors and/or managers of separate accounts.

(b) The term "currency index" means a group of currencies each of whose inclusion and relative representation in the group is determined by its inclusion and relative representation in a currency index.

(c) The term "currency index warrants" shall mean instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration date (i.e., European style), entitling the holder thereof to a cash settlement in U.S. dollars to the extent that the value of the underlying currency index has declined below (in the case of a put warrant) or increased above (in the case of a call warrant) the pre-stated cash settlement value of the underlying currency index.

(d) The term "currency warrants" shall mean instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration date (i.e., European style), entitling the holder thereof to a cash settlement in U.S. dollars to the extent that the value of the underlying foreign currency has declined below (in the case of a put warrant) or increased above (in the case of a call warrant) the pre-stated cash settlement value of the underlying foreign currency. The term "foreign currency warrants" shall also include cross-rate currency warrants.

(e) The term "index warrants" means instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration date (i.e., European style), entitling the holder thereof to a cash settlement in U.S. dollars to the extent that the value of the underlying stock index group has declined below (in the case of a put warrant) or increased above (in the case of a call warrant) the pre-stated cash settlement value of the underlying stock index group.

(f) The term "stock index group" means a group of stocks each of whose inclusion and relative representation in the group is determined by its inclusion and relative representation in a stock index.

### **2843. Account Approval**

(a) No member or person associated with a member shall accept an order from a customer to purchase or sell an index warrant, currency index warrant, or currency warrant unless the customer's account has been approved for options trading pursuant to NASD Rule 2860(b)(16). To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2843, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(16) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2843 or 2860(b)(16) are transferred into the FINRA rulebook, then Equity Rule 2843 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2843 and 2860(b)(16) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to "the Rules of the Association" shall be construed as references to "the Rules of the Exchange", and references to the "Association" shall be construed as references to the Exchange.

### **2844. Suitability**

The provisions of NASD Rule 2860(b)(19) shall apply to recommendations by members and persons associated with members regarding the purchase or sale of index



warrants, currency index warrants, or currency warrants. To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2844, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(19) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2844 or 2860(b)(19) are transferred into the FINRA rulebook, then Equity Rule 2844 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2844 and 2860(b)(19) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **2845. Discretionary Accounts**

(a) Insofar as a member or person associated with a member exercises discretion to trade in index warrants, currency index warrants, or currency warrants in a customer's account, such account shall be subject to the provisions of NASD Rule 2860(b)(18). To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2845, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(18) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 28456 or 2860(b)(18) are transferred into the FINRA rulebook, then Equity Rule 2845 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2845 and 2860(b)(19) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this rule, references to Rule 2510 and Rule 3110(c)(4) shall be construed as references to Equity Rule 2510 and Equity Rule 3110(c)(4).

#### **2846. Supervision of Accounts**

(a) The provisions of NASD Rule 2860(b)(20) shall apply to all customer accounts of a member in which transactions in index warrants, currency index warrants, or currency warrants are effected. To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2846, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(20) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2846 or 2860(b)(20) are transferred into the FINRA rulebook, then Equity Rule 2846 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules

corresponding to NASD Rules 2846 and 2860(b)(19) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this rule, references to Rules 3010, 3012, and 3013 shall be construed as references to Equity Rules 3010, 3012, and 3013.

### **2847. Customer Complaints**

(a) The record-keeping requirements of NASD Rule 2860(b)(17)(A) concerning the receipt and handling of customer complaints relating to options shall also apply to customer complaints relating to index warrants, currency index warrants, or currency warrants. To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2847, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(17)(A) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2847 or 2860(b)(17)(A) are transferred into the FINRA rulebook, then Equity Rule 2847 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2847 and 2860(b)(17)(A) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this rule, references to Rule 3110 shall be construed as references to Equity Rule 3110.

### **2848. Communications with the Public and Customers Concerning Index Warrants, Currency Index Warrants, and Currency Warrants**

(a) The provisions of NASD Rule 2220 (except NASD Rule 2220(c)) shall be applicable to communications to customers regarding index warrants, currency index warrants, or currency warrants. To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2848, Exchange Members and their associated persons shall comply with NASD Rule 2220 (except NASD Rule 2220(c)) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2848 or 2220 are transferred into the FINRA rulebook, then Equity Rule 2848 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2848 and 2220 (except Rule 2220(c), but regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this rule, references to “NASD” shall be construed as references to the Exchange.

**2849. Maintenance of Records**

The record-keeping provisions of NASD Rule 2860(b)(17)(B) shall be applicable to customer accounts approved to trade index warrants, currency index warrants, or currency warrants. To the extent that it is made applicable to index warrants, currency index warrants, and currency warrants by NASD Rule 2849, Exchange Members and their associated persons shall comply with NASD Rule 2860(b)(17)(B) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rules 2849 or 2860(b)(17)(B) are transferred into the FINRA rulebook, then Equity Rule 2849 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rules corresponding to NASD Rules 2849 and 2860(b)(17)(A) (regardless of whether such rules are renumbered or amended) as if such rule were part of the Rules of the Exchange.

**2850. Position Limits**

(a) Except with the prior written approval of the Exchange pursuant to the Rule 9600 Series for good cause shown, no member shall effect for any account in which such member has an interest, or for the account of any partner, officer, director or employee thereof, or for the account of any customer, a purchase or sale transaction in an index warrant listed on the Exchange or on another national securities exchange if the member has reason to believe that as a result of such transaction the member, or partner, officer, director or employee thereof, or customer would, acting alone or in concert with others, directly or indirectly, hold or control an aggregate position in an index warrant issue on the same side of the market, combining such index warrant position with positions in index warrants overlying the same index on the same side of the market, in excess of the position limits established by the Exchange or the other exchange on which the index warrant is listed.

(b) In determining compliance with this Rule, the position limits for index warrants listed on the Exchange are as follows:

(1) Fifteen million warrants with respect to warrants on the same stock index (other than the Standard & Poor's MidCap 400 Index) with an original issue price of ten dollars or less.

(2) Seven million five hundred thousand warrants, with respect to warrants on the Standard & Poor's MidCap 400 Index with an original issue price of ten dollars or less.

(3) For stock index warrants with an original issue price greater than ten dollars, positions in these warrants must be converted to the equivalent of warrants on the same index priced initially at ten dollars by dividing the original issue price of the index warrants priced above ten dollars by ten and multiplying

this number by the size of such index warrant position. After recalculating a warrant position pursuant to this subparagraph, such recalculated warrant position shall be aggregated with other warrant positions on the same underlying index on the same side of the market and subjected to the applicable position limit set forth in subparagraph (1) or (2) above. For example, if an investor held 100,000 Nasdaq 100 Index warrants offered originally at \$20 per warrant, the size of this position for the purpose of calculating position limits would be 200,000, or 100,000 times 20/10.

### **2851. Exercise Limits**

(a) Except with the prior written approval of the Exchange pursuant to the Rule 9600 Series for good cause shown, in each instance, no member or person associated with a member shall exercise, for any account in which such member or person associated with such member has an interest, or for the account of any partner, officer, director or employee thereof, or for the account of any customer, a long position in any index warrant if as a result thereof such member or partner, officer, director or employee thereof or customer, acting alone or in concert with others, directly or indirectly:

(1) has or will have exercised within any five (5) consecutive business days a number of index warrants overlying the same index in excess of the limits for index warrant positions contained in Rule 2850; or

(2) has or will have exceeded the applicable exercise limit fixed from time to time by an exchange other than the Exchange.

(b) The Exchange, pursuant to the Rule 9600 Series for good cause shown, may institute other limitations concerning the exercise of index warrants from time to time. Reasonable notice shall be given of each new limitation fixed by the Exchange. These exercise limitations are separate and distinct from any other exercise limitations imposed by the issuers of index warrants.

### **2852. Reporting Requirements**

(a) Each member shall file with the Regulation Department a report with respect to each account in which the member has an interest, each account of a partner, officer, director or employee of such member, and each customer account of the member, which has established an aggregate position of 100,000 index warrants on the same side of the market in an index warrant issue listed on the Exchange, combining such index warrant position with positions in index warrants overlying the same index on the same side of the market traded on the Exchange or another national securities exchange.

(b) Such report shall identify the person or persons having an interest in such account and shall identify separately the total number of each type of index warrant that comprises the reportable position in such account. The report shall be in such form as may be prescribed by the Regulation Department and shall be filed no later than the close

of business on the next business day following the day on which the transaction or transactions necessitating the filing of such report occurred. Whenever a report shall be required to be filed with respect to an account pursuant to this Rule, the member filing such report shall file with the Regulation Department such additional periodic reports with respect to such account as the Regulation Department may from time to time prescribe.

### **2853. Liquidation of Index Warrant Positions**

(a) Whenever the Regulation Department determines that a person or group of persons acting in concert holds or controls an aggregate position (whether short or long) in index warrants overlying the same index in excess of the position limitations established by Rule 2850, it may, when deemed necessary or appropriate in the public interest and for the protection of investors, direct any member or all members carrying a position in index warrants overlying such index for such person or persons to liquidate such position or positions, or portions thereof, as expeditiously as possible and consistent with the maintenance of an orderly market, so as to bring such person or persons into compliance with the position limitations contained in Rule 2850.

(b) Whenever such a directive is issued by the Regulation Department no member receiving notice thereof shall accept and/or execute for any person or persons named in such directive any order to purchase or sell short any index warrants based on the same index, unless in each instance express approval therefor is given by the Regulation Department, or the directive is rescinded.

### **2854. Reserved**

### **2900. Responsibilities to Other Brokers or Dealers**

#### **2910. Disclosure of Financial Condition to Other Members**

Any Exchange member who is a party to an open transaction or who has on deposit cash or securities of another member shall furnish upon written request of the other member a statement of its financial condition as disclosed in its most recently prepared balance sheet.

### **3000. Responsibilities Relating to Associated Persons, Employees, and Others' Employees**

#### **3010. Supervision**

(a) Each member shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable Exchange rules. Exchange members shall comply with NASD Rule 3010 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the

FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3010 by complying with NASD Rule 3010 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3010 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3010 are transferred into the FINRA rulebook, then Equity Rule 3010 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 3010 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to "NASD Rules", "rules of NASD", or "Rules of this Association" shall be construed as references to "Rules of the Exchange",

(2) the term "registered person" in NASD Rule 3010(b)(2)(I) shall be defined as "any person registered with the Exchange as a representative or principal pursuant to the 1000 Series of the Equity Rules",

(3) references to Article V, Section 3 of the Association's By-Laws shall be construed as references to Equity Rule 1031,

(4) references to Rule 2210 and Rule 3110 shall be construed as references to Equity Rule 2210 and Equity Rule 3110, and

(5) references to registration with NASD or the Association shall be construed as references to registration with the Exchange.

(c) Pursuant to the Rule 9600 Series, the Exchange may in exceptional circumstances, taking into consideration all relevant factors, exempt any member unconditionally or on specified terms and conditions from the requirements contained in paragraph (b)(2) of NASD Rule 3010, as applied to Exchange members through Equity Rule 3010. A member seeking an exemption must file a written application pursuant to the Rule 9600 Series within 30 days after receiving notice or obtaining actual knowledge that it meets one of the criteria in paragraph (b)(2)(H) of NASD Rule 3010. A member that meets one of the criteria in paragraph (b)(2)(H) for the first time may elect to reduce its staffing levels pursuant to the provisions of paragraph (b)(2)(B) of NASD Rule 3010 or, alternatively, to seek an exemption hereunder, as appropriate; such a member may not seek relief from the Rule by both reducing its staffing levels pursuant to paragraph (b)(2)(B) and requesting an exemption.

### **IM-3010-1. Standards for Reasonable Review**

(a) Exchange members and persons associated with a member shall comply with NASD Interpretive Material IM-3010-1 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 3010-1 are transferred into the FINRA rulebook, then Equity Interpretive Material 3010-1 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 3010-1 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to Rule 3010 shall be construed as references to Equity Rule 3010; and

(2) references to "NASD Rules" shall be construed as references to "the Rules of the Exchange".

### **IM-3010-2. Guidance on Heightened Supervision Requirements**

Exchange members shall comply with NASD Notice to Members 97-19 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 3010-2 are transferred into the FINRA rulebook, then Equity Interpretive Material 3010-2 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Interpretive Material 3010-2 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3011. Anti-Money Laundering Compliance Program**

Exchange Members and persons associated with a member shall comply with NASD Rule 3011 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3011 are transferred into the FINRA rulebook, then Equity Rule 3011 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3011 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **IM-3011-1. Independent Testing Requirements**

Exchange members and persons associated with a member shall comply with NASD Interpretive Material IM-3011-1 as if such Rule were part of the Rules of the Exchange. For purposes of this Rule, references to Rule 3011 shall be construed as references to Equity Rule 3011.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 3011-1 are transferred into the FINRA rulebook, then Equity Interpretive Material 3011-1 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Interpretive Material 3011-1 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **IM-3011-2. Review of Anti-Money Laundering Compliance Person Information**

Each Exchange member must identify, review, and, if necessary, update the information regarding its anti-money laundering compliance person designated pursuant to Rule 3011 in the manner prescribed by Rule 1160.

### **3012. Supervisory Control System**

(a) Members and persons associated with a member shall comply with NASD Rule 3012 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3012 by complying with NASD Rule 3012 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3012 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3012 are transferred into the FINRA rulebook, then Equity Rule 3012 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3012 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to "NASD Rules" shall be construed as references to "Rules of the Exchange".

### **3013. Annual Certification of Compliance and Supervisory Processes**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 3013 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3013 are transferred into the FINRA rulebook,



then Equity Rule 3013 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3012 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to "NASD Rules" shall be construed as references to "Rules of the Exchange",

(2) references to IM-3013 shall be construed as references to Equity IM-3013, and

(3) references to "MSRB rules" shall be deleted.

### **IM-3013. Annual Compliance and Supervision Certification**

(a) Exchange Members and persons associated with a member shall comply with NASD Interpretive Material IM-3013 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 3013 are transferred into the FINRA rulebook, then Equity Interpretive Material 3013 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Interpretive Material 3013 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to "NASD Rules" shall be construed as references to "Rules of the Exchange",

(2) references to NASD Rule 3013 and Rule 2110 shall be construed as references to Equity Rule 3013 and Equity Rule 2110,

(3) references to "NASD members" shall be construed as references to "Exchange Members",

(4) references to "the NASD Board of Governors" shall be construed as references to "the Board of Directors of the Exchange", and

(5) references to "MSRB rules" shall be deleted.

### **3020. Fidelity Bonds**

(a) Each member required to join the Securities Investor Protection Corporation who has employees and who is a member in good standing of another self-regulatory organization shall follow the applicable fidelity bond rule of the self-regulatory organization to which it is designated by the Commission for financial responsibility pursuant to Section 17 of the Act and SEC Rule 17d-1 thereunder.

(b) A member designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with NASD Rule 3020 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3020 by complying with NASD Rule 3020 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3020 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3020 are transferred into the FINRA rulebook, then Equity Rule 3020 shall be construed to require Exchange members designated to the Exchange for oversight pursuant to SEC Rule 17d-1 to comply with the FINRA rule corresponding to NASD Rule 3010 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(c) For purposes of this Rule:

(1) references to an "Association member" shall be construed as references to an "Exchange member", and

(2) references to Article I, paragraph (q) of the By-Laws shall be construed as references to Equity Rule 1011.

(d) Pursuant to the Rule 9600 Series, any member subject to paragraph (c) of NASD Rule 3020, through the application of Equity Rule 3020(b), may apply to the Exchange for an exemption from such requirements. The exemption may be granted upon a showing of good cause, including a substantial change in the circumstances or nature of the member's business that results in a lower net capital requirement. The Exchange may issue an exemption subject to any condition or limitation upon a member's bonding coverage that is deemed necessary to protect the public and serve the purposes of this Rule.

### **3030. Outside Business Activities of an Associated Person**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 3030 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3030 are transferred into the FINRA rulebook, then Equity Rule 3030 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3030 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 3040 shall be construed as references to Equity Rule 3040.

### **3040. Private Securities Transactions of an Associated Person**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 3040 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3040 are transferred into the FINRA rulebook, then Equity Rule 3040 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3040 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to Rule 3050 shall be construed as references to Equity Rule 3050, and

(2) references to "immediately family members (as defined in Rule 2790)" shall be construed to mean a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.

### **3050. Transactions for or by Associated Persons**

Exchange Members and persons associated with a member shall comply with NASD Rule 3050 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3050 are transferred into the FINRA rulebook, then Equity Rule 3050 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3050 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3060. Influencing or Rewarding Employees of Others**

Exchange Members and persons associated with a member shall comply with NASD Rule 3060 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3060 are transferred into the FINRA rulebook, then Equity Rule 3060 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3060 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3070. Reporting Requirements**

(a) Exchange Members and persons associated with a member shall comply with NASD Rule 3070 (excluding NASD Rule 3070(g)) as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3070 by complying with NASD Rule 3070 as written (excluding Rule 3070(g)), including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3070 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3070 are transferred into the FINRA rulebook, then Equity Rule 3070 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 3070 (excluding Rule 3070(g) but regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, the requirement of NASD Rule 3070(d) to respond to NASD with respect to any customer complaint, examination, or inquiry shall be construed as a requirement to respond to FINRA and the Exchange.

### **3080. Disclosure to Associated Persons When Signing Form U4**

Exchange Members shall comply with NASD Rule 3080 as if such Rule were part of the Rules of the Exchange. In lieu of incorporating in the written statement the language in paragraph (2) of NASD Rule 3080, members shall include the following provision:

A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated under the Rules of the Exchange. Such a claim may be arbitrated under Exchange rules only if the parties have agreed to arbitrate it, either before or after the dispute arose. The rules of other arbitration forums may be different.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3080 are transferred into the FINRA rulebook, then Equity Rule 3080 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 3080 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3090. Transactions Involving Exchange Employees**

(a) When a member has actual notice that an Exchange employee has a financial interest in, or controls trading in, an account, the member shall promptly obtain and implement an instruction from the employee directing that duplicate account statements be provided by the member to the Exchange.

(b) No member shall directly or indirectly make any loan of money or securities to any Exchange employee. Provided, however, that this prohibition does not apply to loans made in the context of disclosed, routine banking and brokerage agreements, or loans that are clearly motivated by a personal or family relationship.

(c) Notwithstanding the annual dollar limitation set forth in Equity Rule 3060, no member shall directly or indirectly give, or permit to be given, anything of more than nominal value to any Exchange employee who has responsibility for a regulatory matter that involves the member. For purposes of this subsection, the term "regulatory matter" includes, but is not limited to, examinations, disciplinary proceedings, membership applications, listing applications, delisting proceedings, and dispute-resolution proceedings that involve the member.

### **3100. Books and Records, and Financial Condition**

#### **3110. Books and Records**

##### (a) Requirements

Each member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of the Exchange and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 under the Securities Exchange Act of 1934.

##### (b) Reserved

##### (c) Customer Account Information

Each member shall maintain accounts opened after January 1, 1991 as follows:

(1) for each account, each member shall maintain the following information:

(A) customer's name and residence;

(B) whether customer is of legal age;

(C) signature of the registered representative introducing the account and signature of the member or partner, officer, or manager who accepts the account; and

(D) if the customer is a corporation, partnership, or other legal entity, the names of any persons authorized to transact business on behalf of the entity;

(2) for each account other than an institutional account, and accounts in which investments are limited to transactions in open-end investment company shares that are not recommended by the member or its associated persons, each member shall also make reasonable efforts to obtain, prior to the settlement of the initial transaction in the account, the following information to the extent it is applicable to the account:

(A) customer's tax identification or Social Security number;

(B) occupation of customer and name and address of employer;  
and

(C) whether customer is an associated person of another member;  
and

(3) for discretionary accounts, in addition to compliance with subparagraphs (1) and (2) above, and Rule 2510 of these Rules, the member shall:

(A) obtain the signature of each person authorized to exercise discretion in the account;

(B) record the date such discretion is granted; and

(C) in connection with exempted securities other than municipals, record the age or approximate age of the customer.

(4) For purposes of this Rule, Rule 2310, and Rule 2510, the term "institutional account" shall mean the account of:

(A) a bank, savings and loan association, insurance company, or registered investment company;

(B) an investment adviser registered either with the Securities and Exchange Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or

(C) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million.

(d) Record of Written Complaints

Each member shall keep and preserve in each office of supervisory jurisdiction, as defined in Rule 3010, either a separate file of all written complaints of customers and action taken by the member, if any, or a separate record of such complaints and a clear reference to the files containing the correspondence connected with such complaint as maintained in such office.

(e) "Complaint" Defined

A "complaint" shall be deemed to mean any written statement of a customer or any person acting on behalf of a customer alleging a grievance involving the activities of those persons under the control of the member in connection with the solicitation or execution of any transaction or the disposition of securities or funds of that customer.

(f) Requirements When Using Predispute Arbitration Agreements With Customers

(1) Any predispute arbitration clause shall be highlighted and shall be immediately preceded by the following language in outline form.

This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:

(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(D) The arbitrators do not have to explain the reason(s) for their award.

(E) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.

(2) (A) In any agreement containing a predispute arbitration agreement, there shall be a highlighted statement immediately preceding any signature line or other place for indicating agreement that states that the agreement contains a predispute arbitration clause. The statement shall also indicate at what page and paragraph the arbitration clause is located.

(B) Within thirty days of signing, a copy of the agreement containing any such clause shall be given to the customer who shall acknowledge receipt thereof on the agreement or on a separate document.

(3) (A) A member shall provide a customer with a copy of any predispute arbitration clause or customer agreement executed between the customer and the member, or inform the customer that the member does not have a copy thereof, within ten business days of receipt of the customer's request. If a customer requests such a copy before the member has provided the customer with a copy pursuant to subparagraph (2)(B) of this paragraph, the member must provide a copy to the customer by the earlier date required by this subparagraph (3)(A) or by subparagraph (2)(B).

(B) Upon request by a customer, a member shall provide the customer with the names of, and information on how to contact or obtain the rules of, all arbitration forums in which a claim may be filed under the agreement.

(4) No predispute arbitration agreement shall include any condition that:

(A) limits or contradicts the rules of any self-regulatory organization;

(B) limits the ability of a party to file any claim in arbitration;



(C) limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement;

(D) limits the ability of arbitrators to make any award.

(5) If a customer files a complaint in court against a member that contains claims that are subject to arbitration pursuant to a predispute arbitration agreement between the member and the customer, the member may seek to compel arbitration of the claims that are subject to arbitration. If the member seeks to compel arbitration of such claims, the member must agree to arbitrate all of the claims contained in the complaint if the customer so requests.

(6) All agreements shall include a statement that "No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein."

(7) Reserved

(g) Negotiable Instruments Drawn From A Customer's Account

No member or person associated with a member shall obtain from a customer or submit for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share, or similar account, without that person's express written authorization, which may include the customer's signature on the negotiable instrument. Each member shall maintain the authorization required for a period of three years. This provision shall not, however, require maintenance of copies of negotiable instruments signed by customers.

(h) Order Audit Trail System Record keeping Requirements

(1) Exchange Members shall comply with NASD Rule 3110(h) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3110(h) are transferred into the FINRA rulebook, then Equity Rule 3110(h) shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 3110(h) (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(2) For purposes of this Rule, references to Rule 6951 shall be construed as references to NASD Rule 6951, as applied to Exchange members by Equity Rule 6950.

(i) Holding of Customer Mail

Upon the written instructions of a customer, a member may hold mail for a customer who will not be at his or her usual address for the period of his or her absence, but (A) not to exceed two months if the member is advised that such customer will be on vacation or traveling or (B) not to exceed three months if the customer is going abroad.

(j) Changes in Account Name or Designation

Before any customer order is executed, there must be placed upon the memorandum for each transaction, the name or designation of the account (or accounts) for which such order is to be executed. No change in such account name(s) (including related accounts) or designation(s) (including error accounts) shall be made unless the change has been authorized by a member or a person(s) designated under the provisions of the Equity Rules. Such person must, prior to giving his or her approval of the account designation change, be personally informed of the essential facts relative thereto and indicate his or her approval of such change in writing on the order or other similar record of the member. The essential facts relied upon by the person approving the change must be documented in writing and preserved for a period of not less than three years, the first two years in an easily accessible place, as the term "easily accessible place" is used in SEC Rule 17a-4.

For purposes of this paragraph (j), a person(s) designated under the provisions of the Equity Rules to approve account name or designation changes must pass a qualifying principal examination appropriate to the business of the firm.

**IM-3110. Customer Account Information**

(a) Reserved

(b) Additional information is required to be obtained prior to making recommendations to customers (see Rule 2310) and in connection with discretionary accounts (see Rule 2510).

(c) Reserved

**3120. Use of Information Obtained in Fiduciary Capacity**

Exchange Members shall comply with NASD Rule 3120 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3120 are transferred into the FINRA rulebook, then Equity Rule 3120 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 3120 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3121. Custodian of the Record**

A member who files a Securities and Exchange Commission Form BDW shall designate on the Form BDW, as the custodian of the record, a person associated with the member at the time that the Form BDW is filed.

### **3130. Regulation of Activities of Members Experiencing Financial and/or Operational Difficulties**

(a) A member designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with NASD Rule 3130 (except NASD Rule 3130(a)) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3130 are transferred into the FINRA rulebook, then Equity Rule 3130 shall be construed to require Exchange members that are designated to the Exchange for oversight pursuant to SEC Rule 17d-1 to comply with the FINRA rule corresponding to NASD Rule 3130 (except Rule 3130(a) but regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 9557 shall be construed as references to Equity Rule 9557 and references to Rule 3131 shall be deleted.

### **IM-3130. Restrictions on a Member's Activity**

(a) A member designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with NASD Interpretive Material 3130 (except IM-3130(d)) as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Interpretive Material 3130 are transferred into the FINRA rulebook, then Equity Interpretive Material 3130 shall be construed to require Exchange members designated to the Exchange for oversight pursuant to SEC Rule 17d-1 to comply with the FINRA rule corresponding to NASD Interpretive Material 3130 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule:

(1) references to Rule 3131 shall be deleted, and

(2) references to the opinion and belief of the Board of Governors shall be construed to reflect the policy of the Exchange with respect to the application of Rule 3130 and IM-3130.

### **3140. Approval of Change in Exempt Status Under SEC Rule 15c3-3**

(a) Application — For the purposes of this Rule, the term "member" shall be limited to any member of the Exchange who is subject to SEC Rule 15c3-3 and is not designated to another self-regulatory organization by the Commission for financial responsibility pursuant to Section 17 of the Act and SEC Rule 17d-1 promulgated thereunder. Further, the term shall not be applicable to any member that is subject to Section 402.2(c) of the rules of the Treasury Department.

(b) A member operating pursuant to any exemptive provision as contained in subparagraph (k) of SEC Rule 15c3-3 under the Act (Rule 15c3-3), shall not change its method of doing business in a manner which will change its exemptive status from that governed by subparagraph (k)(1) or (k)(2)(ii) to that governed by subparagraph (k)(2)(i); or from subparagraph (k)(1), (k)(2)(i) or (k)(2)(ii) to a fully computing firm that is subject to all provisions of Rule 15c3-3; or commence operations that will disqualify it for continued exemption under Rule 15c3-3 without first having obtained the prior written approval of the Exchange.

(c) In making the determination as to whether to approve, deny in whole or in part an application made pursuant to paragraph (b), Exchange staff shall consider among other things the type of business in which the member is engaged, the training, experience and qualifications of persons associated with the member, the member's procedures for safeguarding customer funds and securities, the member's overall financial and operational condition and any other information deemed relevant in the particular circumstances and the time these measures would remain in effect.

### **3150. Reporting Requirements for Clearing Firms**

(a) Exchange Members shall comply with NASD Rule 3150 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3150 by complying with NASD Rule 3150 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3150 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3150 are transferred into the FINRA rulebook, then Equity Rule 3150 shall be construed to require Exchange members to comply with

the FINRA rule corresponding to NASD Rule 3150 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) Pursuant to the Rule 9600 Series, the Exchange may in exceptional and unusual circumstances, taking into consideration all relevant factors, exempt a member or class of members unconditionally or on specified terms and conditions from any or all of the provisions of this Rule that it deems appropriate.

### **IM-3150. Exemptive Relief**

(a) Upon written request for exemptive relief pursuant to the Rule 9600 Series, the Exchange generally will grant an exemption from the reporting requirements of Rule 3150 to a self-clearing firm that:

(1) derives, on an annualized basis, at least 85 percent of its revenue from transactions in fixed income securities;

(2) conducts an institutional business that settles transactions on an RVP/DVP basis, provided that such exemption from reporting shall apply only with respect to such institutional business unless the Exchange determines that any other remaining business otherwise qualifies for an exemption under this IM-3150 or is *de minimis* in nature; or

(3) does not execute transactions for customers or otherwise hold customer accounts or act as an introducing broker with respect to customer accounts (e.g., that engages solely in proprietary trading, or that conducts business only with other broker-dealers or any other non-customer counter-parties).

(b) Upon written request for exemptive relief pursuant to the Rule 9600 Series, the Exchange also generally will grant an exemption to a clearing firm with respect to one or more of the introducing firms for which it clears if the introducing firm meets one of the above-stated grounds for exemptive relief.

(c) Any self-clearing firm that, due to a change in the facts pertaining to the operation and nature of its business or the operation and nature of the business of a firm for which it clears, as applicable, no longer qualifies for an exemption previously granted by the Exchange from the reporting requirements of Rule 3150 must promptly report such change in circumstances to the Exchange and NASD, Department of Member Regulation, and commence compliance with the reporting requirements of Rule 3150.

### **3160. Extensions of Time Under Regulation T and SEC Rule 15c3-3**

A member designated to the Exchange for oversight pursuant to SEC Rule 17d-1 shall comply with NASD Rule 3160 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the

Exchange. Therefore, Exchange members are complying with Equity Rule 3160 by complying with NASD Rule 3160 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3160 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3160 are transferred into the FINRA rulebook, then Equity Rule 3160 shall be construed to require Exchange members that are designated to the Exchange for oversight pursuant to SEC Rule 17d-1 to comply with the FINRA rule corresponding to NASD Rule 3160 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **3200. Settlements**

#### **3210. Reserved**

#### **3220. Adjustment of Open Orders**

(a) A member holding an open order from a customer or another broker/dealer shall, prior to executing or permitting the order to be executed, reduce, increase or adjust the price and/or number of shares of such order by an amount equal to the dividend, payment or distribution, on the day that the security is quoted ex-dividend, ex-rights, ex-distribution or ex-interest, except where a cash dividend or distribution is less than one cent (\$.01), as follows:

(1) In the case of a cash dividend or distribution, the price of the order shall be reduced by subtracting the dollar amount of the dividend or distribution from the price of the order and rounding the result to the next lower minimum quotation variation used in the primary market, provided that if there is more than one minimum quotation variation in the primary market, then the greater of the variations shall be used;

(2) In the case of a stock dividend or split, the price of the order shall be reduced by rounding the dollar value of the stock dividend or split to the next higher minimum quotation variation used in the primary market as specified in paragraph (a)(1) and subtracting that amount from the price of the order; provided further, that the size of the order shall be increased by (A) multiplying the size of the original order by the numerator of the ratio of the dividend or split, (B) dividing the result by the denominator of the ratio of the dividend or split, and (C) rounding the result to the next lower round lot; and

(3) In the case of a dividend payable in either cash or securities at the option of the stockholder, the price of the order shall be reduced by the dollar value of the cash or securities, whichever is greater, according to the formulas in subparagraph (1) or (2), above; provided, that if the stockholder opts for

securities, the size of the order shall be increased pursuant to the formula in subparagraph (2), above.

(b) If the value of the distribution cannot be determined, the member shall not execute or permit such order to be executed without reconfirming the order with the customer.

(c) If a security is the subject of a reverse split, all open orders shall be cancelled.

(d) The term "open order" means an order to buy or an open stop order to sell, including but not limited to "good 'til cancelled," "limit" or "stop limit" orders which remain in effect for a definite or indefinite period until executed, cancelled or expired.

(e) The provisions of this Rule shall not apply to:

(1) orders governed by the rules of another registered national securities exchange or the NASD;

(2) orders marked "do not reduce" where the dividend is payable in cash;

(3) orders marked "do not increase" where the dividend is payable in stock, provided that the price of such orders shall be adjusted as required by this Rule;

(4) open stop orders to buy;

(5) open sell orders; or

(6) orders for the purchase or sale of securities where the issuer of the securities has not reported a dividend, payment or distribution pursuant to SEC Rule 10b-17.

### **3230. Clearing Agreements**

(a) All clearing or carrying agreements entered into by a member shall specify the respective functions and responsibilities of each party to the agreement and shall, at a minimum, specify the responsibility of each party with respect to each of the following matters:

(1) opening, approving and monitoring customer accounts;

(2) extension of credit;

(3) maintenance of books and records;

(4) receipt and delivery of funds and securities;

(5) safeguarding of funds and securities;

(6) confirmations and statements;

(7) acceptance of orders and execution of transactions;

(8) whether, for purposes of the Commission's financial responsibility rules adopted under the Act, and the Securities Investor Protection Act, as amended, and regulations adopted thereunder, customers are customers of the clearing member; and

(9) the requirement to provide customer notification under paragraph (g) of this Rule.

(b) (1) In order for the introducing member to carry out its functions and responsibilities under the agreement, each clearing member must forward promptly any written customer complaint received by the clearing member regarding the introducing member or its associated persons relating to functions and responsibilities allocated to the introducing member under the agreement directly to: (A) the introducing member; and (B) the introducing member's examining authority designated under Section 17 of the Act ("DEA") (or, if none, to its appropriate regulatory agency or authority). The clearing or carrying agreement must specifically direct and authorize the clearing member to do so.

(2) The clearing member must also notify the customer, in writing, that it has received the complaint, and that the complaint has been forwarded to the introducing member and to the introducing member's DEA (or, if none, to its appropriate regulatory agency or authority).

(3) Pursuant to the Rule 9600 Series, the Exchange may exempt a member or person associated with a member from the requirements of this paragraph for good cause shown in instances where the introducing organization is an affiliated entity of the carrying organization.

(c) (1) A clearing member, when it enters into a clearing agreement, must immediately, and annually thereafter, provide the introducing member a list or description of all reports (exception and other types of reports) which it offers to the introducing member to assist the introducing member in supervising its activities, monitoring its customer accounts, and carrying out its functions and responsibilities under the clearing agreement. The introducing member must notify promptly the clearing member, in writing, of those specific reports offered by the clearing member that the introducing member requires to supervise and monitor its customer accounts.



(2) The clearing member must retain as part of its books and records required to be maintained under the Act and the Rules of the Exchange, copies of the reports requested by or provided to the introducing member. For purposes of this Rule, the clearing member will be in compliance with the requirements of this paragraph if it retains the data from which the original report was produced, provided, the clearing member can, at the request of the DEA (or, if none, to its appropriate regulatory agency or authority), either (A) recreate the report; or (B) provide the data and the data formatting that was used to prepare the report.

(3) Each year, no later than July 31, the clearing member must notify in writing the introducing member's chief executive and compliance officers of the reports offered to the introducing member pursuant to paragraph (c)(1) and the reports requested by or supplied to the introducing member as of such date. The clearing member must also provide a copy of the notice to the introducing member's DEA (or, if none, to its appropriate regulatory agency or authority).

(4) Pursuant to the Rule 9600 Series, the Exchange may exempt a member or person associated with a member from the requirements of this paragraph for good cause shown in instances where the introducing organization is an affiliated entity of the carrying organization.

(d) The clearing or carrying agreement may permit the introducing member to issue negotiable instruments directly to the introducing member's customers using instruments for which the clearing member is the maker or drawer. The clearing member may not grant the introducing member the authority to issue negotiable instruments until the introducing member has notified the clearing member in writing that it has established, and will maintain and enforce, supervisory procedures with respect to the issuance of such instruments that are satisfactory to the carrying organization.

(e) Whenever a clearing member designated to the Exchange for oversight pursuant to Section 17 of the Act, or a rule of the Commission adopted thereunder, amends any of its clearing or carrying agreements with respect to any item enumerated in subparagraphs (a)(1) through (a)(9) or enters into a new clearing or carrying agreement with an introducing member, the clearing member shall submit the agreement to the Exchange for review and approval.

(f) Whenever an introducing member designated to the Exchange for oversight pursuant to Section 17 of the Act, or a rule of the Commission adopted thereunder, amends its clearing or carrying agreement with a clearing member designated to another self-regulatory organization for oversight with respect to any item enumerated in subparagraphs (a)(1) through (a)(9) or enters into a new clearing agreement with another clearing member, the introducing member shall submit the agreement to the Exchange for review.

(g) Each customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of his account of the existence of the clearing or carrying agreement.

(h) All clearing agreements shall require each introducing member to maintain its proprietary and customer accounts and the proprietary and customer accounts of any member for which it is acting as an intermediary in obtaining clearing services from the clearing firm in such a manner as to enable the clearing firm and the Exchange to identify data belonging to the proprietary and customer accounts of each member. The requirements of this paragraph (h) shall apply to intermediary clearing arrangements between a member and an introducing member that are established on or after [the date of adoption of this rule].

(i) Members shall be exempt from Rule 3230 to the extent any party to the clearing agreement is subject to a comparable rule of the self-regulatory organization designated pursuant to SEC Rule 17d-1 as the party's designated examining authority.

### **3300. Trading**

#### **3310. Publication of Transactions and Quotations**

No member shall publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such member believes that such quotation represents a bona fide bid for, or offer of, such security. If nominal quotations are used or given, they shall be clearly stated or indicated to be only nominal quotations.

#### **IM-3310. Manipulative and Deceptive Quotations**

Rule 2110 provides that:

A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

Rule 3310 provides that:

No member shall publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such member believes that such quotation represents a bona fide bid for, or offer

of, such security. If nominal quotations are used or given, they shall be clearly stated or indicated to be only nominal quotations.

Rule 2120 provides that:

No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

It would be inconsistent with the above provisions for a member to publish or circulate or cause to be published or circulated, by any means whatsoever, any report of any securities transaction or of any purchase or sale of any security unless such member knows or has reason to believe that such transaction was a bona fide transaction, purchase or sale.

Similarly, it would be inconsistent with the above provisions for a member, for itself or for any other person, to publish or circulate or to cause to be published or circulated, by any means whatsoever, any quotation for any security without having reasonable cause to believe that such quotation is a bona fide quotation, is not fictitious and is not published or circulated or caused to be published or circulated for any fraudulent, deceptive or manipulative purpose.

For the purposes of this interpretation, the term "quotation" shall include any bid or offer or any formula, such as "bid wanted" or "offer wanted," designed to induce any person to make or submit any bid or offer.

### **3320. Offers at Stated Prices**

No member shall make an offer to buy from or sell to any person any security at a stated price unless such member is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.

### **3330. Payment Designed to Influence Market Prices, Other than Paid Advertising**

No member shall, directly or indirectly, give, permit to be given, or offer to give, anything of value to any person for the purpose of influencing or rewarding the action of such person in connection with the publication or circulation in any newspaper, investment service, or similar publication, of any matter which has, or is intended to have, an effect upon the market price of any security, provided that this Rule shall not be construed to apply to matter which is clearly distinguishable as paid advertising.

### **3340. Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts**

(a) No member or person associated with a member shall, directly or indirectly, effect any transaction or publish a quotation, a priced bid and/or offer, an unpriced

indication of interest (including "bid wanted" and "offer wanted" and name only indications), or a bid or offer accompanied by a modifier to reflect unsolicited customer interest, in any security as to which a trading halt is currently in effect.

(b) No member or person associated with a member shall, directly or indirectly, effect any transaction or publish a quotation, a priced bid and/or offer, an unpriced indication of interest (including "bid wanted" and "offer wanted" and name only indications), or a bid or offer, accompanied by a modifier to reflect unsolicited customer interest, in:

(1) a future for a single security when the underlying security has a regulatory trading halt that is currently in effect; and

(2) a future on a narrow-based securities index when one or more underlying securities that constitute 50% or more of the market capitalization of the index has a regulatory trading halt that is currently in effect.

### **3350. Suspension of Trading**

(a) Members shall promptly notify Nasdaq whenever they have knowledge of any matter related to any "NMS Stock" (as defined in SEC Rule 600 (b)(42)) or the issuer thereof which has not been adequately disclosed to the public or where they have knowledge of a regulatory problem relating to such security.

(b) Whenever any market for any NMS Stock halts or suspends trading in such security, members may continue to conduct trading in such security during the period of any such halt or suspension and shall continue to report all last sale prices reflecting transactions in such security, unless Nasdaq has initiated a trading halt for the security, pursuant to Rule 4120.

### **3351. Trading Practices**

(a) No member shall execute or cause to be executed or participate in an account for which there are executed purchases of any "NMS Stock" (as defined in SEC Rule 600(b)(42)) at successively higher prices, or sales of any such security at successively lower prices, for the purpose of creating or inducing a false, misleading or artificial appearance of activity in such security or for the purpose of unduly or improperly influencing the market price for such security or for the purpose of establishing a price which does not reflect the true state of the market in such security.

(b) No member shall, for the purpose of creating or inducing a false or misleading appearance of activity in an NMS Stock or creating or inducing a false or misleading appearance with respect to the market in such security:

(1) execute any transaction in such security which involves no change in the beneficial ownership thereof; or

(2) enter any order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties; or

(3) enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(c) No member shall execute purchases or sales of any NMS Stock for any account in which such member is directly or indirectly interested, which purchases or sales are excessive in view of the member's financial resources or in view of the market for such security.

(d) No member shall participate or have any interest, directly or indirectly, in the profits of a manipulative operation or knowingly manage or finance a manipulative operation.

(1) Any pool, syndicate or joint account organized or used intentionally for the purpose of unfairly influencing the market price of an NMS Stock shall be deemed to be a manipulative operation.

(2) The solicitation of subscriptions to or the acceptance of discretionary orders from any such pool, syndicate or joint account shall be deemed to be managing a manipulative operation.

(3) The carrying on margin of a position in such securities or the advancing of credit through loans to any such pool, syndicate or joint account shall be deemed to be financing a manipulative operation.

(e) No member shall make any statement or circulate and disseminate any information concerning any NMS Stock which such member knows or has reasonable grounds for believing is false or misleading or would improperly influence the market price of such security.

(f) No member or person associated with a member shall, directly or indirectly, hold any interest or participation in any joint account for buying or selling an NMS Stock, unless such joint account is promptly reported to Nasdaq. The report should contain the following information for each account:

(1) Name of the account, with names of all participants and their respective interests in profits and losses;

(2) a statement regarding the purpose of the account;

(3) name of the member carrying and clearing the account; and

(4) a copy of any written agreement or instrument relating to the account.

(g) No member shall offer that a transaction or transactions to buy or sell an NMS Stock will influence the closing transaction on the Consolidated Tape.

(h) (1) A member may, but is not obligated to, accept a stop order in an NMS Stock.

(A) A buy stop order is an order to buy which becomes a market order when a transaction takes place at or above the stop price.

(B) A sell stop order is an order to sell which becomes a market order when a transaction takes place at or below the stop price.

(2) A member may, but is not obligated to, accept stop limit orders in NMS Stocks. When a transaction occurs at the stop price, the stop limit order to buy or sell becomes a limit order at the limit price.

(i) No member or person associated with a member shall execute or cause to be executed, directly or indirectly, on Nasdaq a transaction in a security subject to an initial public offering until such security has first opened for trading on the national securities exchange listing the security, as indicated by the dissemination of an opening transaction in the security by the listing exchange via the Consolidated Tape.

### **3360. Short-Interest Reporting**

(a) To the extent such information is not otherwise reported to the NASD in conformance with NASD Rule 3360, each member shall maintain a record of total "short" positions in all customer and proprietary firm accounts in securities listed on the Exchange and shall regularly report such information to the Exchange in such a manner as may be prescribed by the Exchange. Reports shall be made as of the close of the settlement date designated by the Exchange. Reports shall be received by the Exchange no later than the second business day after the reporting settlement date designated by the Exchange.

(b) For purposes of this Rule:

(1) "short" positions to be reported are those resulting from "short sales" as that term is defined in SEC Rule 200(a) of Regulation SHO, with the exception of positions that meet the following requirements:

(A) any sale by any person, for an account in which he has an interest, if such person owns the security sold and intends to deliver such security as soon as is possible without undue inconvenience or expense;

(B) any sale of a security covered by a short sale rule on a national securities exchange (except a sale to a stabilizing bid complying with Rule 104 of Regulation M) effected with the approval of such exchange which is necessary to equalize the price of such security thereon with the current price of such security on another national securities exchange which is the principal exchange market for such security;

(C) any sale of a security for a special arbitrage account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase with such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such of securities of the issuer;

(D) any sale of a security registered on, or admitted to unlisted trading privileges on, a national securities exchange effected for a special international arbitrage account for the bona fide purpose of profiting from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on a securities market subject to the jurisdiction of the United States; provided the seller at the time of such sale knows or, by virtue of information currently received, has reasonable grounds to believe that an offer enabling him to cover such sale is then available to him such foreign securities market and intends to accept such offer immediately; and

(E) any sale by an underwriter, or any member of a syndicate or group participating in the distribution of a security, in connection with an over-allotment of securities, or any lay-off sale by such a person in connection with a distribution of securities through rights or a standby underwriting commitment.

(2) the term "customer" includes a broker-dealer.

### **3370. Prompt Receipt and Delivery of Securities**

No member or person associated with a member may accept a customer's purchase order for any security unless it has first ascertained that the customer placing the order or its agent agrees to receive securities against payment in an amount equal to any

execution, even though such an execution may represent the purchase of only a part of a larger order.

### **3380. Order Entry and Execution Practices**

No member or associated person may engage in conduct that has the intent or effect of splitting any order into multiple smaller orders for execution or any execution into multiple smaller executions for transaction reporting for the primary purpose of maximizing a monetary or in-kind amount to be received by the member or associated person as a result of the execution of such orders or the transaction reporting of such executions. For purposes of this rule, "monetary or in-kind amount" shall be defined to include, but not be limited to, any credits, commissions, gratuities, payments for or rebates of fees, or any other payments of value to the member or associated person.

### **3381. SEC Rule 19c-1 — Governing Certain Off-Board Agency Transactions by Members of National Securities Exchanges**

No rule, stated policy, or practice of this exchange shall prohibit or condition, or be construed to prohibit or condition or otherwise limit, directly or indirectly, the ability of any member acting as agent to effect any transaction otherwise than on this exchange with another person (except when such member also is acting as agent for such other person in such transaction), in any equity security listed on this exchange or to which unlisted trading privileges on this exchange have been extended.

### **3385. SEC Rule 19c-3 — Governing Off-Board Trading by Members of National Securities Exchanges**

(a) No rule, stated policy or practice of this exchange shall prohibit or condition, or be construed to prohibit, condition or otherwise limit, directly or indirectly, the ability of any member to effect any transaction otherwise than on this exchange in any reported security listed and registered on this exchange or as to which unlisted trading privileges on this exchange have been extended (other than a put option or call option issued by the Options Clearing Corporation) which is not a covered security.

(b) For purposes of this rule,

(1) The term "Act" shall mean the Securities Exchange Act of 1934, as amended.

(2) The term "exchange" shall mean a national securities exchange registered as such with the Securities and Exchange Commission pursuant to section 6 of the Act.

(3) The term "covered security" shall mean:

(A) Any equity security or class of equity securities which



(i) was listed and registered on an exchange on April 26, 1979, and

(ii) remains listed and registered on at least one exchange continuously thereafter;

(B) Any equity security or class of equity securities which

(i) was traded on one or more exchanges on April 26, 1979, pursuant to unlisted trading privileges permitted by Section 12(f)(1)(A) of the Act, and

(ii) remains traded on any such exchange pursuant to such unlisted trading privileges continuously thereafter; and

(C) Any equity security or class of equity securities which

(i) is issued in connection with a statutory merger, consolidation or similar plan or reorganization (including a reincorporation or change of domicile) in exchange for an equity security or class of equity securities described in paragraph (b)(3)(A) or (b)(3)(B) of this rule,

(ii) is listed and registered on an exchange after April 26, 1979, and

(iii) remains listed and registered on at least one exchange continuously thereafter.

(4) The term "reported security" shall mean any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan.

(5) The term "transaction report" shall mean a report containing the price and volume associated with a completed transaction involving the purchase or sale of a security.

(6) The term "effective transaction reporting plan" shall mean any plan approved by the Commission pursuant to Rule 11Aa3-1 for collecting, processing and making available transaction reports with respect to transactions in an equity security or class of equity securities.

### **3390. SEC Rule 604 — Display of Customer Limit Orders**

Equities Market Makers shall comply with the obligations of SEC Rule 604 and any interpretations issued thereunder. Solely for the purposes of this Rule and SEC Rule 604, Equities Market Makers shall be deemed to be exchange specialists.

### **3400. Reserved**

### **3500. Emergency Preparedness**

#### **3510. Business Continuity Plans**

(a) Exchange Members shall comply with NASD Rule 3510 as if such Rule were part of the Rules of the Exchange. The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 3510 by complying with NASD Rule 3510 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 3510 are being performed by FINRA on behalf of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 3510 are transferred into the FINRA rulebook, then Equity Rule 3510 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 3510 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

#### **3520. Emergency Contact Information**

(a) Each member shall report to the Exchange, via such electronic or other means as the Exchange may specify, prescribed emergency contact information for the member. The emergency contact information for the member includes designation of two emergency contact persons. Each emergency contact person shall be a member of senior management and a registered principal of the member.

(b) Each member must promptly update its emergency contact information, via such electronic or other means as the Exchange may specify, in the event of any material change. With respect to the designated emergency contact persons, each member must identify, review, and, if necessary, update such designations in the manner prescribed by Equity Rule 1160.

### **4000. Listing and Trading on the Exchange**

#### **4100. General**

##### **4110. Use of the Exchange on a Test Basis**

Notwithstanding the listing standards set forth in the Rule 4300 and 4400 Series, the Exchange may at any time authorize the use of its systems on a test basis for whatever studies it considers necessary and appropriate.

#### **4120. Trading Halts**

##### **(a) Authority to Initiate Trading Halts**

In circumstances in which the Exchange deems it necessary to protect investors and the public interest, the Exchange, pursuant to the procedures set forth in paragraph (c):

(1) may halt trading on the Exchange of a security listed on the Exchange to permit the dissemination of material news; or

(2) may halt trading on the Exchange of a security listed on another national securities exchange during a trading halt imposed by such exchange to permit the dissemination of material news; or

(3) may halt trading on the Exchange: (A) in a security listed on another national securities exchange when such exchange imposes a trading halt in that security because of an order imbalance or influx ("operational trading halt"); or (B) by Equities Market Makers in a security listed on the Exchange, when the security is a derivative or component of a security listed on another national securities exchange and such exchange imposes an operational trading halt in that security. In the event that the Exchange halts trading, Exchange Participants may commence quotations and trading at any time following initiation of operational trading halts, without regard to procedures for resuming trading set forth in paragraph (c); or

(4) may halt trading in an American Depositary Receipt ("ADR") or other security listed on the Exchange, when the security listed on the Exchange or the security underlying the ADR is listed on or registered with another national or foreign securities exchange or market, and the national or foreign securities exchange or market, or regulatory authority overseeing such exchange or market, halts trading in such security for regulatory reasons; or

(5) may halt trading in a security listed on the Exchange when the Exchange requests from the issuer information relating to:

(A) material news;

(B) the issuer's ability to meet Exchange listing qualification requirements, as set forth in the Rule 4300, 4400, and 4800 Series; or

(C) any other information which is necessary to protect investors and the public interest.

(6) may halt trading in a security listed on the Exchange when

(A) extraordinary market activity in the security is occurring, such as the execution of a series of transactions for a significant dollar value at prices substantially unrelated to the current market for the security, as measured by the national best bid and offer, and

(B) the Exchange determines that such extraordinary market activity is likely to have a material effect on the market for the security; and

(C) (i) the Exchange believes that such extraordinary market activity is caused by the misuse or malfunction of an electronic quotation, communication, reporting, or execution system operated by, or linked to, the Exchange;

(ii) After consultation with another national securities exchange trading the security on an unlisted trading privileges basis, the Exchange believes that such extraordinary market activity is caused by the misuse or malfunction of an electronic quotation, communication, reporting, or execution system operated by, or linked to, such other national securities exchange; or

(iii) After consultation with FINRA regarding a FINRA facility trading the security, the Exchange believes that such extraordinary market activity is caused by the misuse or malfunction of such FINRA facility or an electronic quotation, communication, reporting, or execution system linked to such FINRA facility.

(7) Reserved

(8) may halt trading in an index warrant on the Exchange whenever the Regulation Department shall conclude that such action is appropriate in the interests of a fair and orderly market and to protect investors. Among the factors that may be considered are the following:

(A) trading has been halted or suspended in underlying stocks whose weighted value represents 20% or more of the index value;

(B) the current calculation of the index derived from the current market prices of the stocks is not available;

(C) other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

(9) may halt trading in a series of Portfolio Depository Receipts, Index Fund Shares, or Managed Fund Shares (as defined in Rule 4420) listed on the Exchange if the Intraday Indicative Value (as defined in Rule 4420) or the index value applicable to that series is not being disseminated as required, during the day in which the interruption to the dissemination of the Intraday Indicative Value or the index value occurs. If the interruption to the dissemination of the Intraday Indicative Value or the index value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange may also exercise discretion to halt trading in a series of Portfolio Depository Receipts, Index Fund Shares, or Managed Fund Shares based on a consideration of the following factors: (A) trading in underlying securities comprising the index applicable to that series has been halted in the primary market(s), (B) the extent to which trading has ceased in securities underlying the index, or (C) the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

(10) shall halt trading in Derivative Securities Products (as defined in Rule 4120(b)(4)(A)) for which a net asset value (“NAV”) (and in the case of Managed Fund Shares under Rule 4420(o), a Disclosed Portfolio) is disseminated if the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares, the Disclosed Portfolio) is not being disseminated to all market participants at the same time. The Exchange will maintain the trading halt until such time as the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares, the Disclosed Portfolio, as applicable) is available to all market participants or, in the case of Derivative Securities Products traded on the Exchange pursuant to unlisted trading privileges, until such time trading resumes in the listing market.

**(b) Trading Halts for Trading of Certain Derivative Securities Products on the Exchange Pursuant to Unlisted Trading Privileges**

(1) During Pre-Market Session. If a Derivative Securities Product begins trading on the Exchange in the Pre-Market Session and subsequently a temporary interruption occurs in the calculation or wide dissemination of an applicable Required Value, the Exchange may continue to trade the Derivative Securities Product for the remainder of the Pre-Market Session.

(2) During Regular Market Session. During the Regular Market Session, if a temporary interruption occurs in the calculation or wide dissemination of an applicable Required Value, and the listing market halts trading in the Derivative Securities Product, the Exchange, upon notification by the listing market of a halt due to such temporary interruption, also shall immediately halt trading in the Derivative Securities Product on the Exchange.

(3) Post-Market Session and Next Trading Day.

(A) If an applicable Required Value continues not to be calculated or widely disseminated after the close of the Regular Market Session, the Exchange may trade the Derivative Securities Product in the Post-Market Session only if the listing market traded the Derivative Securities Product until the close of its regular trading session without a halt.

(B) If an applicable Required Value continues not to be calculated or widely disseminated as of the beginning of the Pre-Market Session on the next trading day, the Exchange shall not commence trading of the Derivative Securities Product in the Pre-Market Session that day. If an interruption in the calculation or wide dissemination of an applicable Required Value continues, the Exchange may resume trading in the Derivative Securities Product only if calculation and wide dissemination of the applicable Required Value resumes or trading in the Derivative Securities Product resumes in the listing market.

(4) Definitions. For purposes of this Rule:

(A) “Derivative Securities Product” means a series of Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, or Trust Issued Receipts (as defined in Equity Rule 4420), a series of Commodity-Related Securities (as defined in Equity Rule 4630), or securities representing interests in unit investment trusts or investment companies.

(B) “Pre-Market Session” means the trading session that begins at 8:00 a.m. and continues until 9:30 a.m.

(C) “Post-Market Session” means the trading session that begins at 4:00 P.M. or 4:15 p.m., and that continues until 7:00 p.m.

(D) “Regular Market Session” means the trading session from 9:30 a.m. until 4:00 p.m. or 4:15 p.m..

(E) “Required Value” shall mean (i) the value of any index or any commodity-related value underlying a Derivative Security Product, and (ii) the indicative optimized portfolio value, intraday indicative value, or other comparable estimate of the value of a share of a Derivative Securities Product updated regularly during the trading day.

**(c) Procedure for Initiating a Trading Halt**

(1) Issuers of securities listed on the Exchange are required to notify the Exchange of the release of certain material news prior to the release of such information to the public as required by Rules 4310(c)(16) and 4320(e)(14).

(2) Except in emergency situations, notification shall be provided directly to the Exchange's MarketWatch Department through the Exchange's electronic disclosure submission system available at a website designated by the Exchange for that purpose. In emergency situations, issuers shall instead provide notification by telephone or facsimile.

(3) Upon receipt of information, from the issuer or other source, the Exchange will promptly evaluate the information, estimate its potential impact on the market and determine whether a trading halt in the security is appropriate.

(4) Should the Exchange determine that a basis exists under Rule 4120(a) for initiating a trading halt, the commencement of the trading halt will be effective at the time specified by the Exchange in a notice posted on a publicly available website of the Exchange. In addition, the Exchange shall disseminate notice of the commencement of a trading halt through major wire services.

(5) Trading in a halted security shall resume at the time specified by the Exchange in a notice posted on a publicly available website of the Exchange. In addition, the Exchange shall disseminate notice of the resumption of trading through major wire services.

(6) (A) In the case of a trading halt under Rule 4120(a)(6) based on the misuse or malfunction of an electronic quotation, communication, reporting, or execution system that is not operated by the Exchange, the Exchange will promptly contact the operator of the system in question (as well as any national securities exchange or FINRA facility to which such system is linked) to ascertain information that will assist the Exchange in determining whether a misuse or malfunction has occurred, what effect the misuse or malfunction is having on trading in a security, and what steps are being taken to address the misuse or malfunction. If the operator of the system is unavailable when contacted by the Exchange, the Exchange will continue efforts to contact the operator of the system to ascertain information that will assist the Exchange in determining whether the trading halt should be terminated.

(B) A trading halt initiated under Rule 4120(a)(6) shall be terminated as soon as the Exchange determines either that the system misuse or malfunction that caused the extraordinary market activity will no longer have a material effect on the market for the security or that system misuse or malfunction is not the cause of the extraordinary market activity.

(7) (A) A trading halt initiated under Rule 4120(a)(1), (4), (5), (6), (9), or (10) or Rule 4120(b) shall be terminated when the Exchange releases

the security for trading, at a time announced to market participants in advance by the Exchange.

### **IM-4120-1. Disclosure of Material Information**

Rules 4310(c)(16) and 4320(e)(14) require that, except in unusual circumstances, issuers of securities listed on the Exchange disclose promptly to the public through any Regulation FD compliant method (or combination of methods) of disclosure any material information which would reasonably be expected to affect the value of their securities or influence investors' decisions. Issuers of securities listed on the Exchange must notify the Exchange in the manner described below of the release of such material information that involves any of the events set forth below prior to its release to the public. The Exchange recommends that issuers provide such notification at least ten minutes before such release. Under unusual circumstances issuers may not be required to make public disclosure of material events; for example, where it is possible to maintain confidentiality of those events and immediate public disclosure would prejudice the ability of the company to pursue its legitimate corporate objectives. However, issuers remain obligated to disclose this information to the Exchange upon request pursuant to Rules 4310(c)(15) or 4320(e)(13).

Whenever unusual market activity takes place in the securities of an issuer listed on the Exchange, the issuer normally should determine whether there is material information or news which should be disclosed. If rumors or unusual market activity indicate that information on impending developments has become known to the investing public, or if information from a source other than the issuer becomes known to the investing public, a clear public announcement may be required as to the state of negotiations or development of issuer plans. Such an announcement may be required, even though the issuer may not have previously been advised of such information or the matter has not yet been presented to the issuer's Board of Directors for consideration. It may also be appropriate, in certain circumstances, to publicly deny false or inaccurate rumors which are likely to have, or have had, an effect on the trading in its securities or would likely have an influence on investment decisions.

#### *Notification to the Exchange's MarketWatch Department*

Issuers of securities listed on the Exchange must notify the Exchange's MarketWatch Department prior to the distribution of certain material news. Except in emergency situations, this notification must be made through the Exchange's electronic disclosure submission system available at a website designated by the Exchange for that purpose. In emergency situations, issuers shall instead provide notification by telephone or facsimile. Examples of an emergency situation include: lack of computer or internet access; technical problems on either the issuer or the Exchange's system or an incompatibility between those systems; and a material development such that no draft disclosure document exists, but immediate notification to MarketWatch is important based on the material event.



If an issuer of securities listed on the Exchange repeatedly fails to either notify the Exchange prior to the distribution of material news, or use the electronic disclosure submission system when the Exchange finds no emergency situation existed, the Exchange may issue a Staff Determination (pursuant to the Rule 4800 Series) that is a public reprimand letter or, in extreme cases, a Staff Determination to delist the company's securities. In determining whether to issue a public reprimand letter, the Exchange will consider whether the issuer has demonstrated a pattern of failures, whether the issuer has been contacted concerning previous violations, and whether the issuer has taken steps to assure that future violations will not occur.

### Trading Halts

A trading halt benefits current and potential shareholders by halting all trading in securities listed on the Exchange until there has been an opportunity for the information to be disseminated to the public. This decreases the possibility of some investors acting on information known to them but which is not known to others. A trading halt provides the public with an opportunity to evaluate the information and consider it in making investment decisions. It also alerts the marketplace to the fact that news has been released.

The Exchange's MarketWatch Department monitors real time trading in all securities listed on the Exchange during the trading day for price and volume activity. In the event of certain price and volume movements, the MarketWatch Department may contact an issuer and its market makers in order to ascertain the cause of the unusual market activity. The MarketWatch Department treats the information provided by the issuer and other sources in a highly confidential manner, and uses it to assess market activity and assist in maintaining fair and orderly markets. An Exchange listing includes an obligation to disclose to the MarketWatch Department information that the issuer is not otherwise disclosing to the investing public or the financial community. On occasion, changes in market activity prior to the issuer's release of material information may indicate that the information has become known to the investing public. Changes in market activity also may occur when there is a release of material information by a source other than the issuer, such as when the issuer is subject to an unsolicited take-over bid by another company. Depending on the nature of the event and the issuer's views regarding the business advisability of disclosing the information, the MarketWatch Department may work with the issuer to accomplish a timely release of the information. Furthermore, depending on the materiality of the information and the anticipated affect of the information on the price of the issuer's securities, the MarketWatch Department may advise the issuer that a temporary trading halt is appropriate to allow for full dissemination of the information and to maintain an orderly market. The institution of a temporary trading halt pending the release of information is not a reflection on the value of the securities halted. Such trading halts are instituted, among other reasons, to insure that material information is fairly and adequately disseminated to the investing public and the marketplace, and to provide investors with the opportunity to evaluate the information in making investment decisions. A trading halt normally lasts one half hour but may last

longer if a determination is made that news has not been adequately disseminated or that the original or an additional basis under Rule 4120 exists for continuing the trading halt. The MarketWatch Department is required to keep non-public information, confidential and to use such information only for regulatory purposes.

Issuers are required to notify the MarketWatch Department of the release of material information included in the following list of events prior to the release of such information to the public. It should also be noted that every development that might be reported to the Exchange in these areas would not necessarily be deemed to warrant a trading halt. In addition to the following list of events, the Exchange encourages issuers to avail themselves of the opportunity for advance notification to the MarketWatch Department in situations where they believe, based upon their knowledge of the significance of the information, that a temporary trading halt may be necessary or appropriate.

- (a) Financial-related disclosures, including quarterly or yearly earnings, earnings restatements, pre-announcements or "guidance."
- (b) Corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies or receiverships.
- (c) New products or discoveries, or developments regarding customers or suppliers (e.g., significant developments in clinical or customer trials, and receipt or cancellation of a material contract or order).
- (d) Senior management changes of a material nature or a change in control.
- (e) Resignation or termination of independent auditors, or withdrawal of a previously issued audit report.
- (f) Events regarding the issuer's securities — e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, or public or private sales of additional securities.
- (g) Significant legal or regulatory developments.
- (h) Any event requiring the filing of a Form 8-K.

*Use of Regulation FD Compliant Methods in the Disclosure of Material Information*

Regardless of the method of disclosure that an issuer chooses to utilize, issuers are required to notify the Exchange's MarketWatch Department of the release of material information that involves any of the events set forth above prior to its release to the public. The Exchange recommends that issuers provide such notification at least ten minutes before such release. When an issuer chooses to utilize a Regulation FD compliant method for disclosure other than a press release or Form 8-K, the issuer will be

required to provide prior notice to the MarketWatch Department of: 1) the press release announcing the logistics of the future disclosure event; and 2) a descriptive summary of the material information to be announced during the disclosure event if the press release does not contain such a summary.

Depending on the materiality of the information and the anticipated effect of the information on the price of the issuer's securities, the MarketWatch Department may advise the issuer that a temporary trading halt is appropriate to allow for full dissemination of the information and to maintain an orderly market. The MarketWatch Department will assess with issuers utilizing methods of disclosure other than a press release or Form 8-K the timing within the disclosure event when the issuer will cover the material information so that the halt can be commenced accordingly. Issuers will be responsible for promptly alerting the MarketWatch Department of any significant changes to the previously outlined disclosure timeline. Issuers are reminded that the posting of information on its own website is not by itself considered a sufficient method of public disclosure under Regulation FD, and as a result, under the Equity Rules.

#### **IM-4120-2. Disclosure of Written Notice of Staff Determination**

Rules 4803(a) and 4804(b) require that an issuer make a public announcement through the news media disclosing the receipt of (i) a notice that the issuer does not meet a listing standard set forth in the Rule 4000 Series, and (ii) a Staff Determination to limit or prohibit continued listing of the issuer's securities under Rule 4804(a) as a result of the issuer's failure to comply with the continued listing requirements. Such public announcement shall be made as promptly as possible, but not more than four business days following the receipt of the notification or the Staff Determination, as applicable. If the public announcement is not made by the issuer within the time allotted, trading of its securities shall be halted, even if the issuer appeals the Staff Determination as set forth in Rule 4805. If the issuer fails to make the public announcement by the time that the Listing Qualifications Panel issues its decision, that decision will also determine whether to delist the issuer's securities for failure to make the public announcement.

Rules 4803(a) and 4804(b) do not relieve an issuer of its disclosure obligation under the federal securities laws, nor should it be construed as providing a safe harbor under the federal securities laws. It is suggested that the issuer consult with corporate/securities counsel in assessing its disclosure obligations under the federal securities laws.

#### **4121. Market Closings**

Upon SEC request (including, but not limited to, in accordance with standing SEC requests regarding market closings), the Exchange will halt all domestic trading in both securities listed on the Exchange and securities traded on the Exchange pursuant to unlisted trading privileges if other major securities markets initiate marketwide trading halts in response to extraordinary market conditions.

#### **4200. Definitions**

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1) "Act" means the Securities Exchange Act of 1934.

(2) "Best efforts offering" means an offering of securities by members of a selling group under an agreement which imposes no financial commitment on the members of such group to purchase any such securities except as they may elect to do so.

(3) "Cash flow" means cash funds provided from limited partnership operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements and replacements.

(4) "Consolidated Quotations Service" (CQS) means the consolidated quotation collection system for securities listed on the Exchange implementing SEC Rule 602.

(5) "Country of Domicile" means the country under whose laws an issuer is organized or incorporated.

(6) "Covered security" means a security described in Section 18(b) of the Securities Act of 1933.

(7) Reserved

(8) Reserved

(9) Reserved

(10) "Direct Registration Program" means any program by an issuer, directly or through its transfer agent, whereby a shareholder may have securities registered in the shareholder's name on the books of the issuer or its transfer agent without the need for a physical certificate to evidence ownership.

(11) "Dissenting Limited Partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the Exchange, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the Equity Rules during the period in which the offer is outstanding. Such objection in writing shall be filed with the party responsible for tabulating the votes or tenders.

(12) "ESOP" means employee stock option plan.

(13) "Firm commitment offering" means an offering of securities by participants in a selling syndicate under an agreement that imposes a financial commitment on participants in such syndicate to purchase such securities.

(14) "Family Member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

(15) "Independent director" means a person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgement in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the company;

(B) a director who accepted or who has a Family Member who accepted any compensation from the company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:

(i) compensation for board or board committee service;

(ii) compensation paid to a Family Member who is an employee (other than an executive officer) of the company; or

(iii) benefits under a tax-qualified retirement plan, or non-discretionary compensation.

Provided, however, that in addition to the requirements contained in this paragraph (B), audit committee members are also subject to additional, more stringent requirements under Rule 4350(d).

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer;

(D) a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following:

(i) payments arising solely from investments in the company's securities; or

(ii) payments under non-discretionary charitable contribution matching programs.

(E) a director of the issuer who is, or has a Family Member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the issuer serve on the compensation committee of such other entity; or

(F) a director who is, or has a Family Member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

(G) in the case of an investment company, in lieu of paragraphs (A)–(F), a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

(16) "Index warrants" means instruments that are direct obligations of the issuing company, either exercisable throughout their life (i.e., American style) or exercisable only on their expiration (i.e., European style), entitling the holder to a cash settlement in U.S. dollars to the extent that the index has declined below (for a put warrant) or increased above (for a call warrant) the pre-stated cash settlement value of the index. Index warrants may be based on either foreign or domestic indexes.

(17) "Limited partner" or "investor in a limited partnership" means the purchaser of an interest in a direct participation program, as defined in Equity Rule 2810, that is a limited partnership who is not involved in the day-to-day management of the limited partnership and bears limited liability.

(18) "Limited partnership" means an unincorporated association that is a direct participation program, as defined in Equity Rule 2810, organized as a limited partnership whose partners are one or more general partners and one or more limited partners, which conforms to the provisions of the Revised Uniform Limited Partnership Act or the applicable statute that regulates the organization of such partnership.

(19) "Limited Partnership Rollup Transaction" means a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which:

(A) some or all of the investors in any of such limited partnerships will receive new securities, or securities in another entity, that will be reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act;

(B) any of the investors' limited partnership securities are not, as of the date of the filing, reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act;

(C) investors in any of the limited partnerships involved are subject to a significant adverse change with respect to voting rights, the term of existence of the entity, management compensation, or investment objectives; and

(D) any of such investors are not provided an option to receive or retain a security under substantially the same terms and conditions as the original issue. Notwithstanding the foregoing definition, a "limited partnership rollup transaction" does not include:

(i) a transaction that involves only a limited partnership or partnerships having an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing, or refinancing of assets in accordance with such criteria as the Commission determines appropriate;

(ii) a transaction involving only limited partnerships wherein the interests of the limited partners are repurchased, recalled or exchanged pursuant to the terms of the pre-existing limited partnership agreements for securities in an operating company specifically identified at the time of the formation of the original limited partnership;

(iii) a transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933;

(iv) a transaction that involves only issuers that are not required to register or report under Section 12 of the Act, both before and after the transaction;

(v) a transaction, except as the Commission may otherwise provide for by rule for the protection of investors, involving the combination or reorganization of one or more limited partnerships in which a non-affiliated party succeeds to the interests of the general partner or sponsor, if:

a. such action is approved by not less than 66-2/3 percent of the outstanding units of each of the participating limited partnerships; and

b. as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the pre-existing partnership agreements; or

(vi) a transaction, except as the Commission may otherwise provide for by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before January 1, 1991, by the Commission under Section 11A of the Act; if:

a. such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

b. the securities of that entity issued to investors in the transaction do not exceed 20 percent of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or subsidiary of the entity.

(vii) a transaction involving only entities registered under the Investment Company Act of 1940 or any Business Development Company as defined in Section 2(a)(48) of that Act.

(20) "Listed securities" means securities listed on the Exchange or another national securities exchange.

(21) "Management fee" means a fee paid to the sponsor, general partner(s), their affiliates, or other persons for management and administration of a limited partnership.

(22) "Market Value" means the closing bid price multiplied by the measure to be valued (e.g., an issuer's market value of public float is equal to the closing bid price multiplied by an issuer's public float).

(23) "Member" means a broker or dealer admitted to membership in the Exchange



(24) "Equities Market Maker" means a dealer that, with respect to a security, holds itself out (by entering quotations in the Exchange) as being willing to buy and sell such security for its own account on a regular and continuous basis and that is registered as such.

(25) Reserved

(26) "security listed on the Exchange" means any security which (1) satisfies all applicable requirements of the Rule 4300 Series and any applicable criteria set forth in the Rule 4400 Series; (2) is a right to purchase such security; (3) is a warrant to subscribe to such security; or (4) is an index warrant which substantially meets the criteria set forth in Rule 4420.

(27) Reserved

(28) Reserved

(29) Reserved

(30) Reserved

(31) "Normal unit of trading" means 100 shares of a security unless, with respect to a particular security, the Exchange determines that a normal unit of trading shall constitute other than 100 shares. If a normal unit of trading is other than 100 shares, a special identifier shall be appended to the issuer's symbol.

(32) "Public holders" of a security include both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding.

(33) "Round lot holder" means a holder of a normal unit of trading. The number of beneficial holders will be considered in addition to holders of record.

(34) "SEC Rule 100," "SEC Rule 101," and "SEC Rule 104" means the rules adopted by the Commission under Regulation M, and any amendments thereto.

(35) "Solicitation expenses" means direct marketing expenses incurred by a member in connection with a limited partnership rollup transaction, such as telephone calls, broker/dealer fact sheets, members' legal and other fees related to the solicitation, as well as direct solicitation compensation to members.

(36) "Stabilizing bid" means the terms "stabilizing" or to "stabilize" as defined in SEC Rule 100.

(37) "Substitution Listing Event" means a reverse stock split, re-incorporation or a change in the issuer's place of organization, the formation of a holding company that replaces a listed company, reclassification or exchange of an issuer's listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, or any technical change whereby the shareholders of the original company receive a share-for-share interest in the new company without any change in their equity position or rights.

(38) "Total holders" of a security include both beneficial holders and holders of record.

(39) "Transaction costs" means costs incurred in connection with a limited partnership rollup transaction, including printing and mailing the proxy, prospectus or other documents; legal fees not related to the solicitation of votes or tenders; financial advisory fees; investment banking fees; appraisal fees; accounting fees; independent committee expenses; travel expenses; and all other fees related to the preparatory work of the transaction, but not including costs that would have otherwise been incurred by the subject limited partnerships in the ordinary course of business or solicitation expenses.

(40) "Underwriting Activity Report" is a report provided by the Corporate Financing Department of FINRA in connection with a distribution of securities subject to SEC Rule 101 pursuant to NASD Rule 2710(b)(11) and includes forms that are submitted by members to comply with their notification obligations under Rules 4614, 4619, and 4623.

(b) For purposes of Rules 4614, 4619, and 4623, the following terms shall have the meanings as defined in SEC Rule 100: "affiliated purchaser," "distribution," "distribution participant," "independent bid," "net purchases," "penalty bid," "reference security," "restricted period," "subject security," and "syndicate covering transaction."

(c) All forms and applications relating to listing of securities on the Exchange referenced in the Rule 4000 Series are available on the Exchange's website.

#### **IM-4200 Definition of Independence — Rule 4200(a)(15)**

It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 4200. Rule 4200 also provides a list of certain relationships that preclude a board finding of independence. These objective measures provide transparency to investors and companies, facilitate uniform application of the rules, and ease administration. Because the Exchange does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. It should be

noted that there are additional, more stringent requirements that apply to directors serving on audit committees, as specified in Rule 4350.

The Rule's reference to the "company" includes any parent or subsidiary of the company. The term "parent or subsidiary" is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the Commission (but not if the issuer reflects such entity solely as an investment in its financial statements). The reference to executive officer means those officers covered in SEC Rule 16a-1(f) under the Act. In the context of the definition of Family Member under Rule 4200(a)(14), the reference to marriage is intended to capture relationships specified in the Rule (parents, children and siblings) that arise as a result of marriage, such as "in-law" relationships. The three year look-back periods referenced in paragraphs (A), (C), (E) and (F) of the Rule commence on the date the relationship ceases. For example, a director employed by the company is not independent until three years after such employment terminates. For purposes of paragraph (A) of the Rule, employment by a director as an executive officer on an interim basis shall not disqualify that director from being considered independent following such employment, provided the interim employment did not last longer than one year. A director would not be considered independent while serving as an interim officer. Similarly, for purposes of paragraph (B) of the Rule, compensation received by a director for former service as an interim executive officer need not be considered as compensation in determining independence after such service, provided such interim employment did not last longer than one year. Nonetheless, the issuer's board of directors still must consider whether such former employment and any compensation received would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. In addition, if the director participated in the preparation of the company's financial statements while serving as an interim executive officer, Rule 4350(d)(2)(A)(iii) would preclude service on the audit committee for three years.

Paragraph (B) of the Rule is generally intended to capture situations where a compensation is made directly to (or for the benefit of) the director or a Family Member of the director. For example, consulting or personal service contracts with a director or Family Member of the director would be analyzed under paragraph (B) of the Rule. In addition, political contributions to the campaign of a director or a Family Member of the director would be considered indirect compensation under paragraph (B). Non-preferential payments made in the ordinary course of providing business services (such as payments of interest or proceeds related to banking services or loans by an issuer that is a financial institution or payment of claims on a policy by an issuer that is an insurance company), payments arising solely from investments in the company's securities and loans permitted under Section 13(k) of the Act will not preclude a finding of director independence as long as the payments are non-compensatory in nature. Depending on the circumstances, a loan or payment could be compensatory if, for example, it is not on terms generally available to the public.

Paragraph (D) of the Rule is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner,

controlling shareholder or executive officer of such entity. Under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in paragraph (D), rather than the individual measurements of paragraph (B). Issuers should contact the Exchange if they wish to apply the Rule in this manner. The reference to a partner in paragraph (D) is not intended to include limited partners. It should be noted that the independence requirements of paragraph (D) of the Rule are broader than SEC Rule 10A-3(e)(8) under the Act.

Under paragraph (D), a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of 5% of the charity's revenues or \$200,000. However, the Exchange encourages companies to consider other situations where a director or their Family Member and the company each have a relationship with the same charity when assessing director independence.

For purposes of determining whether a lawyer is eligible to serve on an audit committee, SEC Rule 10A-3 under the Act generally provides that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee. In determining whether a director may be considered independent for purposes other than the audit committee, payments to a law firm would generally be considered under Rule 4200(a)(15)(D), which looks to whether the payment exceeds the greater of 5% of the recipient's gross revenues or \$200,000; however, if the firm is a sole proprietorship, Rule 4200(a)(15)(B), which looks to whether the payment exceeds \$120,000, applies.

Paragraph (G) of the Rule provides a different measurement for independence for investment companies in order to harmonize with the Investment Company Act of 1940. In particular, in lieu of paragraphs (A)–(F), a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, shall not be considered independent.

### **4300. Listing Requirements for Securities Listed on the Exchange**

The Exchange is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. The Exchange stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Issuers listed on the Exchange are publicly recognized as sharing these important objectives.

The Exchange, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the initial and continued listing of securities on the Exchange in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Exchange may use such discretion to deny initial listing, apply additional or

more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on the Exchange inadvisable or unwarranted in the opinion of the Exchange, even though the securities meet all enumerated criteria for initial or continued listing on the Exchange. In all circumstances where the Listing Department (as defined in Rule 4801) exercises its authority under Rule 4300, the Listing Department shall issue a Staff Determination under Rule 4804, and in all circumstances where an Adjudicatory Body (as defined in Rule 4801) exercises such authority, the use of the authority shall be described in the written decision of the Adjudicatory Body.

#### **IM-4300-1. Use of Discretionary Authority**

In order to further issuers' understanding of Rule 4300, the Exchange is adopting this Interpretive Material as a non-exclusive description of the circumstances in which the Rule is generally invoked.

The Exchange may use its authority under Rule 4300 to deny initial or continued listing to an issuer when an individual with a history of regulatory misconduct is associated with the issuer. Such individuals are typically an officer, director, substantial security holder (as defined in Rule 4350(i)(5)), or consultant to the issuer. In making this determination, the Exchange will consider a variety of factors, including:

- the nature and severity of the conduct, taken in conjunction with the length of time since the conduct occurred;
- whether the conduct involved fraud or dishonesty;
- whether the conduct was securities-related;
- whether the investing public was involved;
- how the individual has been employed since the violative conduct;
- whether there are continuing sanctions (either criminal or civil) against the individual;
- whether the individual made restitution;
- whether the issuer has taken effective remedial action; and
- the totality of the individual's relationship to the issuer, giving consideration to:
  - the individual's current or proposed position;
  - the individual's current or proposed scope of authority;
  - the extent to which the individual has responsibility for financial accounting or reporting; and
  - the individual's equity interest.

Based on this review, the Exchange may determine that the regulatory history rises to the level of a public interest concern, but may also consider whether remedial measures proposed by the issuer, if taken, would allay that concern. Examples of such remedial measures could include any or all of the following, as appropriate:

- the individual's resignation from officer and director positions, and/or other employment with the company;
- divestiture of stock holdings;
- terminations of contractual arrangements between the issuer and the individual; or
- the establishment of a voting trust surrounding the individual's shares.

Staff of the Exchange is willing to discuss with issuers, on a case-by-case basis, what remedial measures may be appropriate to address public interest concerns, and for how long such remedial measures would be required. Alternatively, the Exchange may conclude that a public interest concern is so serious that no remedial measure would be sufficient to alleviate it. In the event that Exchange staff denies initial or continued listing based on such public interest considerations, the issuer may seek review of that determination through the procedures set forth in the Rule 4800 Series. On consideration of such appeal, a listing qualifications panel comprised of persons independent of the Exchange may accept, reject or modify the staff's recommendations by imposing conditions.

The Exchange may also use its discretionary authority, for example, when an issuer files for protection under any provision of the federal bankruptcy laws or comparable foreign laws, when an issuer's independent accountants issue a disclaimer opinion on financial statements required to be audited, or when financial statements do not contain a required certification.

In addition, pursuant to its discretionary authority, the Exchange will review the issuer's past corporate governance activities. This review may include activities taking place while the issuer is listed on the Exchange or another exchange that imposes corporate governance requirements, as well as activities taking place after a formerly listed issuer is no longer listed on the Exchange or such other exchange. Based on such review, and in accordance with the Rule 4800 Series, the Exchange may take any appropriate action, including placing restrictions on or additional requirements for listing, or denying listing of a security, if the Exchange determines that there have been violations or evasions of such corporate governance standards. Such determinations will be made on a case-by-case basis as necessary to protect investors and the public interest.

Although the Exchange has broad discretion under Rule 4300 to impose additional or more stringent criteria, the Rule does not provide a basis for the Exchange to grant exemptions or exceptions from the enumerated criteria for initial or continued listing, which may be granted solely pursuant to rules explicitly providing such authority.

#### **IM-4300-2. Listing of Companies Whose Business Plan is to Complete One or More Acquisitions**

Generally, the Exchange will not permit the initial or continued listing of a company that has no specific business plan or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

However, in the case of a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time, the Exchange will permit the listing if the company meets all applicable initial listing requirements, as well as the conditions described below.

\_\_\_\_\_ (a) At least 90% of the gross proceeds from the initial public offering and any concurrent sale by the company of equity securities must be deposited in a trust account maintained by an independent trustee, an escrow account maintained by an "insured depository institution," as that term is defined in Section 3(c)(2) of the Federal Deposit Insurance Act or in a separate bank account established by a registered broker or dealer (collectively, a "deposit account").

\_\_\_\_\_ (b) Within 36 months of the effectiveness of its IPO registration statement, or such shorter period that the company specifies in its registration statement, the company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (excluding any deferred underwriters fees and taxes payable on the income earned on the deposit account) at the time of the agreement to enter into the initial combination.

\_\_\_\_\_ (c) Until the company has satisfied the condition in paragraph (b) above, each business combination must be approved by a majority of the company's independent directors.

\_\_\_\_\_ (d) Until the company has satisfied the condition in paragraph (b) above, each business combination must be approved by a majority of the shares of common stock voting at the meeting at which the combination is being considered.

\_\_\_\_\_ (e) Until the company has satisfied the condition in paragraph (b) above, public shareholders voting against a business combination must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated. A company may establish a limit (set no lower than 10% of the shares sold in the IPO) as to the maximum number of shares with respect to which any shareholder, together with any affiliate of such shareholder or any person with whom such shareholder is acting as a "group" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act), may exercise such conversion rights. For purposes of this paragraph (e), public shareholder excludes officers and directors of the company, the company's sponsor, the founding shareholders of the company, and any Family Member or affiliate of any of the foregoing persons.

Until the company completes a business combination where all conditions in paragraph (b) above are met, the company must notify the Exchange on the appropriate form about each proposed business combination. Following each business combination, the combined company must meet the requirements for initial listing. If the company does not meet the requirements for initial listing following a business combination or does not

comply with one of the requirements set forth above, the Exchange will issue a Staff Determination under Rule 4804 to delist the company's securities.

#### **4305. Reserved**

#### **4310. Listing Requirements for Domestic and Canadian Securities**

To qualify for listing on the Exchange, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a), (b), and (c) hereof.

(a) A security shall be considered for listing on the Exchange provided that it is registered pursuant to Section 12(b) of the Act.

(b) An issuer that wishes to have a security listed on the Exchange shall submit to the Exchange a listing application that provides the information required by Section 12(b) of the Act on the form designated by the Exchange. Upon approval of a listing application, the Exchange shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

(c) In addition to the requirements contained in paragraph (a) and (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for listing on the Exchange:

(1) For initial listing, the issue shall have three registered and active market makers, and for continued listing, the issue shall have two registered and active market makers, one of which may be a market maker entering a stabilizing bid.

(2) For initial listing, the issuer shall have either:

(A) (i) stockholders' equity of \$5 million; and

(ii) a market value of publicly held shares of \$15 million; and

(iii) an operating history of at least two years; or

(B) (i) stockholders' equity of \$4 million; and

(ii) market value of listed securities of \$50 million (currently traded issuers must meet this requirement and the bid price requirement under Rule 4310(c)(4) for 90 consecutive trading days prior to applying for listing); and



(iii) a market value of publicly held shares of \$15 million; or

(C) (i) stockholders' equity of \$4 million; and

(ii) net income from continuing operations of \$750,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years; and

(iii) a market value of publicly held shares of \$5 million.

(3) For continued listing, the issuer shall maintain either:

(A) stockholders' equity of \$2.5 million; or

(B) market value of listed securities of \$35 million; or

(C) net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

(4) For initial listing, common stock, preferred stock and secondary classes of common stock shall have a minimum bid price of \$4 per share. For continued listing the minimum bid price per share shall be \$1.

(5) (A) In the case of a convertible debt security, for initial listing, there shall be a principal amount outstanding of at least \$10 million.

(B) In addition, for the initial listing of convertible debt, one of the following conditions must be satisfied:

(i) the issuer of the debt must have an equity security that is listed on the Exchange, Nasdaq, the American Stock Exchange or the New York Stock Exchange;

(ii) an issuer whose equity security is listed on the Exchange, Nasdaq, the American Stock Exchange or the New York Stock Exchange, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security;

(iii) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or,

(iv) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned: (1) an investment grade rating to an immediately senior issue; or (2) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.

(C) For initial and continued listing of convertible debt, current last sale information must be available in the United States with respect to the underlying security into which the bond or debenture is convertible.

(D) For continued listing of a convertible debt security, there shall be a principal amount outstanding of at least \$5 million.

(6) (A) In the case of common stock, for initial listing there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

(B) In the case of preferred stock and secondary classes of common stock, for initial listing there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common stock equivalent equity security must be listed on the Exchange or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on the Exchange or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on the Exchange so long as the security satisfies the listing criteria for common stock.

(C) An account of a member that is beneficially owned by a customer (as defined in Rule 0120) will be considered a holder of a security upon appropriate verification by the member.

(7) (A) In the case of common stock, there shall be at least 1,000,000 publicly held shares for initial listing and 500,000 publicly held shares for continued listing. For initial listing such shares shall have a market value as provided in the applicable provision of Rule 4310(c)(2). For continued listing such shares shall have a market value of at least \$1 million.

(B) In the case of preferred stock and secondary classes of common stock, there shall be at least 200,000 publicly held shares having a market value of at least \$3.5 million for initial listing and 100,000 publicly held shares having a market value of \$1 million for continued listing. In addition, the issuer's common stock or common stock equivalent security must be listed on the Exchange or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on the Exchange or is not a covered security, the preferred stock and/or secondary class of common stock may be

traded on the Exchange so long as the security satisfies the listing criteria for common stock.

(C) Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

(8) (A) A failure to meet the continued listing requirement for a number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(B) A failure to meet the continued listing requirement for market value of publicly held shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 90 day compliance period.

(C) A failure to meet the continued listing requirement for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(D) A failure to meet the continued listing requirement for minimum bid price on the Exchange shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer has not been deemed in compliance prior to the expiration of the 180 day compliance period, it will be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial listing set forth in Rule 4310(c) (except for the bid price requirement set forth in Rule 4310(c)(4)), based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (e.g., in an earnings release) indicating that it no longer satisfies the applicable initial listing criteria, it shall not be eligible for the additional compliance period under this rule.

Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(E) The Exchange may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, the Exchange will consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(9) (A) In the case of rights and warrants, for initial listing only, there shall be at least 400,000 issued and the underlying security must be listed on the Exchange or be a covered security. For continued listing, the underlying security must remain listed on the Exchange or be a covered security.

(B) In the case of put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the Company's common stock, at a specified price until a specified period of time), for initial listing only, there shall be at least 400,000 issued and the underlying security must be listed on the Exchange or be a covered security. For continued listing, the underlying security must remain listed on the Exchange or be a covered security.

(C) In the case of index warrants, the criteria established in the Rule 4400 Series shall apply.

(10) In the case of units, the criteria established in the Rule 4400 Series shall apply.

(11) The security shall not currently be suspended from trading by the Commission pursuant to Section 12(k) of the Act.

(12) The issuer shall certify, at or before the time of qualification, that all applicable listing criteria have been satisfied.

(13) The issuer shall pay the Exchange Issuer Listing Fee described in the Rule 4500 Series.

(14) An issuer that has applied for listing on the Exchange or that is listed on the Exchange shall file with the Exchange three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled

for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. An issuer that is not required to file reports with the Commission shall file with the Exchange three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with the Exchange on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with the Exchange shall contain audited financial statements.

(15) The issuer shall provide full and prompt responses to requests by the Exchange for information related to unusual market activity or to events that may have a material impact on trading of its securities in the Exchange.

(16) Except in unusual circumstances, an issuer with securities listed on the Exchange shall make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. The issuer shall, prior to the release of the information, provide notice of such disclosure to the Exchange's Market Watch Department if the information involves any of the events set forth in IM-4120-1.

(17) A listed company is required to notify the Exchange at least 15 calendar days prior to:

(A) (i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) The Exchange recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify the Exchange about the grant and the use of the exception no later than the earlier of: (x) five calendar days after entering into the agreement to issue the securities; or (y) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv); or

(B) issuing securities that may potentially result in a change of control of the issuer; or

(C) issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater

interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or

(D) issuing any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock, greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and the Exchange encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. The Exchange reviews these forms to determine compliance with applicable Exchange rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, the Exchange may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(18) The issuer of any class of securities listed on the Exchange shall notify the Exchange promptly in writing of any change in the issuer's transfer agent or registrar.

(19) The issuer shall comply with any obligation of any person regarding filing or disclosure of information material to the issuer or the security, whether such obligation arises under the federal securities laws and the rules and regulations promulgated thereunder or other applicable federal or state statutes or rules.

(20) The issuer shall notify the Exchange promptly in writing of any change in the general character or nature of its business and any change in the address of its principal executive offices. The issuer also shall file on a form designated by the Exchange notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

(21) [Reserved]

(22) The issuer of units shall include in its prospectus or other offering document used in connection with any offering of securities that is required to be filed with the Commission under the federal securities law and the rules and regulations thereunder a statement regarding any intention to delist the units immediately after the minimum listing period.

(23) (A) For initial listing, a security, except for the security of a Canadian issuer, shall have a CUSIP number identifying the securities included in the file of eligible issues maintained by a securities depository registered as a clearing agency under Section 17A of the Act ("securities depository" or "securities depositories"), in accordance with the rules and procedures of such securities depository; except that this subparagraph shall not apply to a security if the terms of the security do not and cannot

be reasonably modified to meet the criteria for depository eligibility at all securities depositories.

(B) A security depository's inclusion of a CUSIP number identifying a security in its file of eligible issues does not render the security "depository eligible" under Rule 11310 until:

(i) in the case of any new issue distributed by an underwriting syndicate on or after the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available, the date of the commencement of trading in such security on the Exchange; or

(ii) in the case of any new issue distributed by an underwriting syndicate prior to the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available where the managing underwriter elects not to deposit the securities on the date of the commencement of trading in such security on the Exchange, such later date designated by the managing underwriter in a notification submitted to the securities depository; but in no event more than three (3) months after the commencement of trading in such security on the Exchange.

(24) The issuer shall file, on a form designated by the Exchange no later than 10 days after the occurrence, any aggregate increase or decrease of any class of securities listed on the Exchange that exceeds 5% of the amount of securities of the class outstanding.

(25) In the case of any dividend action or action relating to a stock distribution of a listed stock the issuer shall, no later than 10 calendar days prior to the record date of such action:

(i) notify the Exchange by filing the appropriate form as designated by the Exchange; and

(ii) provide public notice using a Regulation FD compliant method.

Notice to the Exchange should be given as soon as possible after declaration and, in any event, no later than simultaneously with the public notice.

(26) [Reserved]

(27) [Reserved]

(28) [Reserved]

(29) [Reserved]

(30) The issuer shall notify the Exchange of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by the Exchange. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify the Exchange as soon as practicable after such event has been implemented by filing the appropriate form as designated by the Exchange. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange other than the Exchange and not designated by the Exchange as national market system securities.

(d) Issuers which distribute interim reports to shareholders should distribute such reports to both registered and beneficial shareholders. Issuers are also encouraged to consider additional technological methods to communicate such information to shareholders in a timely and less costly manner as such technology becomes available.

#### **4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts**

To qualify for listing on the Exchange, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule.

(a) A security of a foreign issuer, an ADR or similar security issued in respect of a security of a foreign issuer shall be considered for listing provided that it is:

(1) registered pursuant to Section 12(b) of the Act; or

(2) subject to an exemption issued by the Commission that permits the listing of the security notwithstanding its failure to be registered pursuant to Section 12(b).

(b) An issuer that wishes to have a security listed on the Exchange shall submit to the Exchange a listing application that provides the information required by Rule 12(b) of the Act on the form designated by the Exchange. Upon approval of a listing application, the Exchange shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

(c) Reserved.

(d) Reserved.



(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on the Exchange. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on the Exchange.

(1) For initial listing, the issue shall have three registered and active market makers, and for continued listing, the issue shall have two registered and active market makers. A failure to meet the continued listing requirement for number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the market maker requirements.

(2) (A) For initial listing, the issue shall meet the requirements of Rule 4310(c)(2)(A), (B) or (C).

(B) For continued listing, the issuer shall meet the requirements of Rule 4310(c)(3)(A), (B) or (C).

(C) An issuer's qualifications will be determined on the basis of financial statements that are either: (i) prepared in accordance with U.S. generally accepted accounting principles; or (ii) reconciled to U.S. generally accepted accounting principles as required by the Commission's rules; or (iii) prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, for companies that are permitted to file financial statements using those standards consistent with the Commission's rules.

(D) A failure to meet the continued listing requirements for market value of listed securities shall be determined to exist only if the deficiency continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 30 calendar days from such notification to achieve compliance with the applicable continued listing standard. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 30 day compliance period.

(E) (i) For initial listing, common stock, preferred stock and secondary classes of common stock, or their equivalents, shall have a minimum bid price of \$4 per share.

(ii) For continued listing, the minimum bid price per share shall be \$1. A failure to meet the continued listing requirement for minimum bid price on the Exchange shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the issuer shall be notified

promptly and shall have a period of 180 calendar days from such notification to achieve compliance. If the issuer has not been deemed in compliance prior to the expiration of the 180 day compliance period, it shall be afforded an additional 180 day compliance period, provided, that on the 180th day of the first compliance period, the issuer demonstrates that it meets the criteria for initial listing set forth in Rule 4320(e) (except for the bid price requirement set forth in this Rule 4320(e)(2)(E)(ii)) based on the issuer's most recent public filings and market information. If the issuer has publicly announced information (e.g., in an earnings release) indicating that it no longer satisfies the applicable initial listing criteria, it shall not be eligible for the additional compliance period under this rule. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days.

(iii) The Exchange may, in its discretion, require an issuer to maintain a bid price of at least \$1.00 per share for a period in excess of ten consecutive business days, but generally no more than 20 consecutive business days, before determining that the issuer has demonstrated an ability to maintain long-term compliance. In determining whether to monitor bid price beyond ten business days, the Exchange will consider the following four factors: (i) margin of compliance (the amount by which the price is above the \$1.00 minimum standard); (ii) trading volume (a lack of trading volume may indicate a lack of bona fide market interest in the security at the posted bid price); (iii) the market maker montage (the number of market makers quoting at or above \$1.00 and the size of their quotes); and, (iv) the trend of the stock price (is it up or down).

(3) (A) In the case of a convertible debt security, for initial listing, there shall be a principal amount outstanding of at least U.S. \$10 million.

(B) In addition, for the initial listing of convertible debt, one of the following conditions must be satisfied:

(i) the issuer of the debt must have an equity security that is listed on the Exchange, Nasdaq, the American Stock Exchange or the New York Stock Exchange;

(ii) an issuer whose equity security is listed on the Exchange, Nasdaq, the American Stock Exchange or the New York Stock Exchange, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security;

(iii) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or,

(iv) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned: (1) an investment grade rating to an immediately senior issue; or (2) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.

(C) For initial and continued listing of convertible debt, current last sale information must be available in the United States with respect to the underlying security into which the bond or debenture is convertible.

(D) For continued listing of a convertible debt security, there shall be a principal amount outstanding of at least \$5 million.

(4) (A) In the case of common stock, for initial listing there shall be at least 300 round lot holders of the security and for continued listing there shall be at least 300 public holders of the security.

(B) In the case of preferred stock and secondary classes of common stock, for initial listing there shall be at least 100 round lot holders of the security and for continued listing there shall be at least 100 public holders of the security, provided in each case that the issuer's common stock or common stock equivalent equity security must be listed on the Exchange or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on the Exchange or is not a covered security, the preferred stock and/or secondary class of common stock may be listed on the Exchange so long as the security satisfies the listing criteria for common stock.

(C) An account of a member that is beneficially owned by a customer (as defined in Rule 0120) will be considered a holder of a security upon appropriate verification by the member.

(5) There shall be at least 1,000,000 publicly held shares for initial listing and 500,000 publicly held shares for continued listing. For initial listing, such shares shall have a market value as provided in the applicable provision of Rule 4310(c)(2). For continued listing, such shares shall have a market value of at least \$1 million. In the case of preferred stock and secondary classes of common stock, there shall be at least 200,000 publicly held shares having a market value of at least \$3.5 million for initial listing and 100,000 publicly held shares having a market value of \$1 million for continued listing. In addition, the issuer's common

stock or common stock equivalent security must be listed on either the Exchange or be a covered security. In the event the issuer's common stock or common stock equivalent security either is not listed on the Exchange or is not a covered security, the preferred stock and/or secondary class of common stock may be traded on the Exchange so long as the security satisfies the listing criteria for common stock. Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

(6) In the case of rights, warrants and ADRs for initial listing only, at least 400,000 shall be issued. Issuers of ADRs must also meet the round lot holders and publicly held shares requirements set forth in the applicable provisions of Rules 4310(c)(2), 4320(e)(4) and 4320(e)(5).

(7) In the case of rights and warrants, for initial and continued listing, the underlying security shall be listed on the Exchange or be a covered security.

(8) In the case of units, all component parts shall meet the requirements for initial and continued listing.

(9) The security shall not currently be suspended from trading by the Commission pursuant to Section 12(k) of the Act or by the appropriate regulatory authorities of the issuer's country of domicile.

(10) The issuer shall certify, at or before the time of listing, that all applicable listing criteria have been satisfied.

(11) The issuer shall pay the Exchange Issuer Listing Fee described in the Rule 4500 Series.

(12) An issuer that has applied for listing on the Exchange or that is listed on the Exchange shall file with the Exchange three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. All required reports must be filed with the Exchange on or before the date they are required to be filed with the Commission.

(13) The issuer shall provide full and prompt responses to requests by the Exchange for information related to unusual market activity or to events that may have a material impact on trading of its securities in the Exchange.

(14) Except in unusual circumstances, an issuer with securities listed on the Exchange shall make prompt disclosure to the public in the United States through any Regulation FD compliant method (or combination of methods) of

disclosure of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions. The issuer shall, prior to the release of the information, provide notice of such disclosure to the Exchange if the information involves any of the events set forth in IM-4120-1.

(15) The issuer of any class of securities listed on the Exchange, except for American Depositary Receipts, is required to notify the Exchange at least 15 calendar days prior to:

(A) (i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) The Exchange recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify the Exchange about the grant and the use of the exception no later than the earlier of: (x) five calendar days after entering into the agreement to issue the securities; or (y) the date of the public announcement of the award required by Rule 4350(i)(1)(A)(iv); or

(B) issuing securities that may potentially result in a change of control of the issuer; or

(C) issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired or in the consideration to be paid; or

(D) issuing any common stock, or any security convertible into common stock, a transaction that may result in the potential issuance of common stock, greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and the Exchange encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. The Exchange reviews these forms to determine compliance with applicable Exchange rules, including the shareholder approval requirements.

Therefore, if a company fails to file timely the form required by this paragraph, the Exchange may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(16) The issuer of any class of securities listed on the Exchange, except for American Depositary Receipts, shall notify the Exchange promptly in writing of any change in the issuer's transfer agent or registrar.

(17) The issuer shall comply with any obligation of any person regarding filing or disclosure of information material to the issuer or the security, whether such obligation arises under the securities laws of the United States or the issuer's country of domicile, or other applicable federal or state statutes or rules.

(18) The issuer shall notify the Exchange promptly in writing of any change in the general character or nature of its business and any change in the address of its principal executive offices. The issuer also shall file on a form designated by the Exchange notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

(19) [Reserved]

(20) The issuer shall file, on a form designated by the Exchange no later than 10 days after the occurrence, any aggregate increase or decrease of any class of securities listed on the Exchange that exceeds 5% of the amount of securities of the class outstanding.

(21) In the case of any dividend action or action relating to a stock distribution of a listed stock the issuer shall, no later than 10 calendar days prior to the record date of such action:

(i) notify the Exchange by filing the appropriate form as designated by the Exchange; and

(ii) provide public notice using a Regulation FD compliant method.

Notice to the Exchange should be given as soon as possible after declaration and, in any event, no later than simultaneously with the public notice.

(22) [Reserved]

(23) [Reserved]

(24) [Reserved]

(25) [Reserved]

(26) The issuer shall notify the Exchange of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by the Exchange. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify the Exchange as soon as practicable after such event has been implemented by filing the appropriate form as designated by the Exchange. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange other than the Exchange and not designated by the Exchange as national market system securities.

(f) Issuers which distribute interim reports to shareholders should distribute such reports to both registered and beneficial shareholders. Issuers are also encouraged to consider additional technological methods to communicate such information to shareholders in a timely and less costly manner as such technology becomes available.

#### **4330. Obligation to Provide Information**

The Exchange may request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued listing, including, but not limited to, any material provided to or received from the Commission or other appropriate regulatory authority. An issuer may be delisted or denied initial listing if it fails to provide such information within a reasonable period of time or if any communication to the Exchange contains a material misrepresentation or omits material information necessary to make the communication to the Exchange not misleading.

#### **4340. Application for Re-Listing by Listed Issuers**

(a) Business Combinations with Entities Not Listed on the Exchange Resulting in a Change of Control. An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with an entity not listed on the Exchange, resulting in a change of control of the issuer and potentially allowing the entity not listed on the Exchange to obtain an Exchange listing. In determining whether a change of control has occurred, the Exchange shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. The Exchange shall also consider the nature of the businesses and the relative size of the issuer listed on the Exchange and the entity not listed on the Exchange. The issuer must submit an application for the post-transaction entity with sufficient time to allow the Exchange to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, the Exchange will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

(b) Bankruptcy. The Exchange may use its discretionary authority under Rule 4300 to deny listing to an issuer that has filed for protection under any provision of the federal bankruptcy laws or comparable foreign laws, even though the issuer's securities otherwise meet all enumerated criteria for continued listing on the Exchange. In the event that the Exchange determines to continue the listing of such an issuer during a bankruptcy reorganization, the issuer shall nevertheless be required to satisfy all requirements for initial listing, including the payment of initial listing fees, upon emerging from bankruptcy proceedings.

### **4350. Qualitative Listing Requirements for Issuers Listed on the Exchange Except for Limited Partnerships**

#### (a) Applicability

(1) Foreign Private Issuers. A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). In addition, a foreign private issuer must be eligible to participate in a Direct Registration Program, as required by Rule 4350(l), unless prohibited from complying by a law or regulation in its home country. A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in its annual reports filed with the Commission or on its website each requirement of Rule 4350 that it does not follow and describe the home country practice followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on the Exchange shall make the same disclosures in its registration statement or on its website.

(2) Management Investment Companies. Management investment companies (including business development companies) are subject to all the requirements of Rule 4350, except that management investment companies registered under the Investment Company Act of 1940 are exempt from the requirements of Rule 4350(c) and (n).

(3) Asset-backed Issuers and Other Passive Issuers. The following are exempt from the requirements of Rule 4350(c), (d) and (n): (a) asset-backed issuers; and (b) issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.



(4) Cooperatives. Cooperative entities, such as agricultural cooperatives, that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock are exempt from Rule 4350(c). However, such entities must comply with all federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A-3 thereunder.

(5) Phase-in Periods

A company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) on the same schedule as it is permitted to phase in its compliance with the independent audit committee requirement pursuant to SEC Rule 10A-3(b)(1)(iv)(A). Accordingly, a company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rule 4350(c) as follows: (1) one independent member at the time of listing; (2) a majority of independent members within 90 days of listing; and (3) all independent members within one year of listing. Furthermore, a company listing in connection with its initial public offering shall have twelve months from the date of listing to comply with the majority independent board requirement in Rule 4350(c). It should be noted, however, that pursuant to SEC Rule 10A-3(b)(1)(iii) investment companies are not afforded the exemptions under SEC Rule 10A-3(b)(1)(iv). Issuers may choose not to adopt a compensation or nomination committee and may instead rely upon a majority of the independent directors to discharge responsibilities under Rule 4350(c). For purposes of Rule 4350 other than Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Act. For purposes of Rule 4350(d)(2)(A)(ii) and Rule 4350(m), a company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in SEC Rule 10A-3(b)(1)(iv)(A) under the Act, namely, that the company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.

Companies that are emerging from bankruptcy or have ceased to be Controlled Companies within the meaning of Rule 4350(c)(5) shall be permitted to phase-in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with their initial public offering. It should be noted, however, that a company that has ceased to be a Controlled Company within the meaning of Rule 4350(c)(5) must comply with the audit committee requirements of Rule 4350(d) as of the date it ceased to be a Controlled Company. Furthermore, the executive sessions requirement of Rule 4350(c)(2) applies to Controlled Companies as of the date of listing and continues to apply after it ceases to be controlled.

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on the Exchange. This transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.

(b) Distribution of Annual and Interim Reports

(1) (A) Each issuer shall make available to shareholders of such securities an annual report containing audited financial statements of the company and its subsidiaries, which, for example, may be on Form 10-K, 20-F, 40-F or N-CSR. An issuer may comply with this requirement either: (i) by mailing the report to shareholders, or (ii) by posting the annual report to shareholders on or through the company's website (or, in the case of an issuer that is an investment company that does not maintain its own website, on a website that the issuer is allowed to use to satisfy the website posting requirement in Exchange Act Rule 16a-3(k)), along with a prominent undertaking in the English language to provide shareholders, upon request, a hard copy of the company's annual report free of charge. An issuer that chooses to satisfy this requirement via a website posting must, simultaneous with this posting, issue a press release stating that its annual report has been filed with the Commission (or other appropriate regulatory authority). This press release must also state that the annual report is available on the company's website and include the website address and that shareholders may receive a hard copy free of charge upon request. An issuer must provide such hard copies within a reasonable period of time following the request.

(B) An issuer that receives an audit opinion that expresses doubt about the ability of the company to continue as a going concern for a reasonable period of time must make a public announcement through the news media disclosing the receipt of such opinion. Prior to the release of the public announcement, the issuer must provide the text of the public announcement to the Exchange's MarketWatch Department ("MarketWatch"). The public announcement shall be provided to MarketWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.

(2) Each issuer which is subject to SEC Rule 13a-13 shall make available copies of quarterly reports including statements of operating results to shareholders either prior to or as soon as practicable following the company's filing of its Form 10-Q with the Commission. If the form of such quarterly report differs from the Form 10-Q, the issuer shall file one copy of the report with the Exchange in addition to filing its Form 10-Q pursuant to Rule 4310(c)(14). The statement of operations contained in quarterly reports shall disclose, as a minimum, any substantial items of an unusual or nonrecurrent nature and net

income before and after estimated federal income taxes or net income and the amount of estimated federal taxes.

(3) Each issuer which is not subject to SEC Rule 13a-13 and which is required to file with the Commission, or another federal or state regulatory authority, interim reports relating primarily to operations and financial position, shall make available to shareholders reports which reflect the information contained in those interim reports. Such reports shall be made available to shareholders either before or as soon as practicable following filing with the appropriate regulatory authority. If the form of the interim report provided to shareholders differs from that filed with the regulatory authority, the issuer shall file one copy of the report to shareholders with the Exchange in addition to the report to the regulatory authority that is filed with the Exchange pursuant to Rule 4310(c)(14).

(4) Each foreign private issuer shall publish, in a press release, which would also be submitted on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter.

#### (c) Independent Directors

(1) A majority of the board of directors must be comprised of independent directors as defined in Rule 4200. The company must disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) those directors that the board of directors has determined to be independent under Rule 4200. If an issuer fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, the issuer shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the issuer shall instead have 180 days from such event to regain compliance. An issuer relying on this provision shall provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(2) Independent directors must have regularly scheduled meetings at which only independent directors are present ("executive sessions").

#### (3) Compensation of Officers

(A) Compensation of the chief executive officer of the company must be determined, or recommended to the Board for determination, either by:

(i) a majority of the independent directors, or

(ii) a compensation committee comprised solely of independent directors.

The chief executive officer may not be present during voting or deliberations.

(B) Compensation of all other executive officers must be determined, or recommended to the Board for determination, either by:

(i) a majority of the independent directors, or

(ii) a compensation committee comprised solely of independent directors.

(C) Notwithstanding paragraphs (3)(A)(ii) and (3)(B)(ii) above, if the compensation committee is comprised of at least three members, one director who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

#### (4) Nomination of Directors

(A) Director nominees must either be selected, or recommended for the Board's selection, either by:

(i) a majority of the independent directors, or

(ii) a nominations committee comprised solely of independent directors.

(B) Each issuer must certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations

process and such related matters as may be required under the federal securities laws.

(C) Notwithstanding paragraph (4)(A)(ii) above, if the nominations committee is comprised of at least three members, one director, who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the nominations committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

(D) Independent director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, this does not relieve a company's obligation to comply with the committee composition requirements under Rule 4350(c) and (d).

(E) This Rule 4350(c)(4) is not applicable to a company if the company is subject to a binding obligation that requires a director nomination structure inconsistent with this rule and such obligation pre-dates the approval date of this rule.

(5) A Controlled Company is exempt from the requirements of this Rule 4350(c), except for the requirements of subsection (c)(2) which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) that it is a Controlled Company and the basis for that determination.

#### (d) Audit Committee

##### (1) Audit Committee Charter

Each Issuer must certify that it has adopted a formal written audit committee charter and that the audit committee has reviewed and reassessed the adequacy of the formal written charter on an annual basis. The charter must specify:

(A) the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;

(B) the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the company, consistent with Independence Standards Board Standard 1, and the audit committee's responsibility for actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor; and

(C) the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer;

(D) the specific audit committee responsibilities and authority set forth in Rule 4350(d)(3).

## (2) Audit Committee Composition

(A) Each issuer must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be independent as defined under Rule 4200(a)(15); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c)); (iii) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement. Additionally, each issuer must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

(B) Notwithstanding paragraph (2)(A)(i), one director who: (i) is not independent as defined in Rule 4200; (ii) meets the criteria set forth in Section 10A(m)(3) under the Act and the rules thereunder; and (iii) is not a current officer or employee or a Family Member of such officer or employee, may be appointed to the audit committee, if the board, under

exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for that determination. A member appointed under this exception may not serve longer than two years and may not chair the audit committee.

### (3) Audit Committee Responsibilities and Authority

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c)), concerning responsibilities relating to: (i) registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

### (4) Cure Periods

(A) If an issuer fails to comply with the audit committee composition requirement under Rule 10A-3(b)(1) under the Act and Rule 4350(d)(2) because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. An issuer relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(B) If an issuer fails to comply with the audit committee composition requirement under Rule 4350(d)(2)(A) due to one vacancy on the audit committee, and the cure period in paragraph (A) is not otherwise being relied upon for another member, the issuer will have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the vacancy, the issuer shall instead have 180 days from such event to regain compliance. An issuer

relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the non-compliance.

(5) Exception

At any time when an issuer has a class of common equity securities (or similar securities') that is listed on another national securities exchange or national securities association subject to the requirements of SEC Rule 10A-3 under the Act, the listing of classes of securities of a direct or indirect consolidated subsidiary or an at least 50% beneficially owned subsidiary of the issuer (except classes of equity securities, other than non-convertible, non-participating preferred securities, of such subsidiary) shall not be subject to the requirements of this paragraph (d).

(e) Shareholder Meetings

Each issuer listing common stock or voting preferred stock, and their equivalents, shall hold an annual meeting of shareholders no later than one year after the end of the issuer's fiscal year-end.

(f) Quorum

Each issuer shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the company's common voting stock.

(g) Solicitation of Proxies

Each issuer shall solicit proxies and provide proxy statements for all meetings of shareholders and shall provide copies of such proxy solicitation to the Exchange.

(h) Conflicts of Interest

Each issuer shall conduct appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the company's audit committee or another independent body of the board of directors. For purposes of this rule, the term "related party transaction" shall refer to transactions required to be disclosed pursuant to SEC Regulation S-K, Item 404. However, in the case of small business issuers (as that term is defined in SEC Rule 12b-2), the term "related party transactions" shall refer to transactions required to be disclosed pursuant to SEC Regulation S-B, Item 404, and in the case of non-U.S. issuers, the term "related party transactions" shall refer to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.



(i) Shareholder Approval

(1) Each issuer shall require shareholder approval or prior to the issuance of securities under subparagraph (A), (B), (C), or (D) below:

(A) when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants, except for:

(i) warrants or rights issued generally to all security holders of the company or stock purchase plans available on equal terms to all security holders of the company (such as a typical dividend reinvestment plan); or

(ii) tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the issuer's independent compensation committee or a majority of the issuer's independent directors; or plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value; or

(iii) plans or arrangements relating to an acquisition or merger as permitted under IM-4350-5; or

(iv) issuances to a person not previously an employee or director of the company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the company, provided such issuances are approved by either the issuer's independent compensation committee or a majority of the issuer's independent directors. Promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

(B) when the issuance or potential issuance will result in a change of control of the issuer;

(C) in connection with the acquisition of the stock or assets of another company if:

(i) any director, officer or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

(ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash:

a. the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or

b. the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares or common stock outstanding before the issuance of the stock or securities; or

(D) in connection with a transaction other than a public offering involving:

(i) the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

(ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

(2) An exception applicable to a specified issuance of securities may be made upon prior written application to the Exchange's Listing Qualifications Department when:

(A) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and

(B) reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors. The Listing Qualifications Department shall respond to each application for such an exception in writing.

A company that receives such an exception must mail to all shareholders not later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required. Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the issuer is relying on a financial viability exception to the stockholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The issuer shall also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.

(3) Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used in making any calculation provided for in this paragraph (i). Unissued shares reserved for issuance upon conversion of securities or upon exercise of options or warrants will not be regarded as outstanding.

(4) Voting power outstanding as used in this Rule refers to the aggregate number of votes which may be cast by holders of those securities outstanding which entitle the holders thereof to vote generally on all matters submitted to the company's security holders for a vote.

(5) An interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of an issuer or party shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

(6) Where shareholder approval is required, the minimum vote which will constitute shareholder approval shall be a majority of the total votes cast on the proposal. These votes may be cast in person, by proxy at a meeting of shareholders or by written consent in lieu of a special meeting to the extent permitted by applicable state and federal law and rules (including interpretations thereof), including, without limitation, SEC Regulations 14A and 14C. Nothing contained in this Rule 4350(i)(6) shall affect an issuer's obligation to hold an annual meeting of shareholders as required by Rule 4350(e).

(7) Shareholder approval shall not be required for any share issuance if such issuance is part of a court-approved reorganization under the federal bankruptcy laws or comparable foreign laws.

(j) Listing Agreement

Each issuer shall execute a Listing Agreement in the form designated by the Exchange.

(k) Auditor Registration

Each listed issuer must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212).

(l) Direct Registration Program

(1) (A) Except as indicated in paragraph (2)(B) below, all securities listed on the Exchange (except non-equity securities which are book-entry only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act.

(B) Until March 31, 2009, a foreign private issuer may follow its home country practice in lieu of the requirements of this Rule 4350(l), provided, however, that such an issuer must follow the requirements of Rule 4350(a) and IM-4350-6 for doing so. Thereafter, the listed securities of such issuers (except securities which are book-entry only) must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act unless prohibited from complying by a law or regulation of its home country.

(2) If an issuer establishes or maintains a Direct Registration Program for its shareholders, the issuer shall, directly or through its transfer agent, participate in an electronic link with a clearing agency registered under Section 17A of the Act to facilitate the electronic transfer of securities held pursuant to such program.

(m) Notification of Material Noncompliance

An issuer must provide the Exchange with prompt notification after an executive officer of the issuer becomes aware of any material noncompliance by the issuer with the requirements of this Rule 4350.

(n) Code of Conduct

Each Issuer shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the Board. Issuers, other than foreign private issuers, shall disclose such waivers in a Form 8-K within four business days. Foreign private issuers shall disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F.

### **IM-4350-1. Interpretive Material Regarding Future Priced Securities**

#### Summary

Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for issuers. The security is generally structured in the form of a convertible security and is often issued via a private placement. Issuers will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the issuer's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay in setting the conversion price is appealing to issuers who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the issuer's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, an issuer may issue \$10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into \$10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is \$5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is \$1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the issuer carefully considers the terms of the securities in connection with several Equity Rules, the issuance of Future Priced Securities could result in a failure to comply with Exchange listing standards and the concomitant delisting of the issuer's securities from the Exchange. Issuers may not always appreciate this potential consequence. Equity Rules that bear upon the continued listing qualification of an issuer and that must be considered when issuing Future Priced Securities include:

1. the shareholder approval rules
2. the voting rights rules
3. the bid price requirement
4. the listing of additional shares rules
5. the change in control rules
6. the Exchange's discretionary authority rules

*It is important for issuers to clearly understand that failure to comply with any of these rules could result in the delisting of the issuer's securities.*

This notice is intended to be of assistance to companies considering financings involving Future Priced Securities. By adhering to the above requirements, issuers can avoid unintended listing qualifications problems. Issuers having any questions about this notice should contact the Exchange's Office of General Counsel at (301) 978-8400 or Listing Qualifications Department at (301) 978-8008. The Exchange will provide an issuer with a written interpretation of the application of Equity Rules to a specific transaction, upon request of the issuer.

#### *How the Rules Apply*

##### *Shareholder Approval*

Rule 4350(i)(1)(D) provides, in part:

Each issuer shall require shareholder approval prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.<sup>1</sup>

When staff of the Exchange is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future Priced Securities, the actual conversion price is dependent on the market price at the time of conversion and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for purposes of this calculation, the lowest possible conversion price is below the book or market value of the stock at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained *prior* to the issuance of the

Future Priced Security. Issuers should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20% or more of the common stock or voting power outstanding before the issuance of the Future Priced Security,<sup>2</sup> or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the greater of book or market value of the common stock prior to the issuance of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still required under Rule 4350(i)(1)(B) if the issuance will result in a change of control.

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### Voting Rights

Rule 4351 provides:

Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

IM-4351 also provides rules relating to voting rights of issuers with securities listed on the Exchange.

Under the voting rights rules, an issuer cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the company based on the company's overall book or market value at the time of the issuance of the Future Priced Security. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the company based on the company's overall book or market value at the time of the *issuance* of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in the price of the underlying

common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, shareholders can not otherwise agree to permit a voting rights violation by the issuer. Because a violation of the voting rights requirement can result in delisting of the issuer's securities from the Exchange, careful attention must be given to this issue to prevent a violation of the rule.

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#### *The Bid Price Requirement*

The bid price requirement establishes a minimum bid price for issues listed on the Exchange. Rules 4310(c)(4) or 4320(e)(2)(E) provide that, for an issue to be eligible for continued listing on the Exchange, the minimum bid price per share shall be \$1. An issue is subject to delisting from the Exchange if its bid price falls below \$1.

The bid price rules must be thoroughly considered because the characteristics of Future Priced Securities often exert downward pressure on the bid price of the issuer's common stock. Specifically, dilution from the discounted conversion of the Future Priced Security may result in a significant decline in the price of the common stock. Furthermore, there appear to be instances where short selling has contributed to a substantial price decline, which, in turn, could lead to a failure to comply with the bid price requirement.<sup>3</sup>

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#### *Listing of Additional Shares*

Rule 4310(c)(17) provides:

The issuer shall be required to notify the Exchange on the appropriate form no later than 15 calendar days prior to: issuing securities that may potentially result in a change of control of the issuer; or entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.

Issuers should be cognizant that under this rule notification is required at least 15 days prior to issuing any security (including a Future Priced Security) convertible into shares of a class of securities already listed on the Exchange. Failure to provide such notice can result in an issuer's removal from the Exchange.

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Public Interest Concerns

Rule 4300 provides:

The Exchange is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. The Exchange stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Issuers listed on the Exchange are publicly recognized as sharing these important objectives.

The Exchange, therefore, in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the initial and continued listing of securities on the Exchange in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Exchange may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on the Exchange inadvisable or unwarranted in the opinion of the Exchange, even though the securities meet all enumerated criteria for initial or continued listing on the Exchange.

The returns on Future Priced Securities may become excessive compared with those of public investors in the issuer's common securities. In egregious situations, the use of a Future Priced Security may raise public interest concerns under Rule 4300. In addition to the demonstrable business purpose of the transaction, other factors that Exchange staff will consider in determining whether a transaction raises public interest concerns include: (1) the amount raised in the transaction relative to the issuer's existing capital structure; (2) the dilutive effect of the transaction on the existing holders of common stock; (3) the risk undertaken by the Future Priced Security investor; (4) the relationship between the Future Priced Security investor and the issuer; (5) whether the transaction was preceded by other similar transactions; and (6) whether the transaction is consistent with the just and equitable principles of trade.

Some Future Priced Securities may contain features that address the public interest concerns. These features tend to provide incentives to the investor to hold the security for a longer time period and limit the number of shares into which the Future Priced Security may be converted. Such features may limit the dilutive effect of the transaction and increase the risk undertaken by the Future Priced Security investor in relationship to the reward available.

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Business Combinations with Entities Not Listed on the Exchange Resulting in a Change of Control

Rule 4340(a) provides:

An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with an entity not listed on the Exchange, resulting in a change of control of the issuer and potentially allowing the entity not listed on the Exchange to obtain an Exchange listing. In determining whether a change of control has occurred, the Exchange shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. The Exchange shall also consider the nature of the businesses and the relative size of the issuer listed on the Exchange and the entity not listed on the Exchange. The issuer must submit an application for the post-transaction entity with sufficient time to allow the Exchange to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, the Exchange will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial listing standards in connection with a combination that results in a change of control. It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in the holders of the Future Priced Securities obtaining control of the listed company. In such event, an issuer may be required to re-apply for initial listing and satisfy all initial listing requirements.

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<sup>1</sup> The Exchange may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.

<sup>2</sup> See IM-4350-2, Interpretative Material Regarding the Use of Share Caps to Comply with Rule 4350(i).

<sup>3</sup> If used to manipulate the price of the stock, short selling by the holders of the Future Priced Security is prohibited by the antifraud provisions of the securities laws and by Exchange Rules and may be prohibited by the terms of the placement.

#### **IM-4350-2. Interpretative Material Regarding the Use of Share Caps to Comply with Rule 4350(i)**

Rule 4350(i) limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities.<sup>1</sup> Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.<sup>2</sup> Issuers sometimes comply with the 20% limitation in this rule by placing a "cap" on the number of shares that can be issued

in the transaction, such that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If an issuer determines to defer a shareholder vote in this manner, shares that are issuable under the cap (in the first part of the transaction) must not be entitled to vote to approve the remainder of the transaction. In addition, a cap must apply for the life of the transaction, unless shareholder approval is obtained. For example, caps that no longer apply if a company is not listed on the Exchange are not permissible under the Rule. Of course, if shareholder approval is not obtained, then the investor will not be able to acquire 20% or more of the common stock or voting power outstanding before the transaction and would continue to hold the balance of the original security in its unconverted form.

Some issuers have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, such as a "penalty" or a "sweetener." For example, a company issues a convertible preferred stock or debt instrument that provides for conversions of up to 20% of the total shares outstanding with any further conversions subject to shareholder approval. However, the terms of the instrument provide that if shareholders reject the transaction, the coupon or conversion ratio will increase or the issuer will be penalized by a specified monetary payment. Likewise, a transaction may provide for improved terms if shareholder approval is obtained. The Exchange believes that in such situations the cap is defective because the related penalty or sweetener has a coercive effect on the shareholder vote, and thus may deprive shareholders of their ability to freely exercise their vote. Accordingly, the Exchange will not accept a cap that defers the need for shareholder approval in such situations. Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no shares may be issued prior to the approval of the shareholders. Issuers that engage in transactions with defective caps may be subject to delisting.

Issuers having questions regarding this policy are encouraged to contact the Exchange's Listing Qualifications Department at (301) 978-8008, which will provide a written interpretation of the application of Equity Rules to a specific transaction, upon prior written request of the issuer.

<sup>1</sup> An exception to this rule is available to issuers when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise. Rule 4350(i)(2). However, a share cap is not permissible in conjunction with the financial viability exception provided in Rule 4350(i)(2), because the application to the Exchange and the notice to shareholders required in the rule must occur prior to the issuance of any common stock or securities convertible into or exercisable for common stock.

<sup>2</sup> This issue may also arise with respect to the 5% threshold set forth in Rule 4350(i)(1)(C)(i).

### **IM-4350-3. Definition of a Public Offering**

Rule 4350(i)(1)(D) provides that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under this rule, however, shareholder approval is not required for a "public offering."

Issuers are encouraged to consult with Exchange staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Exchange staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Exchange staff will consider all relevant factors, including but not limited to:

(i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the issuer);

(ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);

(iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors);

(iv) the offering price (including the extent of any discount to the market price of the securities offered); and

(v) the extent to which the issuer controls the offering and its distribution.

#### **IM-4350-4 Board Independence and Independent Committees**

##### **Independent Directors and Independent Committees — Rule 4350(c)**

**Majority Independent Board.** Independent directors (as defined in Rule 4200(a)(15)) play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in

the companies they oversee and guard against conflicts of interest. Requiring that the board be comprised of a majority of independent directors empowers such directors to carry out more effectively these responsibilities.

**Executive Sessions of Independent Directors.** Regularly scheduled executive sessions encourage and enhance communication among independent directors. It is contemplated that executive sessions will occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.

**Independent Director Oversight of Executive Compensation.** Independent director oversight of executive officer compensation helps assure that appropriate incentives are in place, consistent with the board's responsibility to maximize shareholder value. The rule is intended to provide flexibility for an issuer to choose an appropriate board structure and to reduce resource burdens, while ensuring independent director control of compensation decisions.

**Independent Director Oversight of Director Nominations.** Independent director oversight of nominations enhances investor confidence in the selection of well-qualified director nominees, as well as independent nominees as required by the rules. This rule is also intended to provide flexibility for a company to choose an appropriate board structure and reduce resource burdens, while ensuring that independent directors approve all nominations.

This rule does not apply in cases where the right to nominate a director legally belongs to a third party. For example, investors may negotiate the right to nominate directors in connection with an investment in the company, holders of preferred stock may be permitted to nominate or appoint directors upon certain defaults, or the company may be a party to a shareholder's agreement that allocates the right to nominate some directors. Because the right to nominate directors in these cases does not reside with the company, independent director approval would not be required. This rule is not applicable if the company is subject to a binding obligation that requires a director nomination structure inconsistent with the rule and such obligation pre-dates the approval date of this rule.

**Controlled Company Exemption.** This exemption recognizes that majority shareholders, including parent companies, have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights. In order for a group to exist for purposes of this rule, the shareholders must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D). A Controlled Company not relying upon this exemption need not provide any special disclosures about its controlled status. It should be emphasized that this controlled company exemption does not extend to the audit committee requirements under Rule 4350(d) or the requirement for executive sessions of independent directors under Rule 4350(c)(2).

**Audit Committees — Rule 4350(d)**

**Audit Committee Charter.** Each issuer is required to adopt a formal written charter that specifies the scope of its responsibilities and the means by which it carries out those responsibilities; the outside auditor's accountability to the audit committee; and the audit committee's responsibility to ensure the independence of the outside auditor. Consistent with this, the charter must specify all audit committee responsibilities set forth in Rule 10A-3(b)(2), (3), (4) and (5) under the Act. Rule 10A-3(b)(3)(ii) requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters. The rights and responsibilities as articulated in the audit committee charter empower the audit committee and enhance its effectiveness in carrying out its responsibilities.

Rule 4350(d)(3) imposes additional requirements for investment company audit committees that must also be set forth in audit committee charters for these issuers.

**Audit Committee Composition.** Audit committees are required to have a minimum of three members and be comprised only of independent directors. In addition to satisfying the independent director requirements under Rule 4200, audit committee members must meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c)): they must not accept any consulting, advisory, or other compensatory fee from the company other than for board service, and they must not be an affiliated person of the company. It is recommended that an issuer disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) if any director is deemed independent but falls outside the safe harbor provisions of Rule 10A-3(e)(1)(ii) under the Act. A director who qualifies as an audit committee financial expert under Item 401(h) of Regulation S-K or Item 401(e) of Regulation S-B is presumed to qualify as a financially sophisticated audit committee member under Rule 4350(d)(2)(A).

**The Audit Committee Responsibilities and Authority.** Audit committees must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c)), concerning responsibilities relating to registered public accounting firms; complaints relating to accounting; internal accounting controls or auditing matters; authority to engage advisors; and funding. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

**Executive Officers.** References to executive officers in Rule 4350 mean those officers covered in Rule 16a-1(f) under the Act.

#### **IM-4350-5. Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements**

Employee ownership of company stock can be an effective tool to align employee interests with those of other shareholders. Stock option plans or other equity compensation arrangements can also assist in the recruitment and retention of employees, which is especially critical to young, growing companies, or companies with insufficient cash resources to attract and retain highly qualified employees. However, these plans can potentially dilute shareholder interests. As such, Rule 4350(i)(1)(A) ensures that shareholders have a voice in these situations, given this potential for dilution. Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

(1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);

(2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;

(3) any material expansion of the class of participants eligible to participate in the plan; and

(4) any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an "evergreen formula"), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, issuers should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Rule 4350(i)(1)(A) provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans as these plans are regulated under the Internal Revenue Code and

Treasury Department regulations. An equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from shareholder approval under this section. Further, there is an exception for inducement grants to new employees because in these cases a company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. The rule requires that such issuances must be approved by the issuer's independent compensation committee or a majority of the issuer's independent directors. The rule further requires that promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 4350(i)(1)(A). These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. The Exchange would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in a connection with a merger or acquisition would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 4350(i)(1)(C).

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the issuer's independent compensation committee or a majority of the issuer's independent directors. It should also be noted that a company would not be permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.



For purposes of Rule 4350(i)(1)(A) and IM-4350-5, the term "parallel nonqualified plan" means a plan that is a "pension plan" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Â§1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless: (i) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and, (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

#### **IM 4350-6. Applicability**

1. Foreign Private Issuer Exception and Disclosure. A foreign private issuer (as defined in Rule 3b-4 under the Act) listed on the Exchange may follow the practice in such issuer's home country (as defined in General Instruction F of Form 20-F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule 4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, a foreign private issuer must comply with Rule 4350(l) (Direct Registration Program) unless prohibited from complying by a law or regulation in its home country. Finally, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 shall submit to the Exchange a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws and, in the case of a company prohibit from complying with Rule 4350(l), certifying that a law or regulation in the home country prohibits such compliance. In the case of new listings, this certification is required at the time of listing. For existing issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the issuer's original listing in the United States, if that listing is on the Exchange, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, the issuer may provide these disclosures in English on its website. The issuer shall disclose each requirement of Rule

4350 that it does not follow and include a brief statement of the home country practice the issuer follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and registration statement should so state and provide the web address at which the information may be obtained.

2. Management Investment Companies. Management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance covered by Rule 4350. In light of this, the Exchange exempts from Rule 4350(c) and (n) management investment companies registered under the Investment Company Act of 1940. Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of Rule 4350.

3. Asset-backed Issuers and Other Passive Issuers. Because of their unique attributes, Rule 4350(c), (d) and (n) do not apply to asset-backed issuers and issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

4. Cooperatives. Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. Because of their unique structure and the fact that they do not have a publicly traded class of common stock, such entities are exempt from Rule 4350(c).

### **IM-4350-7. Code of Conduct**

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of an issuer is intended to demonstrate to investors that the board and management of issuers listed on the Exchange have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 4350(n) requires issuers to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule

4350(n) must apply to all directors, officers, and employees. Issuers can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics." As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the company, as when the individual receives improper personal benefits as a result of his or her position with the company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the company. Also, the disclosures an issuer makes to the Commission are the essential source of information about the company for regulators and investors — there can be no question about the duty to make them fairly, accurately and timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for executive officers or directors may be made only by the board and must be disclosed to shareholders, along with the reasons for the waiver. All issuers, other than foreign private issuers, must disclose such waivers in a Form 8-K within four business days. Foreign private issuers must disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the company and its shareholders to the greatest extent possible.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

### **IM-4350-8. Shareholder Meetings**

Rule 4350(e) requires that each issuer listing common stock or voting preferred stock, and their equivalents, hold an annual meeting of shareholders within one year of the end of each fiscal year. At each such meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer's governing documents, to elect directors. A new listing that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one-year after its first fiscal year-end following listing. Of course, the Exchange's meeting requirement does not supplant any applicable state or federal securities laws concerning annual meetings.

This requirement is not applicable as a result of an issuer listing the following types of securities: securities listed pursuant to Rule 4420(f) (such as Trust Preferred Securities and Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock); Portfolio Depository Receipts listed pursuant to Rule 4420(i); Index Fund Shares listed pursuant to Rule 4420(j); and Trust Issued Receipts listed pursuant to Rule 4420(l). Notwithstanding, if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold

an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.

### **4351. Voting Rights**

Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

### **IM-4351. Voting Rights Policy**

The following Voting Rights Policy is based upon, but more flexible than, former SEC Rule 19c-4. Accordingly, the Exchange will permit corporate actions or issuances by issuers that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, the Exchange will consider, among other things, the economics of such actions or issuances and the voting rights being granted. The Exchange's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of issuers change over time. The text of the Exchange's Voting Rights Policy is as follows:

#### *Issuers with Dual Class Structures*

The restriction against the issuance of super voting stock is primarily intended to apply to the issuance of a new class of stock, and issuers with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock without conflict with this policy.

#### *Consultation with the Exchange*

Violation of the Voting Rights Policy could result in the loss of an issuer's public trading market. The policy can apply to a variety of corporate actions and securities issuances, not just super voting or so-called "time phase" voting common stock. While the policy will continue to permit actions previously permitted under Rule 19c-4, it is extremely important that issuers communicate their intentions to the Exchange as early as possible before taking any action or committing to take any action that may be inconsistent with the policy. The Exchange urges issuers of securities listed on the Exchange not to assume, without first discussing the matter with Exchange staff, that a particular issuance of common or preferred stock or the taking of some other corporate action will necessarily be consistent with the policy. It is suggested that copies of preliminary proxy or other material concerning matters subject to the policy be furnished to the Exchange for review prior to formal filing.

### Review of Past Voting Rights Activities

In reviewing an application for initial qualification for listing of a security on the Exchange, the Exchange will review the issuer's past corporate actions to determine whether another self-regulatory organization (SRO) has found any of the issuer's actions to have been a violation or evasion of the SRO's voting rights policy. Based on such review, the Exchange may take any appropriate action, including the denial of the application or the placing of restrictions on such listing. The Exchange will also review whether an issuer seeking initial listing of a security on the Exchange has requested a ruling or interpretation from another SRO regarding the application of that SRO's voting rights policy with respect to a proposed transaction. If so, the Exchange will consider that fact in determining its response to any ruling or interpretation that the issuer may request on the same or similar transaction.

### Non-U.S. Companies

The Exchange will accept any action or issuance relating to the voting rights structure of a non-U.S. issuer that is in compliance with the Exchange's requirements for domestic companies or that is not prohibited by the issuer's home country law.

## **4360. Qualitative Listing Requirements for Issuers That Are Limited Partnerships**

### (a) Applicability

No provision of this Rule shall be construed to require any foreign issuer that is a partnership to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile. The Exchange shall have the ability to provide exemptions from applicability of these provisions as may be necessary or appropriate to carry out this intent.

### **(b) Distribution of Annual and Interim Reports**

(1) Each issuer that is a limited partnership shall distribute to limited partners copies of an annual report containing audited financial statements of the limited partnership. The report shall be distributed to limited partners within a reasonable period of time after the end of the limited partnership's fiscal year end and shall be filed with the Exchange at the time it is distributed to limited partners.

(2) (A) Each issuer that is a limited partnership which is subject to SEC Rule 13a-13 shall make available copies of quarterly reports including statements of operating results to limited partners either prior to or as soon as practicable following the partnership's filing of its Form 10-Q with the Commission. Such reports shall be distributed to limited partners if required by statute or regulation in the state in which the

limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. If the form of such quarterly report differs from the Form 10-Q, the issuer shall file one copy of the report with the Exchange in addition to filing its Form 10-Q pursuant to Rule 4310(c)(14). The statement of operations contained in quarterly reports shall disclose, at a minimum, any substantial items of an unusual or nonrecurrent nature and net income before and after estimated federal income taxes or net income and the amount of estimated federal taxes.

(B) Each issuer that is a limited partnership which is not subject to SEC Rule 13a-13 and which is required to file with the Commission, or another federal or state regulatory authority, interim reports relating primarily to operations and financial position, shall make available to limited partners reports which reflect the information contained in those interim reports. Such reports shall be distributed to limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. Such reports shall be distributed to limited partners either before or as soon as practicable following filing with the appropriate regulatory authority. If the form of the interim report provided to limited partners differs from that filed with the regulatory authority, the issuer shall file one copy of the report to limited partners with the Exchange in addition to the report to the regulatory authority that is filed with the Exchange pursuant to Rule 4310(c)(14).

(C) Each foreign private issuer that is a limited partnership shall publish, in a press release, which would also be submitted on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to U.S. GAAP, must be provided not later than six months following the end of the issuer's second quarter. Such information shall be distributed to limited partners if required by statute or regulation in the jurisdiction in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.

#### **(c) Corporate General Partner/Independent Directors**

Each issuer that is a limited partnership shall maintain a corporate general partner or co-general partner, which shall have the authority to manage the day-to-day affairs of the partnership. Such corporate general or co-partner shall maintain a sufficient number of independent directors on its board of directors to satisfy the audit committee requirement set forth in Rule 4350(d)(2).

#### **(d) Audit Committee**

The corporate general partner or co-general partner of each issuer that is a limited partnership must satisfy the audit committee requirements set forth in Rule 4350(d).

**(e) Partner Meetings**

An issuer that is a limited partnership shall not be required to hold an annual meeting of limited partners unless required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.

**(f) Quorum**

In the event that a meeting of limited partners is required pursuant to paragraph (e), the quorum for such meeting shall be not less than 33-1/3 percent of the limited partnership interests outstanding.

**(g) Solicitation of Proxies**

In the event that a meeting of limited partners is required pursuant to paragraph (e), the issuer shall provide all limited partners with proxy or information statements and if a vote is required shall solicit proxies thereon.

**(h) Listing Agreement**

Each issuer that is a limited partnership shall execute a Listing Agreement in the form designated by the Exchange.

**(i) Conflict of Interest**

Each issuer which is a limited partnership shall conduct an appropriate review of all related party transactions on an ongoing basis and shall utilize the Audit Committee or a comparable body of the Board of Directors for the review of potential material conflict of interest situations where appropriate.

(j) Each issuer that is a limited partnership must comply with the requirements to be eligible for a Direct Registration Program, as described in Rule 4350(l).

**4370. Additional Requirements for Securities Listed on the Exchange Issued by NASDAQ OMX or its Affiliates**

(a) For purposes of this Rule 4370, the terms below are defined as follows:

(1) "Nasdaq Affiliate" means The NASDAQ OMX Group, Inc. and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with The NASDAQ OMX Group, Inc., where "control" means that the one entity possesses, directly or indirectly, voting

control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.

(2) "Affiliate Security" means any security issued by a Nasdaq Affiliate, with the exception of Portfolio Depository Receipts as defined in Rule 4420(i)(1)(A) and Index Fund Shares as defined in Rule 4420(j)(1)(A).

(b) Upon initial and throughout continued listing of the Affiliate Security on the Exchange, the Exchange shall:

(1) file a report quarterly with the Commission detailing the Exchange's monitoring of:

(A) the Nasdaq Affiliate's compliance with the listing requirements contained in the Rule 4200, 4300 and 4400 Series; and

(B) the trading of the Affiliate Security, which shall include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data of such security.

(2) engage an independent accounting firm once a year to review and prepare a report on the Affiliate Security to ensure that the Nasdaq Affiliate is in compliance with the listing requirements contained in the Rule 4200, 4300 and 4400 Series and promptly forward to the Commission a copy of the report prepared by the independent accounting firm.

(c) In the event that the Exchange determines that the Nasdaq Affiliate is not in compliance with any of the listing requirements contained in the Rule 4200, 4300 and 4400 Series, the Exchange shall file a report with the Commission within five business days of providing notice to the Nasdaq Affiliate of its non-compliance. The report shall identify the date of non-compliance, type of non-compliance and any other material information conveyed to the Nasdaq Affiliate in the notice of non-compliance. Within five business days of receipt of a plan of compliance from the Nasdaq Affiliate, the Exchange shall notify the Commission of such receipt, whether the plan of compliance was accepted by the Exchange or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any.

#### **4380. Termination Procedure**

(a) Failure to maintain compliance with the applicable provisions of the Rule 4300, 4400 and 4500 Series will result in the termination of an issue's listing unless an exception is granted as provided in the Rule 4800 Series. Termination shall become



effective in accordance with the procedures set forth in the Rule 4800 Series, including IM-4800.

(b) (1) An issuer may voluntarily terminate its listing upon compliance with all requirements of Rule 12d2-2(c) under the Exchange Act. In part, Rule 12d2-2(c) requires that the issuer may delist by filing an application on Form 25 with the Commission, provided that the issuer: (i) complies with all applicable laws in effect in the state in which it is incorporated and with the applicable Equity Rules; (ii) provides notice to the Exchange no fewer than 10 days before the issuer files the Form 25 with the Commission, including a statement of the material facts relating to the reasons for delisting; and (iii) contemporaneous with providing notice to the Exchange, publishes notice of its intent to delist, along with its reasons therefore, via a press release and on its web site, if it has one. Any notice provided on the issuer's web site pursuant to Rule 12d2-2(c) must remain available until the delisting has become effective. The issuer must also provide a copy of the Form 25 to the Exchange simultaneously with its filing with the Commission. The Exchange will provide notice on its web site of the issuer's intent to delist as required by Rule 12d2-2(c)(3).

(2) An issuer that seeks to voluntarily delist a class of securities pursuant to Rule 4380(b)(1) that has received notice from the Exchange, pursuant to the Rule 4800 Series or otherwise, that it fails to comply with one or more requirements for continued listing, or that is aware that it is below such continued listing requirements notwithstanding that it has not received such notice from the Exchange, must disclose this fact (including the specific continued listing requirement that it is below) in: (i) its statement of all material facts relating to the reasons for withdrawal from listing provided to the Exchange along with written notice of its determination to withdraw from listing required by Rule 12d2-2(c)(2)(ii) under the Exchange Act; and (ii) its press release and web site notice required by Rule 12d2-2(c)(2)(iii) under the Exchange Act.

#### **4390. Issuer Designation Requirements**

Pursuant to SEC Rule 600, those securities for which transaction reporting is required by an effective transaction reporting plan are designated as national market system securities. A transaction reporting plan has been filed with the Commission covering securities listed on the Exchange.

#### **4400. Other Listing Rules**

##### **4410. Applications for Listing**

(a) Application for listing on the Exchange shall be on a form supplied by the Exchange and signed by a corporate officer of the issuer. Compliance with the listing criteria will be determined on the basis of information filed with the appropriate regulatory authority and the records of the Exchange as of the application date. The

Exchange may require the issuer to submit such other information as is relevant to a listing determination.

(b) Upon approval of a listing application, the Exchange shall certify to the Commission, pursuant to Section 12(d) of the Act and the rules thereunder, that it has approved the security for listing and registration. Listing can commence only upon effectiveness of the security's registration pursuant to Section 12(d).

#### **4420. Additional Quantitative Listing Criteria**

In order to be listed on the Exchange, an issuer shall be required to substantially meet the criteria set forth in one or more of the paragraphs below. The Exchange may extend unlisted trading privileges to any security for which the Exchange has in effect rules providing for transactions in such class or type of security. Provisions of Rule 4420 that govern trading hours and surveillance procedures, and that relate to information circulars and prospectus delivery, shall apply to securities traded on an unlisted trading privileges basis.

(a) The Exchange may list first and secondary classes of common stock, preferred stock, convertible debt, shares or certificates of beneficial interest of trusts, limited partnership interests in foreign or domestic issues, American Depositary Receipts, or rights or warrants to purchase listed securities if they satisfy the criteria of the Rule 4300 Series.

(b) Reserved

(c) Reserved

(d) Index Warrants

An index warrant may be listed if it substantially meets the following criteria:

- (1) The minimum public distribution shall be at least 1 million warrants.
- (2) The minimum number of public holders shall be at least 400.
- (3) The aggregate market value of the outstanding index warrants shall be at least \$4 million.
- (4) The issuer of the index warrants must have a minimum tangible net worth in excess of \$150 million.
- (5) The term of the index warrant shall be for a period from one to five years.

(6) Limitations on Issuance — Where an issuer has a minimum tangible net worth in excess of \$150 million but less than \$250 million, the Exchange will not list stock index warrants of the issuer if the value of such warrants plus the aggregate value, based upon the original issuing price, of all outstanding stock index, currency index and currency warrants of the issuer and its affiliates combined that are listed for trading on the Exchange or another national securities exchange exceeds 25% of the issuer's net worth.

(7) A.M. Settlement — The terms of stock index warrants for which 25% or more of the value of the underlying index is represented by securities that are traded primarily in the United States must provide that the opening prices of the stocks comprising the index will be used to determine (i) the final settlement value (i.e., the settlement value for warrants that are exercised at expiration) and (ii) the settlement value for such warrants that are valued on either of the two business days preceding the day on which the final settlement value is to be determined.

(8) Automatic Exercise — All stock index warrants and any other cash-settled warrants must include in their terms provisions specifying (i) the time by which all exercise notices must be submitted and (ii) that all unexercised warrants that are in the money (or that are in the money by a stated amount) will be automatically exercised on their expiration date or on or promptly following the date on which such warrants are delisted by the Exchange (if such warrant issue has not been listed on another national securities exchange).

(9) Foreign Country Securities — In instances where the stock index underlying a warrant is comprised in whole or in part with securities traded outside the United States, the foreign country securities or American Depositary Receipts ("ADRs") thereon that (i) are not subject to a comprehensive surveillance agreement, and (ii) have less than 50% of their global trading volume in dollar value within the United States, shall not, in the aggregate represent more than 20% of the weight of the index, unless such index is otherwise approved for warrant or option trading.

(10) Changes in Number of Warrants Outstanding — Issuers of stock index warrants either will make arrangements with warrant transfer agents to advise the Exchange immediately of any change in the number of warrants outstanding due to the early exercise of such warrants or will provide this information themselves. With respect to stock index warrants for which 25% or more of the value of the underlying index is represented by securities traded primarily in the United States, such notice shall be filed with the Exchange no later than 4:30 p.m. Eastern Time, on the date when the settlement value for such warrants is determined. Such notice shall be filed in such form and manner as may be prescribed by the Exchange from time to time.

(11) Only eligible broad-based indexes can underlie index warrants. For purposes of this subparagraph, eligible broad-based indexes shall include those indexes approved by the Commission to underlie index warrants or index options traded on the Exchange or another national securities exchange.

Any index warrant listed pursuant to this paragraph shall not be required to meet the requirements of Rule 4430 or 4450. The Exchange may apply additional or more stringent criteria as necessary to protect investors and the public interest.

(e) Reserved

(f) Other Securities

(1) The Exchange will consider listing any security not otherwise covered by the criteria of the Rule 4300 Series, provided the instrument is otherwise suited to trade through the facilities of the Exchange. Such securities will be evaluated for listing against the following criteria:

(A) The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of an issuer which is unable to satisfy the income criteria set forth in the Rule 4300 Series, the Exchange generally will require the issuer to have the following: (i) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

(B) There must be a minimum of 400 holders of the security, provided, however, that if the instrument is traded in \$1,000 denominations, there must be a minimum of 100 holders.

(C) For equity securities listed pursuant to this paragraph, there must be a minimum public distribution of 1,000,000 trading units.

(D) The aggregate market value/principal amount of the security shall be at least \$4 million.

(2) Issuers of securities listed pursuant to this paragraph (f) must also be eligible for listing on the Nasdaq Global Market or the New York Stock Exchange (NYSE) or be an affiliate of a company that is also eligible for listing on the Nasdaq Global Market or the NYSE; provided, however, that the provisions of Rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.

(3) Prior to the commencement of trading of securities listed pursuant to this paragraph, the Exchange will evaluate the nature and complexity of the issue and, if appropriate, distribute a circular to the membership providing guidance

regarding member firm compliance responsibilities and requirements when handling transactions in such securities.

(g) The Exchange will consider listing Selected Equity-linked Debt Securities (SEEDS), pursuant to Rule 19b-4(e) under the Act, that generally meet the criteria of this paragraph (g). SEEDS are limited-term, non-convertible debt securities of an issuer where the value of the debt is based, at least in part, on the value of up to thirty (30) other issuers' common stock or non-convertible preferred stock (or sponsored American Depositary Receipts (ADRs) overlying such equity securities).

(1) Issuer Listing Standards

(A) The issuer of a SEEDS must be an entity that:

(i) is eligible for listing on the Nasdaq Global Market or the New York Stock Exchange (NYSE) or is an affiliate of a company eligible for listing on the Nasdaq Global Market or the NYSE; provided, however, that the provisions of Rule 4450 will be applied to sovereign issuers of SEEDS on a case-by-case basis; and

(ii) has a minimum net worth of \$150 million.

(B) In addition, the market value of a SEEDS offering, when combined with the market value of all other SEEDS offerings previously completed by the issuer and traded on the Exchange or another national securities exchange, may not be greater than 25 percent of the issuer's net worth at the time of issuance.

(2) Equity-Linked Debt Security Listing Standards

The issue must have:

(A) a minimum public distribution of one million SEEDS;

(B) a minimum of 400 holders of the SEEDS, provided, however, that if the SEEDS is traded in \$1,000 denominations, there is no minimum number of holders;

(C) a minimum market value of \$4 million; and

(D) a minimum term of one year.

(3) Minimum Standards Applicable to the Linked Security

An equity security on which the value of the SEEDS is based must:

(A) (i) have a market value of listed securities of at least \$3 billion and a trading volume in the United States of at least 2.5 million shares in the one-year period preceding the listing of the SEEDS;

(ii) have a market value of listed securities of at least \$1.5 billion and a trading volume in the United States of at least 10 million shares in the one-year period preceding the listing of the SEEDS; or

(iii) have a market value of listed securities of at least \$500 million and a trading volume in the United States of at least 15 million shares in the one-year period preceding the listing of the SEEDS.

(B) be issued by a company that has a continuous reporting obligation under the Act, and the security must be listed on the Exchange or another national securities exchange and be subject to last sale reporting; and

(C) be issued by:

(i) a U.S. company; or

(ii) a non-U.S. company (including a company that is traded in the United States through sponsored ADRs) (for purposes of this paragraph (g), a non-U.S. company is any company formed or incorporated outside of the United States) if:

a. the Exchange or its subsidiaries has a comprehensive surveillance sharing agreement in place with the primary exchange in the country where the security is primarily traded (in the case of an ADR, the primary exchange on which the security underlying the ADR is traded);

b. the combined trading volume of the non-U.S. security (a security issued by a non-U.S. company) and other related non-U.S. securities occurring in the U.S. market and in markets with which the Exchange or its subsidiaries has in place a comprehensive surveillance sharing agreement represents (on a share equivalent basis for any ADRs) at least 50% of the combined world-wide trading volume in the non-U.S. security, other related non-U.S. securities, and other classes of common stock related to the non-U.S. security over the six month period preceding the date of listing; or

c. 1. the combined trading volume of the non-U.S. security and other related non-U.S. securities occurring in the U.S. market represents (on a share equivalent basis) at least 20% of the combined world-wide trading volume in the non-U.S. security and in other related non-U.S. securities over the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing.

2. the average daily trading volume for the non-U.S. security in the U.S. markets over the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing is 100,000 or more shares; and

3. the trading volume for the non-U.S. security in the U.S. market is at least 60,000 shares per day for a majority of the trading days for the six-month period preceding the date of selection of the non-U.S. security for a SEEDS listing.

d. If the underlying security to which the SEEDS is to be linked is the stock of a non-U.S. company which is traded in the U.S. market as a sponsored ADR, ordinary shares or otherwise, then the minimum number of holders of the underlying linked security shall be 2,000.

#### (4) Limits on the Number of SEEDS Linked to a Particular Security

(A) The issuance of SEEDS relating to any underlying U.S. security may not exceed five percent of the total outstanding shares of such underlying security. The issuance of SEEDS relating to any underlying non-U.S. security or sponsored ADR may not exceed: (i) two percent of the total shares outstanding worldwide if at least 30 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing;<sup>1</sup> (ii) three percent of the total shares outstanding worldwide if at least 50 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing; (iii) five percent of the total shares outstanding worldwide if at least 70 percent of the worldwide trading volume in such security occurs in the U.S. market during the six-month period preceding the date of listing.

(B) If an issuer proposes to issue SEEDS that relate to more than the allowable percentages of the underlying security specified above, then

the Exchange, with the concurrence of the staff of the Division of Trading and Markets of the Commission, will evaluate the maximum percentage of SEEDS that may be issued on a case-by-case basis.

(5) Prior to the commencement of trading of a particular SEEDS listed pursuant to this subsection, the Exchange or its subsidiaries will distribute a circular to the membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations and account approval) when handling transactions in SEEDS.

(h) Units

(1) Initial and Continued Listing Requirements

(A) All units shall have at least one equity component. All components of such units shall satisfy the requirements for initial and continued listing under the Rule 4300 or 4400 Series, as applicable, or, in the case of debt components, satisfy the requirements of 4420(h)(1)(B).

(B) All debt components of a unit, if any, shall meet the following requirements:

(i) the debt issue must have an aggregate market value or principal amount of at least \$5 million;

(ii) the issuer of the debt security must have equity securities listed on the Exchange; and

(iii) in the case of convertible debt, the equity into which the debt is convertible must itself be subject to real-time last sale reporting in the United States, and the convertible debt must not contain a provision which gives the company the right, at its discretion, to reduce the conversion price for periods of time or from time to time unless the company establishes a minimum period of ten business days within which such price reduction will be in effect.

(C) All components of the unit shall be issued by the same issuer. All units and issuers of such units shall comply with the initial and continued listing requirements under the Rule 4300 or 4400 Series, as applicable.

(2) Minimum Listing Period and Notice of Withdrawal

In the case of units, the minimum listing period of the units shall be 30 days from the first day of listing, except the period may be shortened if the units



are suspended or withdrawn for regulatory purposes. Issuers and underwriters seeking to withdraw units from listing must provide the Exchange with notice of such intent at least 15 days prior to withdrawal.

### (3) Disclosure Requirements for Units

Each issuer of units shall include in its prospectus or other offering document used in connection with any offering of securities that is required to be filed with the Commission under the federal securities laws and the rules and regulations promulgated thereunder a statement regarding any intention to delist the units immediately after the minimum inclusion period. The issuer of a unit shall further provide information regarding the terms and conditions of the components of the unit (including information with respect to any original issue discount or other significant tax attributes of any component) and the ratio of the components comprising the unit. An issuer shall also disclose when a component of the unit is separately listed on the Exchange. These disclosures shall be made on the issuer's website, or if it does not maintain a website, in its annual report provided to unit holders. An issuer shall also immediately publicize through, at a minimum, a public announcement through the news media, any change in the terms of the unit, such as changes to the terms and conditions of any of the components (including changes with respect to any original issue discount or other significant tax attributes of any component), or to the ratio of the components within the unit. Such public notification shall be made as soon as practicable in relation to the effective date of the change.

### (i) Portfolio Depository Receipts

(1) Definitions. The following terms shall, unless the context otherwise requires, have the meanings herein specified:

(A) Portfolio Depository Receipt. The term "Portfolio Depository Receipt" means a security:

(i) that is based on a unit investment trust ("Trust") which holds the securities which comprise an index or portfolio underlying a series of Portfolio Depository Receipts;

(ii) that is issued by the Trust in a specified aggregate minimum number in return for a "Portfolio Deposit" consisting of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above;

(iii) that, when aggregated in the same specified minimum number, may be redeemed from the Trust which will pay to the redeeming holder the stock and/or cash, fixed income securities

and/or cash and/or a combination thereof then comprising the "Portfolio Deposit"; and

(iv) that pays holders a periodic cash payment corresponding to the regular cash dividends or distributions declared with respect to the component securities of the securities index or portfolio of securities underlying the Portfolio Depository Receipts, less certain expenses and other charges as set forth in the Trust prospectus.

(B) Reporting Authority. The term "Reporting Authority" in respect to a particular series of Portfolio Depository Receipts means the Exchange, an affiliate of the Exchange, an institution (including the Trustee for a series of Portfolio Depository Receipts), or a reporting service designated by the Exchange or its affiliate as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value; the current value of the portfolio of securities required to be deposited to the Trust in connection with issuance of Portfolio Depository Receipts; the amount of any dividend equivalent payment or cash distribution to holders of Portfolio Depository Receipts, net asset value, and other information relating to the creation, redemption or trading of Portfolio Depository Receipts.

Nothing in this paragraph shall imply that an institution or reporting service that is the source for calculating and reporting information relating to Portfolio Depository Receipts must be designated by the Exchange; the term "Reporting Authority" shall not refer to an institution or reporting service not so designated.

(C) US Component Stock. The term "US Component Stock" shall mean an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depository Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act.

(D) Non-US Component Stock. The term "Non-US Component Stock" shall mean an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives).

(2) The Exchange requires that members provide to all purchasers of a series of Portfolio Depository Receipts a written description of the terms and characteristics of such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members

shall include such a written description with any sales material relating to a series of Portfolio Depository Receipts that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Portfolio Depository Receipts as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of [the series of Portfolio Depository Receipts] has been prepared by [Trust name] and is available from your broker or NASDAQ OMX BX. It is recommended that you obtain and review such circular before purchasing [the series of Portfolio Depository Receipts]. In addition, upon request you may obtain from your broker a prospectus for [the series of Portfolio Depository Receipts]."

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Portfolio Depository Receipts for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members and member organizations under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Portfolio Depository Receipts.

(3) Equity. The Exchange may approve a series of Portfolio Depository Receipts for listing and trading pursuant to Rule 19b-4(e) under the Act, provided each of the following criteria is satisfied:

(A) Eligibility Criteria for Index Components.

(i) US Index or Portfolio. Upon the initial listing of a series of Portfolio Depository Receipts pursuant to Rule 19b-4(e) under the Act, the component stocks of an index or portfolio of US Component Stocks underlying such series of Portfolio Depository Receipts shall meet the following criteria:

a. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$75 million;

b. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum monthly trading volume during each of the last six months of at least 250,000 shares;

c. The most heavily weighted component stock shall not exceed 30% of the weight of the index or portfolio, and

the five most heavily weighted component stocks shall not exceed 65% of the weight of the index or portfolio;

d. The index or portfolio shall include a minimum of 13 component stocks; and

e. All securities in the index or portfolio shall be US Component Stocks listed on the Exchange or another national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act.

(ii) International or global index or portfolio. Upon the initial listing of a series of Portfolio Depository Receipts pursuant to Rule 19b-4(e) under the Act, the components of an index or portfolio underlying a series of Portfolio Depository Receipts that consist of either only Non-US Component Stocks or both US Component Stocks and Non-US Component Stocks shall meet the following criteria:

a. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$100 million;

b. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares;

c. The most heavily weighted component stock shall not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 60% of the weight of the index or portfolio;

d. The index or portfolio shall include a minimum of 20 component stocks; and

e. Each US Component Stock shall be listed on a national securities exchange and shall be an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, and each Non-US Component Stock shall be listed and traded on an exchange that has last-sale reporting.

(iii) Index or portfolio approved in connection with derivative securities. Upon the initial listing of a series of Portfolio

Depository Receipts pursuant to Rule 19b-4(e) under the Act, the index or portfolio underlying a series of Portfolio Depository Receipts shall have been reviewed and approved for trading of options, Portfolio Depository Receipts, Index Fund Shares, index-linked exchangeable notes, or index-linked securities by the Commission under Section 19(b)(2) of the Act and rules thereunder, and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements with respect to Non-US Component Stocks and the requirements regarding dissemination of information, continue to be satisfied. Each component stock of the index or portfolio shall be either

a. a US Component Stock that is listed on a national securities exchange and is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, or

b. a Non-US Component Stock that is listed and traded on an exchange that has last-sale reporting.

(B) Index Methodology and Calculation.

(i) If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor;

(ii) The current index value for Portfolio Depository Receipts listed pursuant to:

a. Rule 4420(i)(3)(A)(i) will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's regular market session.

b. Rule 4420(i)(3)(A)(ii) will be widely disseminated by one or more major market data vendors at least every 60 seconds during the Exchange's regular market session; or

c. Rule 4420(i)(3)(A)(iii) will be widely disseminated by one or more major market data vendors at least every 15 seconds with respect to indexes containing only US Component Stocks and at least every 60 seconds

with respect to indexes containing Non-US Component Stocks, during the Exchange's regular market session.

If the index value does not change during some or all of the period when trading is occurring on the Exchange (for example, for indexes of Non-US Component Stocks because of time zone differences or holidays in the countries where such indexes' component stocks trade), then the last official calculated index value must remain available throughout the Exchange's trading hours; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index or portfolio composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(C) Disseminated Information. The Reporting Authority will disseminate for each series of Portfolio Depository Receipts an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value") during the Exchange's regular market session. The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value will be updated at least every 15 seconds during the Exchange's regular market session; to reflect changes in the exchange rate between the US dollar and the currency in which any component stock is denominated. If the Intraday Indicative Value does not change during some or all of the period when trading is occurring on the Exchange, then the last official calculated Intraday Indicative Value must remain available throughout the Exchange's trading hours.

(D) Initial Shares Outstanding. A minimum of 100,000 shares of a series of Portfolio Depository Receipts is required to be outstanding at start-up of trading.

(E) Surveillance Procedures. FINRA will implement written surveillance procedures for Portfolio Depository Receipts.

(F) Creation and redemption. For Portfolio Depository Receipts listed pursuant to Rule 4420(i)(3)(A)(ii) or (iii) above, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 for the series of Portfolio Depository Receipts must state that the Trust must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with

redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

(4) Fixed Income. Fixed Income Securities are debt securities that are notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or subdivision thereof. The Exchange may approve a series of Portfolio Depository Receipts based on Fixed Income Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided such portfolio or index: (i) has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and the rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) the following criteria are satisfied:

(A) Eligibility Criteria for Index Components. Upon the initial listing of a series of Portfolio Depository Receipts pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, each component of an index or portfolio that underlies a series of Portfolio Depository Receipts shall meet the following criteria:

(i) The index or portfolio must consist of Fixed Income Securities;

(ii) Components that in aggregate account for at least 75% of the weight of the index or portfolio must have a minimum original principal amount outstanding of \$100 million or more;

(iii) A component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio;

(iv) No component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio;

(v) An underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers; and

(vi) Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

(B) Index Methodology and Calculation.

(i) If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

(ii) The current index value will be widely disseminated by one or more major market data vendors at least once per day; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(5) The Exchange may approve a series of Portfolio Depositary Receipts based on a combination of indexes or an index or portfolio of component securities representing the U.S. equity market, the international equity market, and the fixed income market for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided: (i) each index has been reviewed and approved for the trading of options, Portfolio Depositary Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) each index or portfolio of equity and fixed income component securities separately meets either the criteria set forth in Rule 4420(i)(3) or (4) above.



(A) Index Methodology and Calculation.

(i) If an index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

(ii) The current composite index value will be widely disseminated by one or more major market data vendors at least once every 15 seconds during the regular market session, provided however, that (a) with respect to the Non-US Component Stocks of the combination index, the impact on the index is only required to be updated at least every 60 seconds during the regular market session, and (b) with respect to the fixed income components of the combination index the impact on the index is only required to be updated at least once each day; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(6) The following provisions shall apply to all series of Portfolio Depository Receipts listed pursuant Rules 4420(i)(4) and (5) above:

(A) Disseminated Information. The Reporting Authority will disseminate for each series of Portfolio Depository Receipts an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value"). The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value may be calculated by the Exchange or by an independent third party throughout the day using prices obtained from independent market data providers or other independent pricing sources such as a broker-dealer or price evaluation services.

(B) Initial Shares Outstanding. A minimum of 100,000 shares of a series of Portfolio Depository Receipts is required to be outstanding at start-up of trading.

(C) Surveillance Procedures. FINRA will implement written surveillance procedures for Portfolio Depository Receipts.

(7) Regular market session trading will occur between 9:30 a.m. and either 4:00 p.m. or 4:15 p.m. for each series of Portfolio Depository Receipts, as specified by the Exchange. In addition, the Exchange may designate each series of Portfolio Depository Receipts for trading during a pre-market session beginning at 8:00 a.m. and/or a post-market session ending at 7:00 p.m.

(8) The Exchange may list and trade Portfolio Depository Receipts based on one or more indexes or portfolios. The Portfolio Depository Receipts based on each particular index or portfolio, or combination thereof, shall be designated as a separate series and shall be identified by a unique symbol. The components of an index or portfolio on which Portfolio Depository Receipts are based shall be selected by the Exchange or its agent, an affiliate of the Exchange, or by such other person as shall have a proprietary interest in and authorized use of such index or portfolio, and may be revised from time to time as may be deemed necessary or appropriate to maintain the quality and character of the index or portfolio.

(9) A Trust upon which a series of Portfolio Depository Receipts is based will be listed and traded on the Exchange subject to application of the following criteria:

(A) Initial Listing —

(i) for each Trust, the Exchange will establish a minimum number of Portfolio Depository Receipts required to be outstanding at the time of commencement of trading on the Exchange.

(ii) the Exchange will obtain a representation from the issuer of each series of Portfolio Depository Receipts that the net asset value per share for the series will be calculated daily and will be made available to all market participants at the same time.

(B) Continued Listing —

(i) The Exchange will consider the suspension of trading in or removal from listing of a Trust upon which a series of Portfolio Depository Receipts is based under any of the following circumstances:

a. if , following the initial twelve month period after the formation of a Trust and commencement of trading on the Exchange, the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or

beneficial holders of Portfolio Depository Receipts for 30 or more consecutive trading days;

b. if the value of the index or portfolio of securities on which the Trust is based is no longer calculated or available or the index or portfolio on which the Trust is based is replaced with a new index or portfolio, unless the new index or portfolio meets the requirements of this Rule 4420(i) for listing either pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 (including the filing of a Form 19b-4(e) with the Commission) or by Commission approval of a filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934; or

c. if such other event shall occur or condition exists which in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

Upon termination of a Trust, the Exchange requires that Portfolio Depository Receipts issued in connection with such Trust be removed from listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of securities in the Trust falls below a specified amount.

(C) Term — the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

(D) Voting — voting rights shall be as set forth in the Trust prospectus. The Trustee of a Trust may have the right to vote all of the voting securities of such Trust.

(10) Neither the Exchange, the Reporting Authority nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current index or portfolio value, the current value of the portfolio of securities required to be deposited to the Trust; the amount of any dividend equivalent payment or cash distribution to holders of Portfolio Depository Receipts; net asset value; or other information relating to the creation, redemption or trading of Portfolio Depository Receipts, resulting from any negligent act or omission by the Exchange, the Reporting Authority, or any agent of the Exchange or any act, condition or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any

error, omission or delay in the reports of transactions in one or more underlying securities.

(j) Index Fund Shares

(1) Definitions. The following terms shall, unless the context otherwise requires, have the meanings herein specified:

(A) Index Fund Share. The term "Index Fund Share" means a security:

(i) that is issued by an open-end management investment company based on a portfolio of stocks or fixed income securities or a combination thereof, that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic stock index, fixed income securities index or combination thereof;

(ii) that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above, with a value equal to the next determined net asset value; and

(iii) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof, with a value equal to the next determined net asset value.

(B) (i) The term "Index Fund Share" includes a security issued by an open-end management investment company that seeks to provide investment results that either exceed the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple or that correspond to the inverse (opposite) of the performance of a specified domestic equity, international or global equity, or fixed income index or a combination thereof by a specified multiple. Such a security is issued in a specified aggregate number in return for a deposit of a specified number of shares of stock, a specified portfolio of fixed income securities or a combination of the above and/or cash with a value equal to the next determined net asset value. When aggregated in the same specified minimum number, Index Fund Shares may be redeemed at a holder's request by such

open-end investment company which will pay to the redeeming holder the stock, fixed income securities or a combination thereof and/or cash with a value equal to the next determined net asset value.

(ii) In order to achieve the investment result that it seeks to provide, such an investment company may hold a combination of financial instruments, including, but not limited to, stock index futures contracts; options on futures contracts; options on securities and indices; equity caps, collars and floors; swap agreements; forward contracts; repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), but only to the extent and in the amounts or percentages as set forth in the registration statement for such Index Fund Shares.

(iii) Any open-end management investment company which issues Index Fund Shares referenced in this subparagraph (1)(B) that seeks to provide investment results, before fees and expenses, in an amount that exceeds -200% of the percentage performance on a given day of a particular domestic equity, international or global equity or fixed income securities index or a combination thereof shall not be approved by the Exchange for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934.

(iv) For the initial and continued listing of a series of Index Fund Shares referenced in the provisions of this subparagraph (1)(B), the following requirements must be adhered to:

Daily public website disclosure of portfolio holdings that will form the basis for the calculation of the net asset value by the issuer of such series, including, as applicable, the following instruments:

a. The identity and number of shares held of each specific equity security;

b. The identity and amount held for each specific fixed income security;

c. The specific types of Financial Instruments and characteristics of such Financial Instruments; and

d. Cash equivalents and the amount of cash held in the portfolio.

If the Exchange becomes aware that the net asset value related to Index Fund Shares included in the provisions of this subparagraph

(1)(B) is not being disseminated to all market participants at the same time or the daily public website disclosure of portfolio holdings does not occur, the Exchange shall halt trading in such series of Index Fund Share, as appropriate. The Exchange may resume trading in such Index Fund Shares only when the net asset value is disseminated to all market participants at the same time or the daily public website disclosure of portfolio holdings occurs, as appropriate.

(C) Reporting Authority. The term "Reporting Authority" in respect of a particular series of Index Fund Shares means the Exchange, an affiliate of the Exchange, or an institution or reporting service designated by the Exchange or its affiliate as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value; the current value of the portfolio of any securities required to be deposited in connection with issuance of Index Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Index Fund Shares, net asset value, and other information relating to the issuance, redemption or trading of Index Fund Shares.

Nothing in this paragraph shall imply that an institution or reporting service that is the source for calculating and reporting information relating to Index Fund Shares must be designated by the Exchange; the term "Reporting Authority" shall not refer to an institution or reporting service not so designated.

(D) US Component Stock. The term "US Component Stock" shall mean an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depository Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act.

(E) Non-US Component Stock. The term "Non-US Component Stock" shall mean an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives).

(2) The Exchange requires that members provide to all purchasers of a series of Index Fund Shares a written description of the terms and characteristics of such securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series

of Index Fund Shares that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Index Fund Shares as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of [the series of Index Fund Shares] has been prepared by the [open-end management investment company name] and is available from your broker or NASDAQ OMX BX. It is recommended that you obtain and review such circular before purchasing [the series of Index Fund Shares]. In addition, upon request you may obtain from your broker a prospectus for [the series of Index Fund Shares]."

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Index Fund Shares for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members and member organizations under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Index Fund Shares.

(3) Equity. The Exchange may approve a series of Index Fund Shares for listing and trading pursuant to Rule 19b-4(e) under the Act provided each of the following criteria is satisfied:

(A) Eligibility Criteria for Index Components.

(i) US Index or Portfolio. Upon the initial listing of a series of Index Fund Shares pursuant to 19b-4(e) under the Act, the component stocks of an index or portfolio of US Component Stocks underlying a series of Index Fund Shares shall meet the following criteria:

a. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$75 million;

b. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum monthly trading volume during each of the last six months of at least 250,000 shares;

c. The most heavily weighted component stock shall not exceed 30% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 65% of the weight of the index or portfolio;

d. The index or portfolio shall include a minimum of 13 component stocks; and

e. All securities in the index or portfolio shall be US Component Stocks listed on the Exchange or another national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act.

(ii) International or global index or portfolio. Upon the initial listing of a series of Index Fund Shares pursuant to Rule 19b-4(e) under the Act, the components of an index or portfolio underlying a series of Index Fund Shares that consist of either only Non-US Component Stocks or both US Component Stocks and Non-US Component Stocks shall meet the following criteria:

a. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum market value of at least \$100 million;

b. Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each shall have a minimum worldwide monthly trading volume during each of the last six months of at least 250,000 shares;

c. The most heavily weighted component stock shall not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks shall not exceed 60% of the weight of the index or portfolio;

d. The index or portfolio shall include a minimum of 20 component stocks; and

e. Each US Component Stock shall be listed on a national securities exchange and shall be an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, and each Non-US Component Stock shall be listed and traded on an exchange that has last-sale reporting.

(iii) Index or portfolio approved in connection with derivative securities. Upon the initial listing of a series of Index Fund Shares pursuant to Rule 19b-4(e) under the Act, the index or portfolio underlying a series of Index Fund Shares shall have been reviewed and approved for trading of options, Portfolio Depository



Receipts, Index Fund Shares, index-linked exchangeable notes, or index-linked securities by the Commission under Section 19(b)(2) of the Act and rules thereunder, and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements with respect to Non-US Component Stocks and the requirements regarding dissemination of information, continue to be satisfied. Each component stock of the index or portfolio shall be either

a. a US Component Stock that is listed on a national securities exchange and is an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, or

b. a Non-US Component Stock that is listed and traded on an exchange that has last-sale reporting.

(B) Index Methodology and Calculation

(i) If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor;

(ii) The current index value for Index Fund Shares listed pursuant to:

a. Rule 4420(j)(3)(A)(i) will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's regular market session;

b. Rule 4420(j)(3)(A)(ii) will be widely disseminated by one or more major market data vendors at least every 60 seconds during the Exchange's regular market session; or

c. Rule 4420(j)(3)(A)(iii) will be widely disseminated by one or more major market data vendors at least every 15 seconds with respect to indexes containing only US Component Stocks and at least every 60 seconds with respect to indexes containing Non-US Component Stocks, during the Exchange's regular market session

If the index value does not change during some or all of the period when trading is occurring on the Exchange (for example, for

indexes of Non-US Component Stocks because of time zone differences or holidays in the countries where such indexes' component stocks trade), then the last official calculated index value must remain available throughout the Exchange's trading hours; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index or portfolio composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(C) Disseminated Information. The Reporting Authority will disseminate for each series of Index Fund Shares an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value") during the Exchange's regular market session. The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value will be updated at least every 15 seconds during the Exchange's regular market session; to reflect changes in the exchange rate between the US dollar and the currency in which any component stock is denominated. If the Intraday Indicative Value does not change during some or all of the period when trading is occurring on the Exchange, then the last official calculated Intraday Indicative Value must remain available throughout the Exchange's trading hours.

(D) Initial Shares Outstanding. A minimum of 100,000 shares of a series of Index Fund Shares is required to be outstanding at start-up of trading.

(E) Surveillance Procedures. FINRA will implement written surveillance procedures for Index Fund Shares.

(F) Creation and redemption. For Index Fund Shares listed pursuant to Rule 4420(j)(3)(A)(ii) or (iii) above, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 for the series of Index Fund Shares must state that the series of Index Fund Shares must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

(4) Fixed Income. Fixed Income Securities are debt securities that are notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or subdivision thereof. The Exchange may approve a series of Index Fund Shares based on Fixed Income Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided such portfolio or index: (i) has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and the rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) the following criteria are satisfied:

(A) Eligibility Criteria for Index Components. Upon the initial listing of Index Fund Shares pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, each component of an index or portfolio that underlies a series of Index Fund Shares shall meet the following criteria:

(i) The index or portfolio must consist of Fixed Income Securities;

(ii) Components that in aggregate account for at least 75% of the weight of the index or portfolio must have a minimum original principal amount outstanding of \$100 million or more;

(iii) A component may be a convertible security, however, once the convertible security component converts to an underlying equity security, the component is removed from the index or portfolio;

(iv) No component fixed-income security (excluding Treasury Securities) will represent more than 30% of the weight of the index or portfolio, and the five highest weighted component fixed-income securities do not in the aggregate account for more than 65% of the weight of the index or portfolio;

(v) An underlying index or portfolio (excluding exempted securities) must include securities from a minimum of 13 non-affiliated issuers; and

(vi) Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either: (a) from issuers that are required to file reports pursuant to Sections 13

and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) from issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

(B) Index Methodology and Calculation.

(i) If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

(ii) The current index value will be widely disseminated by one or more major market data vendors at least once per day; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(5) The Exchange may approve a series of Index Fund Shares based on a combination of indexes or an index or portfolio of component securities representing the U.S. equity market, the international equity market, and the fixed income market for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 provided: (i) such portfolio or combination of indexes has been reviewed and approved for the trading of options, Portfolio Depository Receipts, Index Fund Shares, Index-Linked Exchangeable Notes or Index-Linked Securities by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or (ii) each index or portfolio of equity and fixed income component securities separately meets either the criteria set forth in Rule 4420(j)(3) or (4) above.

(A) Index Methodology and Calculation.

(i) If an index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index;

(ii) The current composite index value will be widely disseminated by one or more major market data vendors at least once every 15 seconds during regular market session, provided however, that (a) with respect to the Non-US Component Stocks of the combination index, the impact on the index is only required to be updated at least every 60 seconds during the regular market session, and (b) with respect to the fixed income components of the combination index the impact on the index is only required to be updated at least once each day; and

(iii) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.

(6) The following provisions shall apply to all series of Index Fund Shares listed pursuant Rules 4420(j)(4) and (5) above:

(A) Disseminated Information. The Reporting Authority will disseminate for each series of Index Fund Shares an estimate, updated at least every 15 seconds, of the value of a share of each series (the "Intraday Indicative Value"). The Intraday Indicative Value may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value. The Intraday Indicative Value may be calculated by the Exchange or by an independent third party throughout the day using prices obtained from independent market data providers or other independent pricing sources such as a broker-dealer or price evaluation services.

(B) Initial Shares Outstanding. A minimum of 100,000 shares of a series of Index Fund Shares is required to be outstanding at start-up of trading.

(C) Surveillance Procedures. FINRA will implement written surveillance procedures for Index Fund Shares.

(7) Regular market session trading will occur between 9:30 a.m. and either 4:00 p.m. or 4:15 p.m. for each series of Index Fund Shares, as specified by the Exchange. In addition, the Exchange may designate each series of Index Fund Shares for trading during a pre-market session beginning at 8:00 a.m. and/or a post-market session ending at 7:00 p.m.

(8) The Exchange may list and trade Index Fund Shares based on one or more foreign or domestic indexes or portfolios. Each issue of Index Fund Shares based on each particular index or portfolio, or combination thereof, shall be designated as a separate series and shall be identified by a unique symbol. The components that are included in an index or portfolio on which a series of Index Fund Shares are based shall be selected by such person, which may be the Exchange or an agent or wholly-owned subsidiary thereof, as shall have authorized use of such index or portfolio. Such index or portfolio may be revised from time to time as may be deemed necessary or appropriate to maintain the quality and character of the index or portfolio.

(9) Each series of Index Fund Shares will be listed and traded on the Exchange subject to application of the following criteria:

(A) Initial Listing —

(i) for each series, the Exchange will establish a minimum number of Index Fund Shares required to be outstanding at the time of commencement of trading on the Exchange.

(ii) The Exchange will obtain a representation from the issuer of each series of Index Fund Shares that the net asset value per share for the series will be calculated daily and will be made available to all market participants at the same time.

(B) Continued Listing —

(i) The Exchange will consider the suspension of trading in or removal from listing of a series of Index Fund Shares under any of the following circumstances:

a.if, following the initial twelve month period after commencement of trading on the Exchange of a series of Index Fund Shares, there are fewer than 50 beneficial holders of the series of Index Fund Shares for 30 or more consecutive trading days;

b. if the value of the index or portfolio of securities on which the series of Index Fund Shares is based is no longer calculated or available or the index or portfolio on which the series of Index Fund Shares is based is replaced with a new index or portfolio, unless the new index or portfolio meets the requirements of this Rule 4420(j) for listing either pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934 (including the filing of a Form 19b-4(e) with the Commission) or by Commission approval of a

filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934; or

c. if such other event shall occur or condition exists which in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

Upon termination of an open-end management investment company, the Exchange requires that Index Fund Shares issued in connection with such entity be removed from listing.

(C) Voting — voting rights shall be as set forth in the applicable open-end management investment company prospectus.

(10) Neither the Exchange, the Reporting Authority, nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current index or portfolio value, the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Index Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Index Fund Shares; net asset value; or other information relating to the purchase, redemption or trading of Index Fund Shares, resulting from any negligent act or omission by the Exchange, the Reporting Authority or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in one or more underlying securities.

(k) Reserved

(l) Trust Issued Receipts

(1) Definition. The term "Trust Issued Receipt" means a security (a) that is issued by a trust ("Trust") which holds specified securities deposited with the Trust; (b) that, when aggregated in some specified minimum number, may be surrendered to the trust by the beneficial owner to receive the securities; and (c) that pays beneficial owners dividends and other distributions on the deposited securities, if any are declared and paid to the trustee by an issuer of the deposited securities.

(2) The Exchange requires that members provide to all purchasers of newly issued Trust Issued Receipts a prospectus for the series of Trust Issued Receipts.

(3) The eligibility requirements for component securities that are represented by a series of Trust Issued Receipts and that became part of the Trust Issued Receipt when the security was either: (a) distributed by a company already included as a component security in the series of Trust Issued Receipts; or (b) received in exchange for the securities of a company previously included as a component security that is no longer outstanding due to a merger, consolidation, corporate combination or other event, shall be as follows:

(A) the component security must be listed on the Exchange or another national securities exchange;

(B) the component security must be registered under Section 12 of the Act; and

(C) the component security must have a Standard & Poor's Sector Classification that is the same as the Standard & Poor's Sector Classification represented by the component securities included in the Trust Issued Receipt at the time of the distribution or exchange.

(4) Transactions in Trust Issued Receipts may be effected until 4:00 p.m. each business day.

(5) The Exchange may list and trade Trust Issued Receipts based on one or more securities. The Trust Issued Receipts based on particular securities shall be designated as a separate series and shall be identified by a unique symbol. The securities that are included in a series of Trust Issued Receipts shall be selected by the Exchange or its agent, an affiliate of the Exchange, or by such other person as shall have a proprietary interest in such Trust Issued Receipts.

(6) Trust Issued Receipts will be listed and traded on the Exchange subject to application of the following criteria:

(A) Initial Listing — for each Trust, the Exchange will establish a minimum number of Trust Issued Receipts required to be outstanding at the time of the commencement of trading on the Exchange.

(B) Continued Listing — following the initial twelve month period following formation of a Trust and commencement of trading on the Exchange, the Exchange will consider the suspension of trading in or removal from listing of a Trust upon which a series of Trust Issued Receipts is based under any of the following circumstances:

(i) if the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial



holders of Trust Issued Receipts for 30 or more consecutive trading days;

(ii) if the Trust has fewer than 50,000 receipts issued and outstanding;

(iii) if the market value of all receipts issued and outstanding is less than \$1 million; or

(iv) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

Upon termination of a Trust, the Exchange requires that Trust Issued Receipts issued in connection with such Trust be removed from listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of securities in the Trust falls below a specified amount.

(C) Term — the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

(D) Trustee — the following requirements apply:

(i) the trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

(ii) no change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

(E) Voting — voting rights shall be as set forth in the Trust prospectus.

(7) Unit of Trading — transactions in Trust Issued Receipts may only be made in round lots of 100 receipts or round lot multiples.

(8) The Exchange may approve a series of Trust Issued Receipts for listing and trading on the Exchange pursuant to Rule 19b-4(e) under the Act, provided each of the component securities satisfies the following criteria:

(A) each component security must be registered under Section 12 of the Act;

(B) each component security must have a minimum public float of at least \$150 million;

(C) each component security must be listed on the Exchange or another national securities exchange;

(D) each component security must have an average daily trading volume of at least 100,000 shares during the preceding sixty-day trading period;

(E) each component security must have an average daily dollar value of shares traded during the preceding sixty-day trading period of at least \$1 million; and

(F) the most heavily weighted component security may not initially represent more than 20% of the overall value of the Trust Issued Receipt.

(m) Securities Linked to the Performance of Indexes and Commodities (Including Currencies)

The Exchange will consider for listing and trading equity index-linked securities (“Equity Index-Linked Securities) and commodity-linked securities (“Commodity-Linked Securities” and, together with Equity Index-Linked Securities, “Linked Securities”) that in each case meet the applicable criteria of this Rule. Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying equity index or indexes. The payment at maturity with respect to Commodity-Linked Securities is based on one or more physical Commodities or Commodity futures, options or other Commodity derivatives, Commodity-Related Securities, or a basket or index of any of the foregoing (any such basis for payment is referred to below as the “Reference Asset”). The terms “Commodity” and “Commodity-Related Security” are defined in Rule 4630.

Linked Securities may or may not provide for the repayment of the original principal investment amount. The Exchange may submit a rule filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 to permit the listing and trading of Linked Securities that do not otherwise meet the standards set forth below in paragraphs (1) through (12). The Exchange will consider Linked Securities for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, provided:

(1) Both the issue and the issuer of such security meet the criteria for other securities set forth in paragraph (f) of this rule, except that if the security is traded in \$1,000 denominations or is redeemable at the option of holders thereof on at

least a weekly basis, then no minimum number of holders and no minimum public distribution of trading units shall be required.

(2) The issue has a term of not less than one (1) year and not greater than thirty (30) years.

(3) The issue must be the non-convertible debt of the issuer.

(4) The payment at maturity may or may not provide for a multiple of the direct or inverse performance of an underlying index, indexes or Reference Asset; however, in no event will a loss (negative payment) at maturity be accelerated by a multiple that exceeds twice the performance of an underlying index, indexes or Reference Asset.

(5) The issuer will be expected to have a minimum tangible net worth in excess of \$250,000,000 and to exceed by at least 20% the earnings requirements set forth in paragraph (a)(1) of this Rule. In the alternative, the issuer will be expected: (i) to have a minimum tangible net worth of \$150,000,000 and to exceed by at least 20% the earnings requirement set forth in paragraph (a)(1) of this Rule, and (ii) not to have issued securities where the original issue price of all the issuer's other index-linked note offerings (combined with index-linked note offerings of the issuer's affiliates) listed on a national securities exchange exceeds 25% of the issuer's net worth.

(6) The issuer is in compliance with Rule 10A-3 under the Securities Exchange Act of 1934.

(7) Equity Index Criteria—In the case of an Equity Index-Linked Security, each underlying index is required to have at least ten (10) component securities. In addition, the index or indexes to which the security is linked shall either

(A) have been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of the 1934 Act and rules thereunder and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements for non-U.S. stocks, continue to be satisfied, or

(B) the index or indexes meet the following criteria:

(i) Each component security has a minimum market value of at least \$75 million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least \$50 million;

(ii) Each component security shall have trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;

(iii) Indexes based upon the equal-dollar or modified equal-dollar weighting method will be rebalanced at least semiannually;

(iv) In the case of a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;

(v) No underlying component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 component securities);

(vi) 90% of the index's numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading on a national securities exchange or a national securities association, provided, however, that an index will not be subject to this requirement if (a) no underlying component security represents more than 10% of the dollar weight of the index and (b) the index has a minimum of 20 components;

(vii) All component securities shall be either (A) securities (other than securities of a foreign issuer and American Depositary Receipts ("ADRs")) that are (i) issued by a 1934 Act reporting company or by an investment company registered under the Investment Company Act of 1940 that, in each case, has securities listed on a national securities exchange and (ii) an "NMS stock" (as defined in Rule 600 of SEC Regulation NMS) or (B) securities of a foreign issuer or ADRs, provided that securities of a foreign issuer (including when they underlie ADRs) whose primary trading market outside the United States is not a member of the Intermarket Surveillance Group ("ISG") or a party to a comprehensive surveillance sharing agreement with the Exchange

will not in the aggregate represent more than 20% of the dollar weight of the index.

(8) Reference Asset Criteria—In the case of a Commodity-Linked Security, the Reference Asset shall meet the criteria in either subparagraph (A) or subparagraph (B) below:

(A) The Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Commodity-Related Securities or options or other derivatives by the Commission under Section 19(b)(2) of the 1934 Act and rules thereunder and the conditions set forth in the Commission's approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied.

(B) The pricing information for each component of a Reference Asset other than a Currency must be derived from a market which is an ISG member or affiliate or with which the Exchange has a comprehensive surveillance sharing agreement. Notwithstanding the previous sentence, pricing information for gold and silver may be derived from the London Bullion Market Association. The pricing information for each component of a Reference Asset that is a Currency must be either (1) the generally accepted spot price for the currency exchange rate in question or (2) derived from a market which (x) is an ISG member or affiliate or with which the Exchange has a comprehensive surveillance sharing agreement and (y) is the pricing source for a currency component of a Reference Asset that has previously been approved by the Commission. A Reference Asset may include components representing not more than 10% of the dollar weight of such Reference Asset for which the pricing information is derived from markets that do not meet the requirements of this subparagraph (B), provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Reference Asset. The term "Currency," as used in this subparagraph, shall mean one or more currencies, or currency options, futures, or other currency derivatives, Commodity-Related Securities if their underlying Commodities are currencies or currency derivatives, or a basket or index of any of the foregoing.

(9) Maintenance and Dissemination—(i) If the index is maintained by a broker-dealer, the broker-dealer shall erect a "firewall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer. (ii) Unless the Commission order applicable under clause 7(A) or 8(A) hereof provides otherwise, the current value of the index or the Reference Asset (as applicable) will be widely disseminated at least every 15 seconds during the Exchange's regular market session, except as provided in the next clause (iii). (iii) The values of the following indexes need not be calculated and widely

disseminated at least every 15 seconds if, after the close of trading, the indicative value of the Equity Index-Linked Security based on one or more of such indexes is calculated and disseminated to provide an updated value: CBOE S&P 500 BuyWrite Index(sm), CBOE DJIA Buy Write Index(sm), CBOE Nasdaq-100 BuyWrite Index(sm). (iv) If the value of a Linked Security is based on more than one index, then the dissemination requirement of this paragraph 9 applies to the composite value of such indexes. (v) In the case of a Commodity-Linked Security that is periodically redeemable, the indicative value of the subject Commodity-Linked Security must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the Exchange's regular market session.

(10) Trading Halts. In the case of Commodity-Linked Securities, if the indicative value (if required to be disseminated) or the Reference Asset value is not being disseminated as required, or, in the case of Equity Index-Linked Securities, if the value of the index is not being disseminated as required, the Exchange may halt trading during the day on which such interruption occurs. The Exchange will halt trading no later than the beginning of trading following the trading day when the interruption commenced if such interruption persists at this time.

(11) Surveillance Procedures. FINRA will implement on behalf of the Exchange written surveillance procedures for Linked Securities. The Exchange will enter into adequate comprehensive surveillance sharing agreements for non-U.S. securities, as applicable.

(12) Linked Securities will be treated as equity instruments. Furthermore, for the purpose of fee determination, Linked Securities shall be deemed and treated as Other Securities.

(n) FINRA

The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions described in this Rule on behalf of the Exchange. Functions performed by FINRA, FINRA departments, and FINRA staff under Rule 4420 are being performed by FINRA on behalf of the Exchange. Notwithstanding the fact that the Exchange has entered into the Regulatory Contract with FINRA to perform some of the Exchange's functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions.

(o) Managed Fund Shares

(1) The Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Managed Fund Shares that meet the criteria of Rule 4420(o).

(2) Applicability. Rule 4420(o) is applicable only to Managed Fund Shares. Except to the extent inconsistent with Rule 4420(o), or unless the context otherwise requires, the rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Managed Fund Shares are included within the definition of "security" or "securities" as such terms are used in the Equity Rules.

(A) The Exchange will file separate proposals under Section 19(b) of the Act before the listing and/or trading of Managed Fund Shares.

(B) Transactions in Managed Fund Shares will occur throughout the Exchange's trading hours.

(C) Minimum Price Variance. The minimum price variation for quoting and entry of orders in Managed Fund Shares is \$0.01.

(D) Surveillance Procedures. The Exchange will implement written surveillance procedures for Managed Fund Shares.

(E) Creation and Redemption. For Managed Fund Shares based on an international or global portfolio, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 for the series of Managed Fund Shares must state that such series must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933.

(3) Definitions. The following terms as used in the Rules shall, unless the context otherwise requires, have the meanings herein specified:

(A) Managed Fund Share. The term "Managed Fund Share" means a security that (a) represents an interest in a registered investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value; and (c) when aggregated in the same specified minimum number, may be

redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined net asset value.

(B) Disclosed Portfolio. The term "Disclosed Portfolio" means the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day.

(C) Intraday Indicative Value. The term "Intraday Indicative Value" is the estimated indicative value of a Managed Fund Share based on current information regarding the value of the securities and other assets in the Disclosed Portfolio.

(D) Reporting Authority. The term "Reporting Authority" in respect of a particular series of Managed Fund Shares means the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Managed Fund Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Intraday Indicative Value; the Disclosed Portfolio; the amount of any cash distribution to holders of Managed Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Managed Fund Shares. A series of Managed Fund Shares may have more than one Reporting Authority, each having different functions.

(4) Initial and Continued Listing -- Managed Fund Shares will be listed and traded on the Exchange subject to application of the following criteria:

(A) Initial Listing -- Each series of Managed Fund Shares will be listed and traded on the Exchange subject to application of the following initial listing criteria:

(i) For each series, the Exchange will establish a minimum number of Managed Fund Shares required to be outstanding at the time of commencement of trading on the Exchange.

(ii) Nasdaq will obtain a representation from the issuer of each series of Managed Fund Shares that the net asset value per share for the series will be calculated daily and that the net asset value and the Disclosed Portfolio will



be made available to all market participants at the same time.

(B) Continued Listing -- Each series of Managed Fund Shares will be listed and traded on the Exchange subject to application of the following continued listing criteria:

(i) Intraday Indicative Value. The Intraday Indicative Value for Managed Fund Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on the Exchange.

(ii) Disclosed Portfolio.

(a) The Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

(b) The Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

(iii) Suspension of trading or removal. The Exchange will consider the suspension of trading in or removal from listing of a series of Managed Fund Shares under any of the following circumstances:

(a) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of Managed Fund Shares for 30 or more consecutive trading days;

(b) if the value of the Intraday Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time;

(c) if the Investment Company issuing the Managed Fund Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in

compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Fund Shares; or

(d) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on Nasdaq inadvisable.

(iv) Trading Halt. If the Intraday Indicative Value of a series of Managed Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Fund Shares is trading on the Exchange pursuant to unlisted trading privileges, the Exchange will halt trading in that series as specified in Rules 4120 and 4121. In addition, if the Exchange becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.

(v) Termination. Upon termination of an Investment Company, the Exchange requires that Managed Fund Shares issued in connection with such entity be removed from listing on the Exchange.

(vi) Voting. Voting rights shall be as set forth in the applicable Investment Company prospectus.

(5) Limitation of Liability. Neither the Exchange, the Reporting Authority, nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current portfolio value; the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Managed Fund Shares; the amount of any dividend equivalent payment or cash distribution to holders of Managed Fund Shares; net asset value; or other information relating to the purchase, redemption, or trading of Managed Fund Shares, resulting from any negligent act or omission by the

Exchange, the Reporting Authority or any agent of the Exchange, or any act, condition, or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.

(6) Disclosures. The provisions of this subparagraph apply only to series of Managed Fund Shares that are the subject of an order by the Securities and Exchange Commission exempting such series from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 and are not otherwise subject to prospectus delivery requirements under the Securities Act of 1933. The Exchange will inform its members regarding application of these provisions of this subparagraph to a particular series of Managed Fund Shares by means of an information circular prior to commencement of trading in such series.

The Exchange requires that members provide to all purchasers of a series of Managed Fund Shares a written description of the terms and characteristics of those securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series of Managed Fund Shares that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of Managed Fund Shares as an investment vehicle must include a statement in substantially the following form: "A circular describing the terms and characteristics of (the series of Managed Fund Shares) has been prepared by the (open-end management investment company name) and is available from your broker. It is recommended that you obtain and review such circular before purchasing (the series of Managed Fund Shares)"

A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of Managed Fund Shares for such omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members under this rule.

Upon request of a customer, a member shall also provide a prospectus for the particular series of Managed Fund Shares.

(7) If the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio. Personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio.

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<sup>1</sup> The two percent limit, based on 20 percent of the worldwide trading volume in the non-U.S. security or sponsored ADR, applies only if there is a comprehensive surveillance sharing agreement in place with the primary exchange in the country where the security is primarily traded (in the case of an ADR, the primary exchange on which the security underlying the ADR is traded). If there is no such agreement, subparagraph (3) above requires that the combined trading volume of such security and other related securities occurring in the U.S. market represents (on a share equivalent basis for any ADRs) at least 50% of the combined world-wide trading volume in such security, other related securities, and other classes of common stock related to such security over the six month period preceding the date of listing.

**4425. Reserved**

**4426. Reserved**

**4427. Reserved**

**4430. Limited Partnership Rollup Listing Criteria**

An issuer that is formed as a result of a limited partnership rollup transaction, as defined in Rule 4200, must meet the criteria set forth below in order to be listed:

(a) The limited partnership rollup transaction must provide for the right of dissenting limited partners:

(1) to receive compensation for their limited partnership units based on an appraisal of the limited partnership assets performed by an independent appraiser unaffiliated with the sponsor or general partner of the program which values the assets as if sold in an orderly manner in a reasonable period of time, plus or minus other balance sheet items, and less the cost of sale or refinancing and in a manner consistent with the appropriate industry practice. Compensation to dissenting limited partners of limited partnership rollup transactions may be cash, secured debt instruments, unsecured debt instruments, or freely-tradeable securities; provided, however, that:

(A) limited partnership rollup transactions which utilize debt instruments as compensation must provide for a trustee and an indenture to protect the rights of the debt holders and provide a rate of interest equal to at least 120% of the applicable federal rate as determined in accordance with Section 1274 of the Internal Revenue Code of 1986;

(B) limited partnership rollup transactions which utilize unsecured debt instruments as compensation, in addition to the requirements of subparagraph (A), above, must limit total leverage to 70% of the appraised value of the assets;

(C) all debt securities must have a term no greater than 8 years and provide for prepayment with 80% of the net proceeds of any sale or refinancing of the assets previously owned by the partnership entities subject to the limited partnership rollup transaction or any part thereof; and

(D) freely-tradeable securities utilized as compensation to dissenting limited partners must be issued by a company listed on the Exchange or another national securities exchange prior to the limited partnership rollup transaction, and the number of securities to be received in return for limited partnership interests must be determined in relation to the average last sale price of the freely-tradeable securities in the 20-day period following the date of the meeting at which the vote on the limited partnership rollup transaction occurs. If the issuer of the freely-tradeable securities is affiliated with the sponsor or general partner, newly issued securities to be utilized as compensation to dissenting limited partners shall not represent more than 20 percent of the issued and outstanding shares of that class of securities after giving effect to the issuance. For purposes of the preceding sentence, a sponsor or general partner is "affiliated" with the issuer of the freely tradeable securities if the sponsor or general partner receives any material compensation from the issuer or its affiliates in conjunction with the limited partnership rollup transaction or the purchase of the general partner's interest; provided, however, that nothing herein shall restrict the ability of a sponsor or general partner to receive any payment for its equity interests and compensation as otherwise provided by this Rule;

(2) to receive or retain a security with substantially the same terms and conditions as the security originally held. Securities received or retained will be considered to have the same terms and conditions as the security originally held if:

(A) there is no material adverse change to dissenting limited partners' rights with respect to the business plan or the investment, distribution and liquidation policies of the limited partnership; and

(B) the dissenting limited partners receive substantially the same rights, preferences and priorities as they had pursuant to the security originally held; or

(3) to receive other comparable rights including, but not limited to:

(A) approval of the limited partnership rollup transaction by 75% of the outstanding units of each of the individual participating limited partnerships and the exclusion of any individual limited partnership from the limited partnership rollup transaction which fails to reach the 75% threshold. The third-party appointed to tabulate votes and dissents pursuant to paragraph (b)(2)(D) of this Rule shall submit the results of such tabulation to the Exchange.

(B) review of the limited partnership rollup transaction by an independent committee of persons not affiliated with the general partner(s) or sponsor. Whenever utilized, the independent committee:

(i) shall be approved by a majority of the outstanding securities of each of the participating partnerships;

(ii) shall have access to the books and records of the partnerships;

(iii) shall prepare a report to the limited partners subject to the limited partnership rollup transaction that presents its findings and recommendations, including any minority views;

(iv) shall have the authority to negotiate the proposed transaction with the general partner or sponsor on behalf of the limited partners, but not the authority to approve the transaction on behalf of the limited partners;

(v) shall not deliberate for a period longer than 60 days, although extensions will be permitted if unanimously agreed upon by the members of the independent committee or if approved by the Exchange;

(vi) may be compensated and reimbursed by the limited partnerships subject to the limited partnership rollup transaction and shall have the ability to retain independent counsel and financial advisors to represent all limited partners at the limited partnerships' expense provided the fees are reasonable; and

(vii) shall be entitled to indemnification to the maximum extent permitted by law from the limited partnerships subject to the limited partnership rollup transaction from claims, causes of action or lawsuits related to any action or decision made in furtherance of their responsibilities; provided, however, that general partners or sponsors may also agree to indemnify the independent committee; or

(C) any other comparable rights for dissenting limited partners proposed by general partners or sponsors, provided, however, that the general partner(s) or sponsor demonstrates to the satisfaction of the Exchange or, if the Exchange determines appropriate, to the satisfaction of an independent committee, that the rights proposed are comparable.

(b) Regardless of whether a limited partnership rollup transaction meets the requirements set forth in paragraph (a) above, a limited partnership rollup transaction will not be listed:

(1) if the general partner(s):

(A) converts an equity interest in any limited partnership(s) subject to a limited partnership rollup transaction for which consideration was not paid and which was not otherwise provided for in the limited partnership agreement and disclosed to limited partners, into a voting interest in the new entity (provided, however, an interest originally obtained in order to comply with the provisions of Internal Revenue Service Revenue Procedure 89-12 may be converted);

(B) fails to follow the valuation provisions, if any, in the limited partnership agreements of the subject limited partnerships when valuing their limited partnership interests; or

(C) utilizes a future value of their equity interest rather than the current value of their equity interest, as determined by an appraisal conducted in a manner consistent with paragraph (a)(1) of this Rule, when determining their interest in the new entity;

(2) as to voting rights, if:

(A) the voting rights in the entity resulting from a limited partnership rollup transaction do not generally follow the original voting rights of the limited partnerships participating in the limited partnership rollup transaction; provided, however, that changes to voting rights may be effected if the Exchange determines that such changes are not unfair or if the changes are approved by an independent committee;

(B) a majority of the interests in an entity resulting from a limited partnership rollup transaction may not, without concurrence by the sponsor, general partner(s), board of directors, trustee, or similar governing entity, depending on the form of entity and to the extent not inconsistent with state law, vote to:

(i) amend the limited partnership agreement, articles of incorporation or by-laws, or indenture;

(ii) dissolve the entity;

(iii) remove the general partner, board of directors, trustee or similar governing entity, and elect a new general partner, board of directors, trustee or similar governing entity; or

(iv) approve or disapprove the sale of substantially all of the assets of the entity;

(C) the general partner(s) or sponsor(s) proposing a limited partnership rollup transaction do not provide each person whose equity interest is subject to the transaction with a document which instructs the person on the proper procedure for voting against or dissenting from the rollup; or

(D) the general partner(s) or sponsor(s) does not utilize an independent third party to receive and tabulate all votes and dissents in connection with the limited partnership rollup transaction, and require that the third party make the tabulation available to the general partner and any limited partner upon request at any time during and after voting occurs;

(3) as to transaction costs, if:

(A) transaction costs of a rejected limited partnership rollup transaction are not apportioned between general and limited partners of the subject limited partnerships according to the final vote on the proposed transaction as follows:

(i) the general partner(s) or sponsor(s) bear all transaction costs in proportion to the total number of abstentions and votes to reject the limited partnership rollup transaction; and

(ii) limited partners bear transaction costs in proportion to the number of votes to approve the limited partnership rollup transaction; or



(B) individual limited partnerships that do not approve a limited partnership rollup transaction are required to pay any of the transaction costs, and the general partner or sponsor is not required to pay the transaction costs on behalf of the non-approving limited partnerships, in a limited partnership rollup transaction in which one or more limited partnerships determines not to approve the transaction, but where the transaction is consummated with respect to one or more approving limited partnerships; or

(4) as to fees of general partners, if:

(A) general partners are not prevented from receiving both unearned management fees discounted to a present value (if such fees were not previously provided for in the limited partnership agreement and disclosed to limited partners) and new asset-based fees;

(B) property management fees and other general partner fees are inappropriate, unreasonable and more than, or not competitive with, what would be paid to third parties for performing similar services; or

(C) changes in fees which are substantial and adverse to limited partners are not approved by an independent committee according to the facts and circumstances of each transaction.

#### **4440. Reserved**

#### **4450. Additional Quantitative Maintenance Criteria**

After listing on the Exchange, certain securities must substantially meet the criteria set forth in the paragraphs below to continue to remain listed on the Exchange.

(a) Reserved

(b) Reserved

(c) Other Securities Listed Pursuant to Rule 4420(f) and Linked Securities

(1) The aggregate market value or principal amount of publicly-held units (except Linked Securities that were listed pursuant to Rule 4420(m)) must be at least \$1 million.

(2) Delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading) with respect to any Equity Index-Linked Security that was listed pursuant to paragraph (7)(B) of Rule 4420(m) if any of the standards set forth in paragraph (7)(B) of such rule are not continuously maintained, except that:

(i) the criteria that no single component represent more than 25% of the weight of the index and the five highest weighted components in the index may not represent more than 50% (or 60% for indexes with less than 25 components) of the weight of the Index, need only be satisfied for capitalization weighted and price weighted indexes as of the first day of January and July in each year;

(ii) the total number of components in the index may not increase or decrease by more than 33-1/3% from the number of components in the index at the time of its initial listing, and in no event may be less than ten (10) components;

(iii) the trading volume of each component security in the index must be at least 500,000 shares for each of the last six months, except that for each of the lowest weighted components in the index that in the aggregate account for no more than 10% of the weight of the index, trading volume must be at least 400,000 shares for each of the last six months; and

(iv) in a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of stocks in the index have had an average monthly trading volume of at least 1,000,000 shares over the previous six months.

(3) With respect to an Equity Index-Linked Security that was listed pursuant to paragraph (7)(A) of Rule 4420(m), delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading of the subject security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under Section 19(b)(2) of the 1934 Act approving the index or indexes for the trading of options or other derivatives.

(4) With respect to a Commodity-Linked Security that was listed pursuant to Rule 4420(m), delisting or removal proceedings will be commenced (unless the Commission has approved the continued trading of the subject security) if any of the listing requirements set forth in Rule 4420(m) that were applicable at the time of the initial listing of the security are no longer being met. Notwithstanding the foregoing, a security will not be delisted due to lack of comprehensive surveillance sharing agreements if the Reference Asset has at least 10 components and the Exchange has comprehensive surveillance sharing agreements with respect to at least 90% of the dollar weight of the Reference Asset for which such agreements are otherwise required.

(5) Delisting or removal proceedings will also be commenced with respect to any Linked Security listed pursuant to Rule 4420(m) (unless the Commission has approved the continued trading of the subject security), under any of the following circumstances:

(i) if the aggregate market value or the principal amount of the Linked Security issue publicly held is less than \$400,000;

(ii) if the value of the index, composite value of the indexes or the value of the Reference Asset (as applicable) is no longer calculated or widely disseminated as required by Rule 4420(m)(9);

(iii) with respect to a Commodity-Linked Security, if the value of the Reference Asset is no longer calculated or available and a new Reference Asset is substituted, unless the new Reference Asset meets the requirements of this Rule and Rule 4420(m); or

(iv) if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

(d) Rights and Warrants

The common stock of the issuer must continue to be listed on the Exchange.

(e) Reserved

(f) Bankruptcy and/or Liquidation

Should an issuer file under any of the sections of the Bankruptcy Act or announce that liquidation has been authorized by its board of directors and that it is committed to proceed, the Exchange may suspend or terminate the issuer's securities unless it is determined that the public interest and the protection of investors would be served by continued listing.

(g) Reserved

(h) Reserved

(i) Reserved

**4500. Reserved**

**4600. Requirements for Equities Market Makers and Other Participants in the NASDAQ OMX BX Equities Market**

**4601. Scope**

Unless otherwise specified, the rules set forth in this 4600 Series apply only to the quoting and trading of System securities via the NASDAQ OMX BX Equities Market.

**4602. Reserved****4610. Registration and Other Requirements****4611. NASDAQ OMX BX Equities Market Participant Registration**

(a) Participation in the NASDAQ OMX BX Equities Market as an Equities Market Maker, Equities ECN or Order Entry Firm requires current registration as such with the Exchange. Such registration shall be conditioned upon the participant's initial and continuing compliance with the following requirements:

(1) execution of applicable agreements with the Exchange;

(2) membership in, or access arrangement with a participant of, a clearing agency registered with the Commission which maintains facilities through which NASDAQ OMX BX Equities Market compared trades may be settled;

(3) compliance with all applicable rules and operating procedures of the Exchange and the Commission in their use of the System;

(4) maintenance of the physical security of the equipment located on the premises of the Equities Market Maker, Equities ECN or Order Entry Firm to prevent the improper use or access to Exchange systems, including unauthorized entry of information into the NASDAQ OMX BX Equities Market; and

(5) acceptance and settlement of each NASDAQ OMX BX Equities Market trade that the NASDAQ OMX BX Equities Market identifies as having been effected by such participant, or if settlement is to be made through another clearing member, guarantee of the acceptance and settlement of such identified NASDAQ OMX BX Equities Market trade by the clearing member on the regularly scheduled settlement date.

A member's registration shall become effective upon receipt by the member of notice of an approval of registration by the Exchange. The registration required hereunder will apply solely to the qualification of a Participant to participate in the System. Such registration shall not be conditioned upon registration in any particular NASDAQ OMX BX Equities Market securities.

(b) Each Equities Market Maker, Equities ECN or Order Entry Firm shall be under a continuing obligation to inform the Exchange of noncompliance with any of the registration requirements set forth above.

(c) The Exchange may impose upon any Equities Market Maker, Equities ECN or Order Entry Firm such temporary restrictions upon the automated entry or updating of orders or Quotes/Orders as the Exchange may determine to be necessary to protect the integrity of the Exchange's systems. For example, such temporary restrictions may be necessary to address a system problem at a particular Equities Market Maker, Equities ECN or Order Entry Firm or at the Exchange, or an unexpected period of extremely high message traffic. The scope of any such restrictions shall be communicated to the affected Equities Market Maker, Equities ECN or Order Entry Firm in writing.

(d) Sponsored Participants. A Sponsored Participant may obtain authorized access to the NASDAQ OMX BX Equities Market only if such access is authorized in advance by one or more Exchange members as follows:

(1) Sponsored Participants must enter into and maintain customer agreements with one or more Sponsoring Members establishing proper relationship(s) and account(s) through which the Sponsored Participant may trade on the NASDAQ OMX BX Equities Market. Such customer agreement(s) must incorporate the Sponsorship Provisions set forth in paragraph (2) below.

(2) For a Sponsored Participant to obtain and maintain authorized access to the NASDAQ OMX BX Equities Market, a Sponsored Participant and its Sponsoring Member must agree in writing to the following Sponsorship Provisions:

(A) Sponsored Participant and its Sponsoring Member must have entered into and maintained a User Agreement with the Exchange. The Sponsoring Member must designate the Sponsored Participant by name in its User Agreement as such.

(B) Sponsoring Member acknowledges and agrees that

(i) All orders entered by the Sponsored Participants and any person acting on behalf of or in the name of such Sponsored Participant and any executions occurring as a result of such orders are binding in all respects on the Sponsoring Member and

(ii) Sponsoring Member is responsible for any and all actions taken by such Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant.

(C) Sponsoring Member shall comply with the Exchange's Certificate of Incorporation, Bylaws, Rules and procedures with regard to the NASDAQ OMX BX Equities Market and Sponsored Participant shall comply with the Exchange's Certificate of Incorporation, Bylaws, Rules

and procedures with regard to the NASDAQ OMX BX Equities Market, as if Sponsored Participant were an Exchange Member.

(D) Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member a list of individuals authorized to obtain access to the NASDAQ OMX BX Equities Market on behalf of the Sponsored Participant.

(E) Sponsored Participant shall familiarize its authorized individuals with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the NASDAQ OMX BX Equities Market.

(F) Sponsored Participant may not permit anyone other than authorized individuals to use or obtain access to the NASDAQ OMX BX Equities Market.

(G) Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the NASDAQ OMX BX Equities Market, including unauthorized entry of information into the NASDAQ OMX BX Equities Market, or the information and data made available therein. Sponsored Participant understands and agrees that Sponsored Participant is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of authorized individuals, and for the trading and other consequences thereof.

(H) Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and customers' use and access to the NASDAQ OMX BX Equities Market for compliance with the terms of this agreement.

(I) Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member, the Exchange, or any other third parties that arise from the Sponsored Participant's access to and use of the NASDAQ OMX BX Equities Market. Such amounts include, but are not limited to applicable exchange and regulatory fees.

(3) The Sponsoring Member must provide the Exchange with a Notice of Consent acknowledging its responsibility for the orders, executions and actions of its Sponsored Participant at issue.

#### **4612. Registration as an Equities Market Maker**

(a) Quotations and quotation sizes may be entered into the NASDAQ OMX BX Equities Market only by a member registered as an Equities Market Maker or other entity approved by the Exchange to function in a market making capacity.

(b) An Equities Market Maker may become registered in an issue by entering a registration request via an Exchange-approved electronic interface with the Exchange's systems or by contacting Exchange Market Operations. Registration shall become effective on the day the registration request is entered.

(c) An Equities Market Maker's registration in an issue shall be terminated by the Exchange if the market maker fails to enter quotations in the issue within five (5) business days after the market maker's registration in the issue becomes effective.

### **4613. Character of Quotations**

A member registered as an Equities Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

#### (a) Quotation Requirements and Obligations

(1) Two-Sided Quote Obligation. For each security in which a member is registered as an Equities Market Maker, the member shall be willing to buy and sell such security for its own account on a continuous basis and shall enter and maintain a two-sided quotation ("Principal Quote"), which is attributed to the market maker by a special market participant identifier ("MPID") and is displayed in the NASDAQ OMX BX Equities Market at all times, subject to the procedures for excused withdrawal set forth in Rule 4619.

(A) A registered Equities Market Maker must display a quotation size for at least one normal unit of trading (or a larger multiple thereof) when it is not displaying a limit order in compliance with SEC Rule 604, provided, however, that a registered Equities Market Maker may augment its displayed quotation size to display limit orders priced at the Equities Market Maker's quotation. Unless otherwise designated, a "normal unit of trading" shall be 100 shares.

(B) The minimum quotation increment for quotations of \$1.00 or above in all System Securities shall be \$0.01. The minimum quotation increment in the System for quotations below \$1.00 in System Securities shall be \$0.0001.

(2) The first MPID issued to a member pursuant to subparagraph (1) of this rule, or Rule 4623, shall be referred to as the member's "Primary MPID." Market makers and ECNs may request the use of additional MPIDs that shall be referred to as "Supplemental MPIDs." A market maker may request the use of a

Supplemental MPIDs for displaying Attributable Quotes/Orders in the Exchange's Quotation Montage for any security in which it is registered and meets the obligations set forth in subparagraph (1) of this rule. An ECN may request the use of Supplemental MPIDS for displaying Attributable Quotes/Orders in the Exchange's Quotation Montage for any security in which it meets the obligations set forth in Rule 4623. A market maker or ECN that ceases to meet the obligations appurtenant to its Primary MPID in any security shall not be permitted to use a Supplemental MPID for any purpose in that security.

(3) Market makers and ECNs that are permitted the use of Supplemental MPIDs for displaying Attributable Quotes/Orders pursuant to subparagraph (2) of this rule are subject to the same rules applicable to the member's first quotation, with two exceptions: (a) the continuous two-sided quote requirement and excused withdrawal procedures described in subparagraph (1) above do not apply to market maker's Supplemental MPIDs; and (b) Supplemental MPIDs may not be used by market makers to enter stabilizing bids pursuant to Equity Rule 4614.

**(b) Firm Quotations**

All quotations and orders to buy and sell entered into the System by Equities Market Makers, Equities ECNs, and Order Entry firms are firm and automatically executable for their displayed and non-displayed size in the System.

**(c) Impaired Ability to Enter or Update Quotations**

In the event that an Equities Market Maker's ability to enter or update quotations is impaired, the market maker shall immediately contact Exchange Market Operations to request the withdrawal of its quotations.

In the event that an Equities Market Maker's ability to enter or update quotations is impaired and the market maker elects to continue quoting in the Exchange, the Equities Market Maker shall execute an offer to buy or sell received from another member at its quotations as disseminated through the NASDAQ OMX BX Equities Market.

**(d) Reserved**

**(e) Locked and Crossed Markets**

(1) Locked and Cross Markets within the System: Any quotes or orders that are entered into the System that would lock or cross another order in the System will be executed by the System. This processing, set forth in Rule 4757, ensures that no locked or crossed markets can exist within the System and that price improvement is allocated fairly.



(2) Inter-market Locked and Crossed Markets. The provisions of this subsection (e)(2) apply to the trading of securities governed by Regulation NMS.

(A) Definitions. For purposes of this Rule, the following definitions shall apply:

(i) The terms automated quotation, effective national market system plan, intermarket sweep order, manual quotation, NMS stock, protected quotation, regular trading hours, and trading center shall have the meanings set forth in Rule 600(b) of Regulation NMS under the Securities Exchange Act of 1934.

(ii) The term crossing quotation shall mean the display of a bid for an NMS stock during regular trading hours at a price that is higher than the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock during regular trading hours at a price that is lower than the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan.

(iii) The term locking quotation shall mean the display of a bid for an NMS stock during regular trading hours at a price that equals the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock during regular trading hours at a price that equals the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan.

(B) Prohibition. Except for quotations that fall within the provisions of paragraph (D) of this Rule, Exchange members shall reasonably avoid displaying, and shall not engage in a pattern or practice of displaying any quotations that lock or cross a protected quotation, and any manual quotations that lock or cross a quotation previously disseminated pursuant to an effective national market system plan.

(C) Manual quotations. If a member of the Exchange displays a manual quotation that locks or crosses a quotation previously disseminated pursuant to an effective national market system plan, such member of the Exchange shall promptly either withdraw the manual quotation or route an intermarket sweep order to execute against the full displayed size of the locked or crossed quotation.

(D) Exceptions.

(i) The locking or crossing quotation was displayed at a time when the trading center displaying the locked or crossed quotation was experiencing a failure, material delay, or malfunction of its systems or equipment.

(ii) The locking or crossing quotation was displayed at a time when a protected bid was higher than a protected offer in the NMS stock.

(iii) The locking or crossing quotation was an automated quotation, and the Exchange member displaying such automated quotation simultaneously routed an intermarket sweep order to execute against the full displayed size of any locked or crossed protected quotation.

(iv) The locking or crossing quotation was a manual quotation that locked or crossed another manual quotation, and the member of the Exchange displaying the locking or crossing manual quotation simultaneously routed an intermarket sweep order to execute against the full displayed size of the locked or crossed manual quotation.

#### **4614. Stabilizing Bids**

##### (a) Equities Market Maker Obligation/Identifier

An Equities Market Maker that intends to stabilize the price of a security that is a subject or reference security under SEC Rule 101 shall submit a request to the Exchange's MarketWatch Department for the entry of a one-sided bid that is identified on the Exchange as a stabilizing bid in compliance with the standards set forth in this Rule and SEC Rules 101 and 104.

##### (b) Eligibility

Only one Equities Market Maker in a security may enter a stabilizing bid.

##### (c) Limitations on Stabilizing Bids

(1) A stabilizing bid shall not be entered in the NASDAQ OMX BX Equities Market unless at least one other Equities Market Maker in addition to the market maker entering the stabilizing bid is registered as an Equities Market Maker in the security and entering quotations that are considered an independent bid under SEC Rule 104.

(2) A stabilizing bid must be available for all freely tradable outstanding securities of the same class being offered.

(d) Submission of Request to the Exchange

(1) An Equities Market Maker that wishes to enter a stabilizing bid shall submit a request to the Exchange's MarketWatch Department for entry in the NASDAQ OMX BX Equities Market of a one-sided bid identified as a stabilizing bid. The Equities Market Maker shall confirm its request in writing no later than the close of business the day the stabilizing bid is entered by submitting an Underwriting Activity Report to the Exchange's MarketWatch Department that includes the information required by subparagraph (d)(2).

(2) In lieu of submitting the Underwriting Activity Report as set forth in subparagraph (d)(1), the market maker may provide written confirmation to MarketWatch that shall include:

(A) the identity of the security and its symbol;

(B) the contemplated effective date of the offering and the date when the offering will be priced;

(C) the date and time that an identifier should be included on the Exchange; and

(D) a copy of the cover page of the preliminary or final prospectus or similar offering document, unless the Exchange determines otherwise.

**4615. Reserved**

**4616. Reports**

An Equities Market Maker, Equities ECN, or Order Entry Firm shall make such reports to the Exchange as may be prescribed from time to time by the Exchange.

**4617. Normal Business Hours**

The System operates from 8:00 a.m. to 7:00 p.m. Eastern Time on each business day, unless modified by the Exchange. An Equities Market Maker shall be open for business as of 9:30 a.m. Eastern Time and shall close no earlier than 4:00 p.m. Eastern Time. An Equities Market Maker may voluntarily open for business prior to 9:30 a.m. and remain open for business later than 4:00 p.m. Eastern Time. Equities Market Makers whose quotes are open prior to 9:30 a.m. Eastern Time or after 4:00 p.m. Eastern Time shall be obligated to comply, while their quotes are open, with all Rules that are not by their express terms, or by an official interpretation of the Exchange, inapplicable to any part of the 8:00 a.m. to 9:30 a.m. or 4:00 p.m. to 7:00 p.m. Eastern Time period.

**4618. Clearance and Settlement**

(a) All transactions through the facilities of the NASDAQ OMX BX Equities Market shall be cleared and settled through a registered clearing agency using a continuous net settlement system. This requirement may be satisfied by direct participation, use of direct clearing services, or by entry into a correspondent clearing arrangement with another member that clears trades through such an agency.

(b) Notwithstanding paragraph (a), transactions may be settled "ex-clearing" provided that both parties to the transaction agree.

#### **4619. Withdrawal of Quotations**

(a) Except as provided in paragraph (b) of this Rule, a market maker that wishes to withdraw quotations in a security shall contact the Exchange's MarketWatch Department to obtain excused withdrawal status prior to withdrawing its quotations. Withdrawals of quotations shall be granted by MarketWatch only upon satisfying one of the conditions specified in this Rule.

(b) An Equities Market Maker that wishes to obtain excused withdrawal status based on a market maker's systemic equipment problems, such as defects in an Equities Market Maker's software or hardware systems or connectivity problems associated with the circuits connecting NASDAQ OMX BX Equities Market systems with the Equities Market Maker's systems, shall contact Exchange Market Operations. Exchange Market Operations may grant excused withdrawal status based on systemic equipment problems for up to five (5) business days, unless extended by Exchange Market Operations.

(c) (1) For Nasdaq-listed securities, excused withdrawal status based on circumstances beyond the Equities Market Maker's control, other than systemic equipment problems, may be granted for up to five (5) business days, unless extended by the Exchange's MarketWatch Department. Excused withdrawal status based on demonstrated legal or regulatory requirements, supported by appropriate documentation and accompanied by a representation that the condition necessitating the withdrawal of quotations is not permanent in nature, may, upon notification, be granted for not more than sixty (60) days (unless such request is required to be made pursuant to paragraph (e) below). Excused withdrawal status based on religious holidays may be granted only if written notice is received by the Exchange one business day in advance and is approved by the Exchange. Excused withdrawal status based on vacation may be granted only if:

(A) The written request for withdrawal is received by the Exchange one business day in advance, and is approved by the Exchange; and

(B) The request includes a list of the securities for which withdrawal is requested.

Excused withdrawal status may be granted to an Equities Market Maker that has withdrawn from an issue prior to the public announcement of a merger or acquisition and wishes to re-register in the issue pursuant to the same-day registration procedures contained in Rule 4611 above, provided the Equities Market Maker has remained registered in one of the affected issues. The withdrawal of quotations because of pending news, a sudden influx of orders or price changes, or to effect transactions with competitors shall not constitute acceptable reasons for granting excused withdrawal status.

(2) For securities listed on the Exchange or any other exchange other than Nasdaq, an Equities Market Maker that wishes to withdraw quotations shall contact the Exchange's MarketWatch Department to obtain excused withdrawal status prior to withdrawing its quotations. Excused withdrawal status based on illness, vacations or physical circumstances beyond the Equities Market Maker's control may be granted for up to five (5) business days, unless extended by MarketWatch. Excused withdrawal status based on investment activity or advice of legal counsel, accompanied by a representation that the condition necessitating the withdrawal of quotations is not permanent in nature, may, upon written request, be granted for not more than sixty (60) days. The withdrawal of quotations because of pending news, a sudden influx of orders or price changes, or to effect transactions with competitors shall not normally constitute acceptable reasons for granting excused withdrawal status, unless the Exchange has initiated a trading halt for market makers in the security, pursuant to Rule 4120.

(d) Excused withdrawal status may be granted to an Equities Market Maker that fails to maintain a clearing arrangement with a registered clearing agency or with a member of such an agency and is withdrawn from participation in the trade reporting service of the NASDAQ OMX BX Equities Market, thereby terminating its registration as an Equities Market Maker; provided, however, that if the Exchange finds that the Equities Market Maker's failure to maintain a clearing arrangement is voluntary, the withdrawal of quotations will be considered voluntary and unexcused pursuant to Rule 4620 and the Rule 4700 Series governing the NASDAQ OMX BX Equities Market. Equities Market Makers that fail to maintain a clearing relationship will have their NASDAQ OMX BX Equities Market system status set to "suspend" and be thereby prevented from entering, or executing against, any quotes/orders in the system.

(e) Excused withdrawal status may be granted to an Equities Market Maker that is a distribution participant (or, in the case of excused withdrawal status, an affiliated purchaser) in order to comply with SEC Rule 101 or 104 under the Act on the following conditions:

(1) A member acting as a manager (or in a similar capacity) of a distribution of a security that is a subject security or reference security under SEC Rule 101 and any member that is a distribution participant or an affiliated purchaser in such a distribution that does not have a manager shall provide written

notice to the Exchange's MarketWatch Department and the Market Regulation Department of FINRA no later than the business day prior to the first entire trading session of the one-day or five-day restricted period under SEC Rule 101, unless later notification is necessary under the specific circumstances.

(A) The notice required by subparagraph (e)(1) of this Rule shall be provided by submitting a completed Underwriting Activity Report that includes a request on behalf of each Equities Market Maker that is a distribution participant or an affiliated purchaser to withdraw the Equities Market Maker's quotations and includes the contemplated date and time of the commencement of the restricted period.

(B) The managing underwriter shall advise each Equities Market Maker that it has been identified as a distribution participant or an affiliated purchaser to MarketWatch and that its quotations will be automatically withdrawn, unless a market maker that is a distribution participant (or an affiliated purchaser of a distribution participant) notifies MarketWatch as required by subparagraph (e)(2), below.

(2) An Equities Market Maker that has been identified to MarketWatch as a distribution participant (or an affiliated purchaser of a distribution participant) shall promptly notify MarketWatch and the manager of its intention not to participate in the prospective distribution in order to avoid having its quotations withdrawn.

(3) If an Equities Market Maker that is a distribution participant withdraws its quotations in order to comply with any provision of SEC Regulation M and promptly notifies MarketWatch of its action, the withdrawal shall be deemed an excused withdrawal. Nothing in this subparagraph shall prohibit the Exchange from taking such action as is necessary under the circumstances against a member and its associated persons for failure to contact MarketWatch to obtain an excused withdrawal as required by subparagraphs (a) and (e) of this Rule.

(4) A member acting as a manager (or in a similar capacity of a distribution subject to subparagraph (e)(1)) of this Rule shall submit a request to MarketWatch and the Market Regulation Department of FINRA to rescind the excused withdrawal status of distribution participants and affiliated purchasers, which request shall include the date and time of the pricing of the offering, the offering price, and the time the offering terminated, and, if not in writing, shall be confirmed in writing no later than the close of business the day the offering terminates. The request by this subparagraph may be submitted on the Underwriting Activity Report.

(f) The Market Operations Review Committee shall have jurisdiction over proceedings brought by Equities Market Makers seeking review of the denial of an

excused withdrawal pursuant to this Rule 4619, or the conditions imposed on their reentry.

#### **4620. Voluntary Termination of Registration**

(a) A market maker may voluntarily terminate its registration in a security by withdrawing its two-sided quotation from the NASDAQ OMX BX Equities Market. An Equities Market Maker that voluntarily terminates its registration in a security may not re-register as a market maker in that security for twenty (20) business days in the case of securities listed on the Exchange or for one (1) business day in the case of other securities. Withdrawal from participation as an Equities Market Maker in the NASDAQ OMX BX Equities Market shall constitute termination of registration as a market maker in that security for purposes of this Rule; provided, however, that an Equities Market Maker that fails to maintain a clearing arrangement with a registered clearing agency or with a member of such an agency and is withdrawn from participation in the NASDAQ OMX BX Equities Market and thereby terminates its registration as an Equities Market Maker may register as a market maker at any time after a clearing arrangement has been reestablished unless the Exchange finds that the Equities Market Maker's failure to maintain a clearing arrangement is voluntary, in which case the withdrawal of quotations will be considered voluntary and unexcused.

(b) Notwithstanding the above, an Equities Market Maker that accidentally withdraws as an Equities Market Maker may be reinstated if:

(1) the Equities Market Maker notified the Exchange's MarketWatch Department of the accidental withdrawal as soon as practicable under the circumstances, but within at least one hour of such withdrawal, and immediately thereafter provided written notification of the withdrawal and reinstatement request;

(2) it is clear that the withdrawal was inadvertent and the market maker was not attempting to avoid its market making obligations; and

(3) the Equities Market Maker's firm would not exceed the following reinstatement limitations:

(A) for firms that simultaneously made markets in less than 250 stocks during the previous calendar year, the firm can receive no more than two (2) reinstatements per year;

(B) for firms that simultaneously made markets in 250 or more but less than 500 stocks during the previous calendar year, the firm can receive no more than three (3) reinstatements per year; and

(C) for firms that simultaneously made markets in 500 or more stocks during the previous calendar year, the firm can receive no more than six (6) reinstatements per year.

(c) Factors that the Exchange will consider in granting a reinstatement under paragraph (b) of this rule include, but are not limited to:

(1) the number of accidental withdrawals by the Equities Market Maker in the past, as compared with Equities Market Makers making markets in a comparable number of stocks;

(2) the similarity between the symbol of the stock that the Equities Market Maker intended to withdraw from and the symbol of the stock that the Equities Market Maker actually withdrew from;

(3) market conditions at the time of the withdrawal;

(4) whether, given the market conditions at the time of the withdrawal, the withdrawal served to reduce the exposure of the member's position in the security at the time of the withdrawal to market risk; and

(5) the timeliness with which the Equities Market Maker notified MarketWatch of the error.

(d) For purposes of paragraph (a) of this Rule, a market maker shall not be deemed to have voluntarily terminated its registration in a security by voluntarily withdrawing its two-sided quotation from the NASDAQ OMX BX Equities Market if the Equities Market Maker's two-sided quotation in the subject security is withdrawn by the Exchange's systems due to issuer corporate action related to a dividend, payment or distribution, or due to a trading halt, and one of the following conditions is satisfied:

(1) the Equities Market Maker enters a new two-sided quotation prior to the close of the regular market session on the same day when the Exchange's systems withdrew such a quotation;

(2) the Equities Market Maker enters a new two-sided quotation on the day when trading resumes following a trading halt, or, if the resumption of trading occurs when the market is not in regular session, the Equities Market Maker enters a new two-sided quotation prior to the opening of the next regular market session; or

(3) upon request from the market maker, MarketWatch authorizes the market maker to enter a new two-sided quotation, provided that MarketWatch receives the market maker's request prior to the close of the regular market session on the next regular trading day after the day on which the market maker became eligible to re-enter a quotation pursuant to subparagraph (d)(1) or (d)(2)



hereof and determines that the market maker was not attempting to avoid its market making obligations by failing to re-enter such a quotation earlier.

(e) The Market Operations Review Committee shall have jurisdiction over proceedings brought by market makers seeking review of their denial of a reinstatement pursuant to paragraphs (b) or (d) of this Rule.

#### **4621. Suspension and Termination of Quotations**

The Exchange may, pursuant to the procedures set forth in the Rule 9000 Series, suspend, condition, limit, prohibit or terminate the authority of an Equities Market Maker, Equities ECN, or Order Entry Firm to enter quotations in one or more authorized securities for violations of applicable requirements or prohibitions.

#### **4622. Termination of Exchange Service**

The Exchange may, upon notice, terminate service in the event that an Equities Market Maker, Equities ECN, or Order Entry Firm fails to qualify under specified standards of eligibility or fails to pay promptly for services rendered by the Exchange.

#### **4623. Alternative Trading Systems**

(a) The Exchange may provide a means to permit alternative trading systems ("ATs"), as such term is defined in Regulation ATS, and electronic communications networks ("ECNs"), as such term is defined in SEC Rule 600,

(1) to comply with SEC Rule 301(b)(3);

(2) to comply with the terms of the ECN display alternative provided for in SEC Rule 602(b)(5)(ii)(A) and (B) ("ECN display alternatives"); or

(3) to provide orders to the Exchange voluntarily.

In providing any such means, the Exchange shall establish a mechanism that permits the ATS or ECN to display the best prices and sizes of orders entered into the ATS or ECN by subscribers of the ATS or ECN, if the ECN or ATS so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in the Exchange, and allows any Exchange member the electronic ability to effect a transaction with such priced orders that is equivalent to the ability to effect a transaction with a market maker quotation in systems operated by the Exchange.

(b) An ATS or ECN that seeks to utilize the Exchange-provided means to comply with SEC Rule 301(b)(3), the ECN display alternatives, or to provide orders to the Exchange voluntarily shall:

(1) demonstrate to the Exchange that it is in compliance with Regulation ATS or that it qualifies as an ECN meeting the definition in the SEC Rule 600;

(2) be registered as an Exchange member;

(3) enter into and comply with the terms of applicable agreements with the Exchange;

(4) agree to provide for the Exchange's dissemination in the quotation data made available to quotation vendors the prices and sizes of subscriber orders of the ATS or ECN, if the ATS or ECN so chooses or is required by SEC Rule 301(b)(3) to display a subscriber's order in the Exchange, at the highest buy price and the lowest sell price for each security entered in and widely disseminated by the ATS or ECN; and prior to entering such prices and sizes, register with Exchange Market Operations as an ATS or ECN;

(5) provide an automatic execution of any quote or order entered into the System by the ATS or ECN.

#### **4624. Penalty Bids and Syndicate Covering Transactions**

(a) An Equities Market Maker acting as a manager (or in a similar capacity) of a distribution of a security that is a subject or reference security under SEC Rule 101 shall provide written notice to the Corporate Financing Department of FINRA of its intention to impose a penalty bid on syndicate members or to conduct syndicate covering transactions pursuant to SEC Rule 104 prior to imposing the penalty bid or engaging in the first syndicate covering transaction. An Equities Market Maker that intends to impose a penalty bid on syndicate members may request that its quotation be identified as a penalty bid on the Exchange pursuant to paragraph (c) below.

(b) The notice required by paragraph (a) shall include:

(1) the identity of the security and its symbol;

(2) the date the member is intending to impose the penalty bid and/or conduct syndicate covering transactions.

(c) Notwithstanding paragraph (a), an Equities Market Maker may request that its quotation be identified as a penalty bid on the Exchange by providing notice to the Exchange's MarketWatch Department, which notice shall include the date and time that the penalty bid identifier should be entered on the Exchange and, if not in writing, shall be confirmed in writing no later than the close of business the day the penalty bid identifier is entered on the Exchange.

(d) The written notice required by this Rule may be submitted on the Underwriting Activity Report.

**4625. Obligation to Provide Information**

(a) An Equities Market Maker, Equities ECN, or Order Entry Firm operating in or participating in the NASDAQ OMX BX Equities Market or other system operated by the Exchange shall provide information orally, in writing, or electronically (if such information is, or is required to be, maintained in electronic form) to the staff of the Exchange when:

(1) the Exchange's MarketWatch staff makes an oral, written, or electronically communicated request for information relating to a specific Exchange rule, SEC rule, or provision of a joint industry plan (e.g., UTP, CTA, and CQA) (as promulgated and amended from time-to-time) that MarketWatch is responsible for administering or to other duties and/or obligations imposed on MarketWatch by the Exchange; this shall include, but not be limited to, information relating to:

(A) a locked or crossed market; or

(B) trading activity, rumors, or information that a member may possess that may assist in determining whether there is a basis to initiate a trading halt, pursuant to Rule 4120 and IM-4120-1; or

(C) a clearly erroneous transaction, pursuant to Rule 11890; or

(D) a request for an excused withdrawal or reinstatement, pursuant to Rules 4619 and 4620; or

(E) trade-throughs; or

(F) a request to submit a stabilizing bid, pursuant to Equity Rule 4614, or a request to have a quotation identified as a penalty bid on the Exchange, pursuant to Equity Rule 4624.

(2) Exchange Market Operations staff makes an oral, written, or electronically communicated request for information relating to a specific Exchange rule, SEC rule, provision of a joint industry plan (e.g., UTP, CTA, and CQA) (as promulgated and amended from time-to-time) that Exchange Market Operations is responsible for administering or to other duties and/or obligations for which Exchange Market Operations is responsible; this shall include, but not be limited to, information relating to an equipment failure.

(b) A failure to comply in a timely, truthful, and/or complete manner with a request for information made pursuant to this rule may be deemed conduct inconsistent with just and equitable principles of trade.

**4626. Limitation of Liability**

(a) Except as provided for in paragraph (b) below, the Exchange and its affiliates shall not be liable for any losses, damages, or other claims arising out of the NASDAQ OMX BX Equities Market, any other Exchange facility, or the use thereof. Any losses, damages, or other claims, related to a failure of the NASDAQ OMX BX Equities Market or any other Exchange facility to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the NASDAQ OMX BX Equities Market or any other Exchange facility shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data.

(b) The Exchange, subject to the express limits set forth below, may compensate users of the NASDAQ OMX BX Equities Market for losses directly resulting from the System's actual failure to correctly process an order, Quote/Order, message, or other data, provided the NASDAQ OMX BX Equities Market has acknowledged receipt of the order, Quote/Order, message, or data.

(1) For one or more claims made by a single market participant related to the use of the NASDAQ OMX BX Equities Market on a single trading day, the Exchange's liability shall not exceed the larger of \$100,000, or the amount of any recovery obtained by the Exchange under any applicable insurance policy.

(2) For the aggregate of all claims made by all market participants related to the use of the NASDAQ OMX BX Equities Market on a single trading day, the Exchange's liability shall not exceed the larger of \$250,000, or the amount of the recovery obtained by the Exchange under any applicable insurance policy.

(3) For the aggregate of all claims made by all market participants related to the use of the NASDAQ OMX BX Equities Market during a single calendar month, the Exchange's liability shall not exceed the larger of \$500,000, or the amount of the recovery obtained by the Exchange under any applicable insurance policy.

(4) In the event all of the claims arising out of the use of the NASDAQ OMX BX Equities Market cannot be fully satisfied because in the aggregate they exceed the maximum amount of liability provided for in this Rule, then the maximum amount will be proportionally allocated among all such claims arising on a single trading day, or during a single calendar month, as applicable.

(5) All claims for compensation pursuant to this Rule shall be in writing and must be submitted no later than the opening of trading on the next business day following the day on which the use of the NASDAQ OMX BX Equities Market gave rise to such claims. Nothing in this rule shall obligate the Exchange to seek recovery under any applicable insurance policy.

**4627. Obligation to Honor System Trades**

(a) If a Participant, or clearing member acting on a Participant's behalf, is reported by the System, or shown by the activity reports generated by the System, as constituting a side of a System trade, such Participant, or clearing member acting on its behalf, shall honor such trade on the scheduled settlement date.

(b) The Exchange shall have no liability if a Participant, or a clearing member acting on the Participant's behalf, fails to satisfy the obligations in paragraph (a).

**4628. Compliance with Rules and Registration Requirements**

(a) Failure by a Participant to comply with any of the rules or registration requirements applicable to the NASDAQ OMX BX Equities Market identified herein shall subject such Participant to censure, fine, suspension or revocation of its registration as an Equities Market Maker, Order Entry Firm, and/or Equities ECN or any other fitting penalty under the Equity Rules.

(b) (1) If a Participant fails to maintain a clearing relationship as required under paragraphs (a)(2) of Rule 4611, it shall be removed from the NASDAQ OMX BX Equities Market until such time as a clearing arrangement is reestablished.

(2) A Participant that is not in compliance with its obligations under paragraphs (a)(2) of Rule 4611 shall be notified when the Exchange exercises its authority under paragraph (b)(1) above.

(3) The authority and procedures contained in this paragraph (b) do not otherwise limit the Exchange's authority, contained in other provisions of the Rules of the Exchange, to enforce its rules or impose any fitting sanction.

**4630. Trading in Commodity-Related Securities**

(a) The Exchange will consider for trading pursuant to unlisted trading privileges, a Commodity-Related Security that meets the criteria of this Rule. Unless otherwise noted, a Commodity-Related Security approved for trading under this rule is eligible for trading during all market sessions if members comply with Rule 4631 when accepting Commodity-Related Security orders for execution in the pre-market session or post-market session.

(b) Applicability. This Rule is applicable only to Commodity-Related Securities. Except to the extent inconsistent with this Rule, or unless the context otherwise requires, the provisions of all other Equity Rules shall be applicable to the trading on the Exchange of such securities. Commodity-Related Securities are included within the definition of "security" or "securities" as such terms are used in the Equity Rules.

(c) Definitions. The following terms shall, unless the context otherwise requires, have the meaning herein specified:

(1) Commodity-Related Security. The term “Commodity-Related Security” means a security that is issued by a trust, partnership, commodity pool or similar entity that invests, directly or through another entity, in any combination of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, or the value of which is determined by the value of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives.

(2) Commodity. The term “commodity” is defined in Section 1(a)(4) of the Commodity Exchange Act.

(d) Information Barriers. A member acting as a registered market maker in a Commodity-Related Security is obligated to establish adequate information barriers when such market maker engages in inter-departmental communications. Members should refer to NASD/NYSE Joint Memo on Chinese Wall Policies and Procedures (NASD Notice to Members 91-45) for guidance on the “‘minimum elements’ of adequate Chinese Wall policy and procedures.” For purposes of a Commodity-Related Security only, “inter-departmental communications” shall include communications to other departments within the same firm or the firm’s affiliates that involve trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security.

(e) Market Maker Accounts. A member acting as a registered market maker in a Commodity-Related Security must file with the Exchange’s Regulation Department in a manner prescribed by such Department and keep current a list identifying all accounts for trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security, that the market maker may have or over which it may exercise investment discretion. No market maker shall trade in such underlying commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, in an account in which a market maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, that has not been reported as required by this Rule.

(f) The member acting as a registered market maker in a Commodity-Related Security shall make available to the Exchange’s Regulation Department such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security, as may be requested by the Regulation Department.

(g) In connection with trading a Commodity-Related Security or commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying a Commodity-Related Security, the member acting as a market maker in a Commodity-Related Security shall not use any material nonpublic information received from any person associated with the member or employee of such person regarding trading by such person or employee in the commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity- Related Security.

(h) The Exchange requires that members provide all purchasers of a newly issued Commodity-Related Security a prospectus for such Commodity-Related Security.

(i) The Exchange will file proposals under Section 19(b) of the Securities Exchange Act of 1934 before trading separate and distinct Commodity-Based Securities designated on different underlying commodity-related investments or values. The proposal filed with respect to particular Commodity-Related Security will specify the applicable trading hours for such Commodity-Related Security.

#### **4631. Customer Disclosures**

No member may accept an order from a customer for execution in the premarket session or post-market session without disclosing to such customer that extended hours trading involves material trading risks, including the possibility of lower liquidity, high volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, wider spreads and any other relevant risk. The absence of an updated underlying index value or intraday indicative value is an additional trading risk in extended hours for Derivative Securities Products.

The disclosures required pursuant to this rule may take the following form or such other form as provides substantially similar information:

1. Risk of Lower Liquidity. Liquidity refers to the ability of market participants to buy and sell securities. Generally, the more orders that are available in a market, the greater the liquidity. Liquidity is important because with greater liquidity it is easier for investors to buy or sell securities, and as a result, investors are more likely to pay or receive a competitive price for securities purchased or sold. There may be lower liquidity in extended hours trading as compared to regular market hours. As a result, your order may only be partially executed, or not at all.

2. Risk of Higher Volatility. Volatility refers to the changes in price that securities undergo when trading. Generally, the higher the volatility of a security, the greater its price swings. There may be greater volatility in extended hours trading than in regular market hours. As a result, your order may only be partially executed, or not at all, or you may receive an inferior price in extended hours trading than you would during regular market hours.

3. Risk of Changing Prices. The prices of securities traded in extended hours trading may not reflect the prices either at the end of regular market hours, or upon the opening of the next morning. As a result, you may receive an inferior price in extended hours trading than you would during regular market hours.

4. Risk of Unlinked Markets. Depending on the extended hours trading system or the time of day, the prices displayed on a particular extended hours system may not reflect the prices in other concurrently operating extended hours trading systems dealing in the same securities. Accordingly, you may receive an inferior price in one extended hours trading system than you would in another extended hours trading system.

5. Risk of News Announcements. Normally, issuers make news announcements that may affect the price of their securities after regular market hours. Similarly, important financial information is frequently announced outside of regular market hours. In extended hours trading, these announcements may occur during trading, and if combined with lower liquidity and higher volatility, may cause an exaggerated and unsustainable effect on the price of a security.

6. Risk of Wider Spreads. The spread refers to the difference in price between what you can buy a security for and what you can sell it for. Lower liquidity and higher volatility in extended hours trading may result in wider than normal spreads for a particular security.

7. Risk of Lack of Calculation or Dissemination of Underlying Index Value or Intraday Indicative Value ("IIV"). For certain Derivative Securities Products, an updated underlying index value or IIV may not be calculated or publicly disseminated in extended trading hours. Since the underlying index value and IIV are not calculated or widely disseminated during the pre-market and post-market sessions an investor who is unable to calculate implied values for certain Derivative Securities Products in those sessions may be at a disadvantage to market professionals.

#### **4700. The NASDAQ OMX BX Equities Market**

##### **4750. Execution Services**

##### **4751. Definitions**

The following definitions apply to the Rule 4600 and 4750 Series for the trading of securities listed on the Exchange or another national securities exchange.

(a) The term "NASDAQ OMX BX Equities Market" or "System" shall mean the automated system for order execution and trade reporting owned and operated by the Exchange. The System comprises:



(1) an order execution service that enables Participants to automatically execute transactions in System Securities; and provides Participants with sufficient monitoring and updating capability to participate in an automated execution environment;

(2) a trade reporting service that submits "locked-in" trades for clearing to a registered clearing agency for clearance and settlement; transmits last-sale reports of transactions automatically to the national trade reporting system, if required, for dissemination to the public and industry; and provides participants with monitoring and risk management capabilities to facilitate participation in a "locked-in" trading environment;

(3) a data feed(s) that can be used to display with attribution to Participants' MPIDs all Quotes and displayed Orders on both the bid and offer side of the market for all price levels then within the NASDAQ OMX BX Equities Market.

(b) The term "System Securities" shall mean any NMS stock, as defined in SEC Rule 600.

(c) The term "Participant" shall mean an entity that fulfills the obligations contained in Rule 4611 regarding participation in the System, and shall include:

(1) "Equities ECNs," members that meet all of the requirements of Rule 4623, and that participates in the System with respect to one or more System Securities.

(2) "Equities Market Makers," members that are registered as Equities Market Makers for purposes of participation in the System on a fully automated basis with respect to one or more System Securities.

(3) "Order Entry Firms," members that are registered as Order Entry Firms for purposes of entering orders in System Securities into the System. This term shall also include any Electronic Communications Network or Alternative Trading System that fails to meet all the requirements of Rule 4623.

(d) With respect to System-provided quotation functionality:

(1) The term "Quote" shall mean a single bid or offer quotation submitted to the System and designated for display (price and size) next to the Participant's MPID by a Participant that is eligible to submit such quotations.

(2) The term "Reserve Size" shall mean the System-provided functionality that permits a Participant to display in its Displayed Quote part of the full size of a proprietary or agency order, with the remainder held in reserve on an undisplayed basis. Both the displayed and non-displayed portions are available for potential

execution against incoming orders. If the Displayed Quote is reduced to less than a normal unit of trading, the System will replenish the display portion from reserve up to at least a single round-lot amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the time-stamp of its original entry.

(e) The term "Order" shall mean a single order or multiple orders at the same price submitted to the System by a Participant that is eligible to submit such orders and shall include:

(1) "Attributable Orders," orders that are designated for display (price and size) next to the Participant's MPID;

(2) "Non-Attributable Orders," orders that are entered by a Participant that are designated for display (price and size) on an anonymous basis in the order display service of the System; and

(3) "Non-Displayed Orders," a limit order that is not displayed in the System, but nevertheless remains available for potential execution against all incoming orders until executed in full or cancelled.

(f) The term "Order Type" shall mean the unique processing prescribed for designated orders that are eligible for entry into the System, and shall include:

(1) Reserved

(2) "Reserve Orders" are limit orders that have both a round-lot displayed size as well as an additional non-displayed share amount. Both the displayed and non-displayed portions of the Reserve Order are available for potential execution against incoming orders. If the round-lot displayed portion of a Reserve Order is reduced to less than a normal unit of trading, the System will replenish the display portion from reserve up to at least a single round-lot amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the time-stamp of its original entry.

(3) "Limit Orders" are orders to buy or sell a stock at a specified price or better. A limit order is marketable when, for a limit order to buy, at the time it is entered into the System, the order is priced at the current inside offer or higher, or for a limit order to sell, at the time it is entered into the System, the order is priced at the inside bid or lower.

(4) "Pegged Orders" are orders that, after entry, have their price automatically adjusted by the System in response to changes in either the NASDAQ OMX BX Equities Market inside bid or offer or bids or offers in the national market system, as appropriate. A Pegged Order can specify that its price will equal the inside quote on the same side of the market ("Primary Peg"), the

opposite side of the market ("Market Peg"), or the midpoint of the national best bid and offer ("Midpoint Peg"). A Pegged Order may have a limit price beyond which the order shall not be executed. In addition, the Primary Peg and Market Peg Orders may also establish their pricing relative to the appropriate bids or offers by the selection of one or more offset amounts that will adjust the price of the order by the offset amount selected. A Midpoint Peg Order is priced based upon the national best bid and offer, excluding the effect that the Midpoint Peg Order itself has on the inside bid or inside offer. Midpoint Pegged Orders will never be displayed. A Midpoint Pegged Order may be executed in sub-pennies if necessary to obtain a midpoint price. A new timestamp is created for the order each time it is automatically adjusted.

(5) "Minimum Quantity Orders" are orders that require that a specified minimum quantity of shares be obtained, or the order is cancelled. Minimum Quantity Orders may only be entered with a time-in-force designation of System Hours Immediate or Cancel.

(6) "Intermarket Sweep Order" or "ISO" are limit orders that are designated as ISOs in the manner prescribed by the Exchange and are executed within the System by Participants at multiple price levels without respect to Protected Quotations of other market centers within the meaning of Rule 600(b) of Regulation NMS under the Act. ISOs are immediately executable within the System pursuant to Rule 4757.

Simultaneously with the routing of an ISO to the System, one or more additional limit orders, as necessary, are routed by the entering party to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS under the Act) in the case of a limit order to sell or buy with a price that is superior to the limit price of the limit order identified as an intermarket sweep order (as defined in Rule 600(b) of Regulation NMS under the Act). These additional routed orders must be identified as intermarket sweep orders.

(7) "Price to Comply Order" are orders that, if, at the time of entry, a Price to Comply Order would lock or cross the quotation of an external market, the order will be priced to the current low offer (for bids) or to the current best bid (for offers) and displayed at a price one minimum price increment lower than the offer (for bids) or higher than the bid (for offers). The displayed and undisplayed prices of a Price to Comply order may be adjusted once or multiple times depending upon the method of order entry and changes to the prevailing NBBO.

(8) "Price to Comply Post Order" are orders that, if, at the time of entry, a Price to Comply Post Order would create a violation of Rule 610(d) of Regulation NMS under the Exchange Act of 1934 by locking or crossing the protected quote of an external market or would cause an Order Protection Rule violation, the order will be re-priced and displayed by the System to one minimum price increment

(i.e., \$0.01 or \$0.0001) below the current low offer (for bids) or to one penny above the current best bid (for offers).

(g) The term "Order Size" shall mean the number of shares up to 999,999 associated with a Quote or Order and shall include:

(1) "normal unit of trading": the round lot size for the security.

(2) "mixed lot": an order that is for more than a normal unit of trading but not a multiple thereof.

(3) "odd-lot": an order that is for less than a normal unit of trading.

(h) The term "Time in Force" shall mean the period of time that the System will hold an order for potential execution, and shall include:

(1) "System Hours Immediate or Cancel" or "SIOC" shall mean, for limit orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant. SIOC Orders shall be available for entry and execution from 8:00 a.m. until 7:00 p.m. Eastern Time.

(2) "System Hours Day" or "SDAY" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution from 8:00 a.m. until 7:00 p.m. Eastern Time on the day it was submitted unless cancelled by the entering party.

(3) Reserved

(4) "System Hours Expire Time" or "SHEX" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time specified by the entering Participant unless canceled by the entering party. SHEX Orders shall be available for entry and execution from 8:00 a.m. until 7:00 p.m. Eastern Time.

(5) Reserved

(6) "Market Hours Day" or "MDAY" shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until 4:00 p.m. Eastern Time, unless canceled by the entering party, after which it shall be returned to the entering party. MDAY orders shall be available for entry from 7:00 a.m. until 4:00 p.m. Eastern Time and for potential execution from 9:30 a.m. until 4:00 p.m. Eastern Time.

(7) Reserved

(8) "Good-til-market close" or "GTMC" shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until cancelled by the entering party, or until 4:00 p.m. Eastern Time, after which it shall be returned to the entering party. GTMC orders shall be available for entry and potential execution from 8:00 a.m. until 7:00 p.m. Eastern Time. GTMC orders entered after 4:00 p.m. will be treated as SIOC orders.

(i) The term "System Book Feed" shall mean a data feed for System eligible securities.

(j) The term "MPID" shall mean a Participant's unique market participant identifier.

**4752. Opening Process; Opening and Closing Price**

(a) Trading Prior To Normal Market Hours. The system shall process all eligible Quotes/Orders at 8:00 a.m.:

(1) At 8:00 a.m., the system shall add in time priority all eligible Orders in accordance with each order's defined characteristics.

(2) Quoting Market Participants may instruct the Exchange to open their Quotes at 9:25 a.m. at price of \$0.01 (bid) and \$999,999 (offer) and a size of one round lot in order to provide a two-sided quotation. In all other cases, the quote of a participant shall be at the price and size entered by the participant.

(3) All trades executed prior to 9:30 shall be automatically appended with the ".T" modifier.

(b) The official opening price for a security listed on the Exchange will be the price of the first trade executed at or after 9:30 a.m. and the official closing price will be the price of the last trade executed at or prior to 4:00 p.m.

**4753. Reserved**

**4754. Reserved**

**4755. Order Entry Parameters**

(a) System Orders—A System order is an order that is entered into the System for display and/or execution as appropriate. Such orders are executable against marketable contra-side orders in the System.

(1) All System Orders shall indicate limit price and whether they are a buy, short sale, or long sale. Systems Orders can be designated as Market Hours Day (“MDAY”), System Hours Expire Time (“SHEX”), System Hours Day (“SDAY”), System Hours Immediate or Cancel (“SIOC”), or Good-til-Market Close “GTMC”).

(2) A System order may also be designated as Reserve Order, a Pegged Order, a Non-Displayed Order, a Minimum Quantity Order, an Intermarket Sweep Order, a Price to Comply order, or a Price to Comply Post order. In addition to such other designations as may be chosen by a participant, all System orders must be entered with a Time in Force of System Hours Immediate or Cancel or designated as a Pegged Order, an Intermarket Sweep Order, a Price to Comply order, or a Price to Comply Post order.

(3) System Hours Pegged Orders may only be entered between 9:30 a.m. and 4:00 p.m. Eastern Time.

(b) Regulation NMS—In connection with the trading of securities governed by Regulation NMS, Intermarket Sweep Orders shall be executed exclusively within the System and the entering Participants shall be responsible for compliance with Regulation NMS Order Protection Rule and Locked and Crossed market rule with respect to such orders. All other orders must be entered with a Time in Force of System Hours Immediate or Cancel or designated as either a Pegged Order, a Price to Comply order or a Price to Comply Post order. Orders shall be processed in compliance with Regulation NMS by being priced by the System in a manner that avoids trading through protected quotations and avoids locked and crossed markets.

#### **4756. Entry and Display of Quotes and Orders**

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

(1) Participants shall be permitted to transmit to the System multiple orders at a single as well as multiple price levels. Each order shall indicate the amount of Reserve Size (if applicable).

(2) The System shall time-stamp an order which shall determine the time ranking of the order for purposes of processing the order.

(3) Orders can be entered into the System (or previously entered orders cancelled) from 8:00 a.m. until 7:00 p.m. Eastern Time.

(b) Entry or Quotes—Equities Market Makers, Order Entry Firms, and Equities ECNs can enter Quotes into the system from 8:00 a.m. to 7:00 p.m. Eastern Time. When

open, Quotes will be processed as System Hours Day Orders (SDAY). Entry of Quotes will be subject to the requirements and conditions set forth in section (a) above.

(c) Display of Quotes and Orders—The System will display quotes and orders submitted to the System as follows:

(1) System Book Feed—quotes and orders resident in the System available for execution will be displayed via the System Book Feed.

(2) Best Priced Order Display—For each System Security, the aggregate size of all Quotes and Orders at the best price to buy and sell resident in the System will be transmitted for display to the appropriate network processor, unless the aggregate size is less than one round lot in which case the aggregate size will be displayed in the System Book Feed but not be transmitted to a network processor.

(3) Exceptions—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

(A) Reserve Size—Reserve Size shall not be displayed in the System, but shall be accessible as described in Rule 4757.

(B) Reserved

(C) Non-Displayed Orders—Non-Displayed Orders are not displayed in the System, and have lower priority within the System than an equally priced Displayed Order, regardless of time stamp, and shall be executed pursuant to Rule 4757.

(4) In connection with the trading of securities governed by Regulation NMS, pursuant to Rule 600(b)(4) of Regulation NMS under the Act, the Exchange has implemented such systems, procedures, and rules as are necessary to render it capable of meeting the requirements for automated quotations, as defined in Rule 600(b)(3) of Regulation NMS under the Act; and immediately to identify its quotations as manual whenever it has reason to believe it is not capable of displaying automated quotations. The Exchange has adopted policies and procedures for notifying members and other trading centers that it has reason to believe it is not capable of displaying automated quotations or, once manual, that it has restored the ability to display automated quotations and is preparing to identify its quotation as automated. In addition, the Exchange has adopted policies and procedures for responding to notices that it receives from other trading centers indicating that they have elected to use the "self-help" exception of Rule 611(b)(1) of Regulation NMS under the Act.

#### **4757. Book Processing**

System orders shall be executed through the Book Process set forth below:

(a) Execution Algorithm - Price/Time — The System shall execute equally priced or better priced trading interest within the System in price/time priority in the following order:

(1) Displayed Orders; and

(2) Non-Displayed Orders, the reserve portion of Quotes and Reserve Orders, in price/time priority among such interest.

(b) Decrementation—Upon execution, an order shall be reduced by an amount equal to the size of that execution.

(c) Price Improvement—any potential price improvement resulting from an execution in the System shall accrue to the taker of liquidity.

Example:

Buy order resides on the Exchange book at 10.  
Incoming order to sell priced at 9 comes into the System  
Order executes at 10 (seller get \$1 price improvement)

#### **4758. Reserved**

#### **4759. Reserved**

#### **4760. Anonymity**

(a) Transactions executed in the System shall be cleared and settled anonymously. The transaction reports produced by the System will indicate the details of the transactions, and shall not reveal contra party identities.

(b) The Exchange shall reveal a Participant's identity in the following circumstances:

(1) when a registered clearing agency ceases to act for a participant, or the Participant's clearing firm, and the registered clearing agency determines not to guarantee the settlement of the Participant's trades;

(2) for regulatory purposes or to comply with an order of an arbitrator or court;

(3) if both Participants to the transaction consent;



(4) Unless otherwise instructed by a member, the Exchange will reveal to a member, no later than the end of the day on the date an anonymous trade was executed, when the member's Quote or Order has been decremented by another Quote or Order submitted by that same member.

#### **4762 Clearly Erroneous Transactions**

All matters related to clearly erroneous transactions executed in the System shall be initiated and adjudicated pursuant to Rule 11890.

#### **4800. Procedures for Review of Listing Determinations**

##### **IM-4800. Removal from Listing**

Rules 4804(e), 4806(e), 4807(f) and 4809(c) provide that the Exchange will delist an issuer in certain circumstances, following the Exchange's determination that the issuer no longer meets the requirements for continued listing and after the issuer has received notice of that determination and an opportunity to appeal the determination pursuant to this Rule 4800 Series. This interpretive material describes the steps the Exchange will follow to effect such a delisting.

Consistent with Exchange Act Rule 12d2-2, to effect a delisting, the Exchange will provide public notice of its final determination to remove a security from listing by issuing a press release and posting notice on its web site. This public notice will be disseminated no fewer than 10 days before the delisting becomes effective and will remain posted until the delisting is effective. Following such public notification, the Exchange will file an application on Form 25 with the Commission to delist the security, and will promptly provide a copy of that Form 25 to the issuer. The Form 25, and the delisting of the security, will become effective 10 days after it is filed pursuant to Exchange Act Rule 12d2-2(d)(1), unless the Commission postpones such delisting pursuant to Rule 12d2-2(d)(3).

##### **4801. Definitions**

(a) The term "Adjudicator" shall mean a member of an Adjudicatory Body.

(b) The term "Adjudicatory Body" shall mean a Listing Qualifications Panel, the Listing Council, or the Exchange Board.

(c) The term "Advisor" shall mean an individual employed by the Exchange who is advising an Adjudicatory Body with respect to a proceeding under the Rule 4800 Series.

(d) The term "Hearings Department" shall mean the Listing Qualifications Hearings Department in the Exchange's Office of General Counsel.

(e) The term "Listing Council" shall mean the Exchange Listing and Hearing Review Council, a committee appointed by the Exchange's Board of Directors pursuant to Article VI of the Exchange's By-Laws whose responsibilities include the review of determinations to limit or prohibit the listing of an issuer's securities made by a Listing Qualifications Panel.

(f) The term "Listing Council Decision" shall mean a written decision of the Listing Council.

(g) The term "Listing Department" shall mean the Listing Qualifications Department, the department of the Exchange that is responsible for evaluating the compliance of issuers with the quantitative and qualitative listing standards set forth in the Rule 4000 Series and determining the eligibility for initial or continued listing of an issuer's securities.

(h) The term "Listing Qualifications Panel" or "Panel" shall mean an independent panel composed of at least two persons, not employees of the Exchange or its affiliates, designated by the Exchange's Board of Directors.

(i) The term "Exchange Board" shall mean the Board of Directors of the Exchange.

(j) The term "Panel Decision" shall mean a written decision of a Listing Qualifications Panel.

(k) The term "Staff Determination" shall mean either:

(1) a written determination by the Listing Department to limit or prohibit the initial or continued listing of an issuer's securities pursuant to Rule 4804; or

(2) a public reprimand letter in a case where the Listing Department has determined that the issuer has violated a corporate governance or notification listing standard of the Exchange (other than one required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Listing Department shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.

#### **4802. Purpose and General Provisions**

(a) The purpose of this Rule 4800 Series is to provide procedures for the independent review of determinations of the Exchange that prohibit or limit the listing of an issuer's securities on the Exchange based upon the Equity Rules, as set forth in the Rule 4000 Series. Securities of issuers that do not meet the quantitative or qualitative listing standards set forth in the Rule 4000 Series are subject to delisting from, or denial of initial listing on, the Exchange.

(b) An issuer may file a written request for an exception to any of the standards set forth in the Rule 4000 Series at any time during the pendency of a proceeding under the Rule 4800 Series. A Listing Qualifications Panel may grant exceptions for a period not to exceed 180 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, and the Listing Council may grant exceptions for a period not to exceed 360 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, in each case where it deems appropriate.

(c) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, the Listing Council, or the Exchange Board, as part of its respective review, (1) may request additional information from the issuer or the Listing Department, and (2) may consider such additional information available from any source as the Adjudicatory Body may deem to be relevant. The issuer and the Listing Department shall be afforded written notice and an opportunity to address the significance of any such information requested or considered.

(d) At each level of a proceeding under the Rule 4800 Series, an Adjudicatory Body, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. The Listing Council or the Exchange Board, as part of its respective review, may also consider any action by an issuer during the review process that would have constituted a violation of the Exchange's corporate governance requirements had the issuer's securities been listed on the Exchange at the time. The issuer shall be afforded written notice of such consideration and an opportunity to respond. Furthermore, an Adjudicatory Body may subject the issuer to additional or more stringent criteria for the initial or continued listing of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities inadvisable or unwarranted in the opinion of the Adjudicatory Body, even though the securities meet all enumerated criteria for initial or continued listing on the Exchange.

(e) The Listing Department or the Advisor to an Adjudicatory Body, as applicable, shall document the date on which a decision with respect to an issuer is implemented.

(f) A security that has been the subject of a decision by an Adjudicatory Body to delist such security shall be required, prior to re-listing, to comply with the requirements for initial listing. A security that has been suspended but that has not been the subject of

such a decision shall be required, prior to re-listing, to comply with requirements for continued listing.

### **4803. Staff Review of Deficiency**

(a) Whenever staff of the Listing Department determines that an issuer does not meet a listing standard set forth in the Rule 4000 Series, staff shall immediately notify the issuer. The issuer shall make a public announcement through the news media disclosing the receipt of this notice, including the Rule(s) upon which it was based. Prior to the release of the public announcement, the issuer shall provide such disclosure to the Exchange's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the notice from the Listing Department.

(1) In the case of

(A) all quantitative deficiencies from standards that do not provide a compliance period;

(B) deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is not applicable; or

(C) deficiencies from the standards of Rules 4350(f), (h), (i), (k), (l) or (n), 4360(f) or (i), or 4351;

staff's notice shall provide the issuer with fifteen calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending. Subject to the restrictions of paragraph (b), staff may extend this deadline upon good cause shown. Upon receipt of the issuer's plan, staff in the Listing Department may request such additional information from the issuer as is necessary to make a determination regarding the likelihood that the plan will allow the issuer to meet the listing standard at issue.

(2) In the case of:

(A) quantitative deficiencies from standards that do provide a compliance period: and

(B) deficiencies from the standards of Rules 4350(c) or (d) or 4360(c) or (d) where the cure period of the Rule is applicable;

staff's notice shall provide the issuer with the applicable compliance or cure period.

(3) In all other cases, staff's notice shall be in the form of a Staff Determination issued pursuant to Rule 4804(a).

(b) Unless review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Rule 4801(k)(2)) with respect to the issuer is already pending, the Listing Department may grant the issuer additional time to regain compliance with a listing standard described in paragraph (a)(1); provided, however, that the additional time provided by all such exceptions shall not exceed 105 calendar days from the date of staff's notification pursuant to paragraph (a). The Listing Department shall prepare a written record describing the basis for granting any exception, and shall provide the issuer with written notice as to the terms of the exception. If the issuer does not regain compliance within the time period provided by all applicable exceptions, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a). If the Listing Department determines not to grant the issuer additional time to regain compliance, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a) that includes a description of the basis for denying the exception.

#### **IM-4803. Staff Review of Deficiency**

As provided in Rule 4803(a)(1)(A), the staff of the Listing Department may accept a plan to regain compliance with respect to quantitative deficiencies from standards that do not themselves provide a compliance period. Such standards include:

Rules 4310(c)(3)(A) and 4310(c)(3)(C)

Rule 4310(c)(6)

Rule 4310(c)(7) (but only as to the number of publicly held shares, and not as to such shares' market value)

Rule 4320(e)(2)(B)

Rules 4320(e)(4) and (5) (but only as to the number of publicly held shares, and not as to such shares' market value)

In a case where an issuer fails to comply with the requirements of Rule 4310(c)(3)(C), the Listing Department shall not accept a plan to achieve compliance with those requirements in the future, since compliance requires stated levels of net income or assets and revenues during completed fiscal years and therefore can only be demonstrated through audited financial statements. Similarly, an issuer may not submit a plan relying on partial-year performance to demonstrate compliance with these standards. An issuer cited for non-compliance with these requirements may, however, submit a plan that demonstrates current or near-term compliance with Rule 4310(c)(3)(A) (i.e., the alternative listing requirement relating to stockholders' equity), or Rules 4310(c)(3)(B) (i.e., the alternative listing requirement relating to market value of listed securities).

#### **4804. Written Notice of Staff Determination**

(a) If the Listing Department reaches a determination to limit or prohibit the initial or continued listing of an issuer's securities or to issue a public reprimand letter, it shall prepare and provide to the issuer a Staff Determination that shall describe the specific grounds for the determination, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that upon request the issuer shall be provided an opportunity for a hearing under this Rule 4800 Series.

(b) An issuer that receives a Staff Determination under Rule 4804(a) shall make a public announcement through the news media disclosing the receipt of the Staff Determination, including the Rule(s) upon which the Staff Determination was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to the Exchange's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the Staff Determination.

(c) If review under the Rule 4800 Series of a Staff Determination described in Rule 4801(k)(1) is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall prepare and provide to the issuer a Staff Determination with respect to such additional deficiencies. If the new Staff Determination is issued prior to a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall notify the issuer that it should present its views with respect to the additional deficiencies at the Panel hearing. If the new Staff Determination is issued after a Panel hearing with respect to the original Staff Determination, the new Staff Determination shall inform the issuer that it should present its views with respect to the additional deficiencies in writing within the period specified in the Staff Determination, to allow review of the additional deficiencies as provided under Rule 4802(d).

(d) If review under the Rule 4800 Series of a public reprimand letter is pending and the Listing Department identifies the existence of one or more additional deficiencies with respect to the issuer, the Listing Department shall review the additional deficiencies as provided in Rule 4803.

(e) If an issuer receives a Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Rule 4801(k)(2)) and does not request a hearing within the period specified in Rule 4805, the securities of the issuer will be suspended and the Exchange will follow the procedures described in IM-4800 and submit an application on Form 25 to the Securities and Exchange Commission to strike the security from listing.

#### **4805. Request for Hearing**

(a) An issuer may, within seven calendar days of the date of the Staff Determination, request either a written or oral hearing to review the Staff Determination.

Requests for hearings should be filed with the Hearings Department. A request for a hearing shall stay the delisting action pending the issuance of a Panel Decision. If no hearing is requested within the seven calendar day period, the right to request review is waived, and the Staff Determination shall take immediate effect. All hearings shall be held before a Listing Qualifications Panel as described in Rule 4806. All hearings shall be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department shall make an acknowledgment of the issuer's hearing request stating the date, time, and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer shall be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b) The issuer may file a written submission with the Hearings Department stating the specific grounds for the issuer's contention that the Staff Determination was in error or requesting that the Listing Qualifications Panel grant an exception, as permitted by Rule 4802. The issuer may also submit any documents or other written material in support of its request for review, including any information not available at the time of the Staff Determination.

(c) Within 15 calendar days of the date of the Staff Determination, but in no event after the time of the hearing, the issuer must submit a hearing fee to the Exchange, to cover the cost of holding the hearing, as follows:

(1) where consideration is on the basis of written submission from the issuer, \$4,000; or

(2) where consideration is on the basis of an oral hearing, whether in person or by telephone, \$5,000.

#### **4806. The Listing Qualification Panel**

(a) All hearings shall be conducted before a Listing Qualifications Panel. Prior to the hearing, the Listing Qualifications Panel shall review the written record, as defined in Rule 4811. At the hearing, the issuer may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons. Hearings are generally scheduled to last one hour, but may be extended at the discretion of the Listing Qualifications Panel. The Listing Qualifications Panel may question any representative of the issuer appearing at the hearing. A transcript of oral hearings shall be kept. The record of proceedings before a Listing Qualifications Panel shall be kept by the Hearings Department.

(b) After the hearing, the Listing Qualifications Panel shall issue a Panel Decision that meets the requirements of Rule 4811, and, except as provided in paragraph (c), each member of the Listing Qualifications Panel shall affirmatively approve it. The Panel Decision shall be promptly provided to the issuer and is effective immediately unless it specifies to the contrary. If the Panel determines to delist the issuer, the securities of the

issuer will be immediately suspended, unless the Panel Decision specifies to the contrary. The Panel Decision shall provide notice that the issuer may request review of the Panel Decision by the Listing Council within 15 calendar days of the date of the Panel Decision and that the Panel Decision may be called for review by the Listing Council within 45 calendar days from the date of the Panel Decision pursuant to Rule 4807.

(c) If, following the hearing, the Listing Qualifications Panel cannot reach an unanimous decision regarding the matter under review, a Panel Decision shall not be issued and the issuer shall be notified of this circumstance. Thereafter, the issuer shall be provided an additional hearing before a Listing Qualifications Panel composed of three persons who did not participate in the previous hearing. The issuer may determine whether the hearing shall be conducted based on the written record or an oral hearing, whether in person or by telephone. The issuer may submit any documents or other written material in support of its request for review, including any information not available at the time of the initial hearing before the Listing Qualifications Panel. There shall be no fee for the new hearing. After a hearing of a Listing Qualifications Panel convened pursuant to this paragraph (c), the Listing Qualifications Panel shall issue a Panel Decision that meets the requirements of Rule 4811 and that has been affirmatively approved by at least a majority of the Listing Qualifications Panel.

(d) (1) In the event that:

(A) a Listing Qualifications Panel exercises its authority under Rule 4802(b) to grant an exception from listing standards in the Rule 4000 Series requiring the issuer to maintain certain levels of stockholders' equity or to timely file periodic reports with the Commission; and

(B) within one year following the date on which the issuer regains compliance with such listing standard, the issuer is found by the Listing Department to be out of compliance with the requirement that was the subject of the exception, and the Panel has not opted to monitor the issuer pursuant to Rule 4806(d)(2),

then, notwithstanding Rule 4803, the issuer shall not be permitted to provide the Listing Department with a plan to regain compliance, and the Listing Department shall not be permitted to grant additional time for the issuer to regain compliance. The Listing Department shall provide the issuer with a Staff Determination, and the issuer may request review by a Panel pursuant to Rule 4805. The Panel shall consider the prior non-compliance when rendering its decision.

(2) In the event that a Listing Qualifications Panel exercises its authority under Rule 4802(b) to grant an exception from any listing standard in the Rule 4000 Series and the issuer regains compliance with all applicable listing standards, the Panel may nevertheless monitor the issuer's continued compliance for a period of up to one year following the date on which the issuer regains compliance if the Panel concludes that there is a likelihood that the issuer will fail



to maintain compliance with one or more listing standards during that period. If the Panel or the Listing Department determines that an issuer that is being monitored fails to satisfy any listing standards during the monitoring period, the Panel (or a newly convened Panel if the initial Panel is unavailable) shall promptly schedule an oral hearing with respect to such failure pursuant to Rule 4806(a) (unless the issuer requests consideration based on written submission in lieu of an oral hearing). Notwithstanding Rule 4803, the issuer shall not be permitted to provide the Listing Department with a plan to regain compliance with respect to any new deficiency that arises during the monitoring period, and the Listing Department shall not be permitted to grant additional time for the issuer to regain compliance with respect to any such new deficiency. The Panel shall consider the prior non-compliance when rendering its decision.

(e) If the Panel determines to delist the issuer and the issuer does not timely request review by the Listing Council and the Listing Council does not call the matter for review, the Exchange will submit an application to the Securities and Exchange Commission to strike the security from listing. A copy of such application will be furnished to the issuer in accordance with Section 12 of the Act and the rules thereunder.

#### **4807. Review by the Exchange Listing and Hearing Review Council**

(a) The issuer may initiate the Listing Council's review of any Panel Decision by making a written request within 15 calendar days of the date of the decision. Requests for review should be addressed to the Listing Council in care of the Exchange's Office of Appeals and Review. The request shall not operate as a stay of the Panel Decision. Also within 15 calendar days of the date of the Panel Decision, the issuer must submit a fee of \$4,000 to the Exchange to cover the cost of the review. Upon receipt of the request for review and the applicable fee, the Exchange's Office of Appeals and Review shall make an acknowledgment of the issuer's request stating the deadline for the issuer to provide any written submissions.

(b) The Listing Council may also consider any Panel Decision upon the request of one or more members of the Listing Council within 45 calendar days of the date of the Panel Decision. The issuer shall be promptly informed of the reasons for the review and shall be provided a deadline to provide a written submission if the issuer wishes. The institution of discretionary review by the Listing Council shall not operate as a stay of the Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Listing Council, the call for review of a Panel Decision may be withdrawn at any time prior to the issuance of a decision.

(c) The Listing Council shall consider the written record and, at its discretion, hold additional hearings. Any hearing shall be scheduled, to the extent practicable, within 45 days of the date that a request for review initiated by either the issuer or one or more members of the Listing Council, is made. The Listing Council may also recommend that the Exchange Board consider the matter. The record of proceedings before the Listing Council shall be kept by the Exchange's Office of Appeals and Review.

(d) In each proceeding before the Listing Council, a subcommittee consisting of at least two members of the Listing Council shall review the complete written record. Members of the Listing Council who are not on a subcommittee shall be provided with a written summary of the record prepared by an Advisor, and may, but shall not be required to, review the complete written record.

(e) The Listing Council shall issue a Listing Council Decision that affirms, modifies, or reverses the Panel Decision or that remands the matter to the Listing Department or to the Listing Qualifications Panel for further consideration. The Listing Council Decision shall be affirmatively approved by at least a majority of the Listing Council and shall meet the requirements of Rule 4811. The Listing Council Decision shall provide notice that the Exchange Board may call the Listing Council Decision for review at any time before its next meeting which is at least 15 calendar days following the issuance of the Listing Council Decision. The Listing Council Decision shall be promptly provided to the issuer and shall take immediate effect unless it specifies to the contrary. If the Listing Council determines to delist the issuer, the securities of the issuer will be immediately suspended, unless the Listing Council Decision specifies to the contrary.

(f) If the Listing Council determines to delist the issuer and the Exchange Board does not call the matter for review or withdraws its call for review, the Exchange will follow the procedures described in IM-4800 and submit an application on Form 25 to the Securities and Exchange Commission to strike the security from listing.

#### **4808. Reconsideration by the Listing Qualifications Panel and the Listing and Hearing Review Council**

(a) An issuer may request that the Listing Qualifications Panel reconsider a Panel Decision only upon the basis that a mistake of material fact existed at the time of the Panel Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Panel Decision. An issuer's request for reconsideration shall not stay a Listing Qualifications Panel delisting determination unless the Listing Qualifications Panel issues a written determination staying the delisting prior to the scheduled date for delisting. An issuer's request for reconsideration shall not toll the time period set forth in Rule 4807(a) for the issuer to initiate the Listing Council's review of the Panel Decision. If the Listing Qualifications Panel grants an issuer's reconsideration request, the Listing Qualifications Panel shall issue a modified decision meeting the requirements of Rule 4806(b) within 15 calendar days following the issuance of the original Panel Decision or lose jurisdiction over the matter. If the Listing Council calls a Panel Decision for review on the same issue that the issuer has requested reconsideration by the Listing Qualifications Panel, the Listing Council, in its discretion, may assert jurisdiction over the Panel Decision or may permit the Listing Qualifications Panel to proceed with the reconsideration.

(b) An issuer may request that the Listing Council reconsider a Listing Council Decision only upon the basis that a mistake of material fact existed at the time of the Listing Council Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Listing Council Decision. An issuer's request for reconsideration shall not stay a Listing Council Decision unless the Listing Council issues a written determination staying the decision. If the Listing Council grants an issuer's reconsideration request, the Listing Council shall issue a modified decision meeting the requirements of Rule 4807(e) within 15 calendar days following the issuance of the original Listing Council Decision or lose jurisdiction over the matter.

(c) The Listing Qualifications Panel and the Listing Council may correct clerical or other non-substantive errors in their respective decisions either on their own motion or at the request of an issuer. A copy of any such corrected decision shall be provided to the issuer.

#### **4809. Discretionary Review by the Exchange Board**

(a) A Listing Council Decision may be called for review by the Exchange Board solely upon the request of one or more Director not later than the next Exchange Board meeting that is 15 calendar days or more following the date of the Listing Council Decision. Such review shall be undertaken solely at the discretion of the Exchange Board and will not operate as a stay of the Listing Council Decision, unless the call for review specifies to the contrary. At the sole discretion of the Exchange Board, the call for review of a Listing Council Decision may be withdrawn at any time prior to the issuance of a decision.

(b) If the Exchange Board conducts a discretionary review, the review generally shall be based on the written record considered by the Listing Council. However, the Exchange Board may, at its discretion, request and consider additional information from the issuer and/or from staff of the Listing Department. If the Board considers additional information, the record of proceedings before the Exchange Board shall be kept by the Exchange's Office of Appeals and Review.

(c) If the Exchange Board conducts a discretionary review, the issuer shall be provided with a written decision that meets the requirements of Rule 4811. The Exchange Board may affirm, modify or reverse the Listing Council Decision and may remand the matter to the Listing Council, Listing Qualifications Panel, or staff of the Listing Department with appropriate instructions. The decision of the Exchange Board will take immediate effect, unless it specifies to the contrary, and represents the final action of the Exchange. If the Exchange Board determines to delist the issuer, the securities of the issuer will be immediately suspended, unless the Exchange Board specifies to the contrary, and the Exchange will follow the procedures described in IM-4800 and submit an application on Form 25 to the Commission to strike the security from listing.

#### **4810. Reserved.**

**4811. Record on Review; Contents of Decisions**

(a) Documents in the written record may consist of the following items, as applicable: correspondence between the Exchange and the issuer, the issuer's public filings, information released to the public by the issuer, and any written submissions or exhibits submitted by either the issuer or the Listing Department, including any written request for an exception as permitted in Rule 4802(b) and any response thereto. Any additional information requested from the issuer or staff of the Listing Department by the Listing Qualifications Panel, Listing Council, or the Exchange Board as part of the review process shall be included in the written record. The written record shall be supplemented by the transcript of any hearings held during the review process and each decision issued. At each level of review under this Rule 4800 Series, the issuer shall be provided with a list of documents in the written record, and a copy of any documents included in the record that are not in the issuer's possession or control, at least three calendar days in advance of the deadline for issuer submissions, unless the issuer waives such production.

(b) In addition to the documents described in paragraph (a), if any additional information is considered as permitted in Rule 4802(c), that information, and any written submission addressing the significance of that information, shall be made part of the record.

(c) If additional issues arising under the Rule 4000 Series are considered, as permitted in Rule 4802, the notice of such consideration and any response to such notice shall be made a part of the record.

(d) Each Panel Decision, Listing Council Decision, and decision of the Exchange Board shall include:

(1) a statement describing the procedural history of the proceeding, including investigations or reviews undertaken by the Listing Department;

(2) the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer is alleged to have failed to satisfy;

(3) a statement setting forth the findings of fact with respect to the issuer;

(4) the conclusions of the Adjudicatory Body as to whether the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series;

(5) a statement of the Adjudicatory Body in support of the disposition of the principal issues raised by the issuer in the proceeding, and, if applicable, any exception to the Rule 4000 Series as permitted by Rule 4802(b) and the rationale therefor.

(e) If a Panel Decision, Listing Council Decision, or decision of the Exchange Board concludes that the issuer has failed to satisfy the quantitative standards or qualitative considerations set forth in the Rule 4000 Series, the decision shall either:

(1) grant an exception to the Rule 4000 Series as permitted by Rule 4802(b);

(2) limit or prohibit the initial or continued listing of the issuer's securities;  
or

(3) serve as a public reprimand letter in a case where the Adjudicatory Body determines that the issuer has violated a corporate governance or notification listing standard of the Exchange (other than one required by Rule 10A-3 of the Securities Exchange Act of 1934) and that delisting is not an appropriate sanction. In determining whether to issue a public reprimand letter, the Adjudicatory Body shall consider whether the violation was inadvertent, whether the violation materially adversely affected shareholders' interests, whether the violation has been cured, whether the issuer reasonably relied on an independent advisor and whether the issuer has demonstrated a pattern of violations.

(f) An issuer that receives an Adjudicatory Body decision that serves as a public reprimand letter as described in Rule 4811(e)(3) shall make a public announcement through the news media disclosing the receipt of the decision, including the Rule(s) upon which the decision was based. Prior to the release of the public announcement, an issuer shall provide such disclosure to the Exchange's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the decision.

#### **4812. Document Retention Procedures**

Any document submitted to the Exchange in connection with a Rule 4800 proceeding shall be retained in accordance with applicable record retention policies.

#### **4813. Delivery of Documents**

Delivery of any document under this Rule 4800 Series may be made by electronic delivery, hand delivery, facsimile, or overnight courier. Delivery shall be considered timely if the electronic delivery, hand delivery, fax, or overnight courier is received on or before the relevant deadline. If an issuer has not specified a facsimile number, email address, or street address, delivery shall be made to the last known facsimile number, email address, and street address. If an issuer is represented by counsel or a representative, delivery may be made to the counsel or representative.

#### **4814. Computation of Time**

(a) In computing any period of time under the Rule 4800 Series, the day of the act, event, or default from which the period of time begins to run is not to be included. The last day of the period so computed is included, unless it is a Saturday, Sunday, federal holiday, or Exchange holiday in which event the period runs until the end of the next day that is not a Saturday, Sunday, federal holiday or Exchange holiday.

(b) In the event that the Office of General Counsel determines that notice required to be provided under the Rule 4800 Series was not properly given or that other extenuating circumstances exist, the Office of General Counsel shall adjust the periods of time provided by such rules for the filing of written submissions, the scheduling of hearings, or the performance of other procedural actions by the issuer or an Adjudicator, as applicable, to allow the issuer or the Adjudicator the time contemplated by these rules.

(c) An issuer may waive any notice period specified by the Rule 4800 Series.

#### **4815. Ex Parte Communications; Separation of Adjudicators**

##### (a) Ex Parte Communications

(1) Unless on notice and opportunity for staff of the Listing Department and the issuer to participate, a member of the staff of the Listing Department involved in reaching a Staff Determination, counsel to the Listing Department, an issuer, or counsel to or representative of an issuer, shall not make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding under this Rule 4800 Series to an Adjudicator who is participating in a decision with respect to that proceeding, or to any Advisor with respect to that proceeding.

(2) No Adjudicator who is participating in a decision with respect to a proceeding under this Rule 4800 Series, and no Advisor with respect to such a proceeding, shall make or knowingly cause to be made an ex parte communication relevant to the merits of that proceeding to an issuer, counsel to or representative of an issuer, a member of the staff of the Listing Department involved in reaching a Staff Determination, or counsel to the Listing Department.

(3) An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made an ex parte communication relevant to the merits of a proceeding shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. Staff of the Listing Department or the issuer, as applicable, shall be permitted to respond to the ex parte communication, and any such response shall be placed in the record of the proceeding.

##### (b) Separation of Adjudicators

(1) Members of a Listing Qualifications Panel and their Advisors who are participating in a proceeding under this Rule 4800 Series are prohibited from making communications relevant to the merits of such proceeding to members of the Listing Council or the Exchange Board or their respective Advisors.

(2) Members of the Listing Council and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the Exchange Board or their Advisors.

(3) Members of the Exchange Board and their Advisors are prohibited from making communications relevant to the merits of a proceeding under this Rule 4800 Series to members of a Listing Qualifications Panel who are participating in such proceeding or their Advisors, or members of the Listing Council or their Advisors.

(4) An Adjudicator or Advisor who is participating in or advising with respect to a proceeding who receives, makes, or knowingly causes to be made a communication prohibited by paragraphs (b)(1)–(3) of this Rule shall place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. Staff of the Listing Department and the issuer shall be permitted to respond to the communication, and any such response shall be placed in the record of the proceeding.

#### **4816. Recusal or Disqualification**

(a) No person shall serve as a member of a Listing Qualifications Panel, or participate as a member of the Listing Council, the Exchange Board, or the staff of the Listing Department, in a matter as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the person shall recuse himself or herself, or shall be disqualified as follows:

##### (1) Exchange Board

The Chair of the Exchange Board shall have authority to order the disqualification of a Director, and a majority of the Exchange Board excluding the Chair of the Exchange Board shall have authority to order the disqualification of the Chair.

##### (2) Listing Council

A Chair of the Listing Council shall have authority to order the disqualification of a member of the Listing Council, and a majority of the Listing

Council excluding any Chairs of the Listing Council shall have authority to order the disqualification of a Chair of the Listing Council.

(3) Staff of Listing Department; Panelist of Listing Qualifications Panel

The General Counsel of the Exchange shall have authority to order the disqualification of (A) a member of the staff of the Listing Department reviewing the qualifications of an issuer, or (B) a member of a Listing Qualifications Panel.

(b) At least five days prior to any proceeding under the Rule 4800 Series, the issuer shall provide the Hearings Department or the Advisor to the Listing Council or the Exchange Board, as applicable, with names and biographical information of each person that will appear on behalf of the issuer at the proceeding, and the Hearings Department or such Advisor, as applicable, shall provide the issuer with names and biographical information of the Adjudicators for the proceeding; provided, however, that with respect to proceedings before the Listing Council or the Exchange Board, the Advisor to the respective Adjudicatory Body may post names and biographical information of each Adjudicator on a publicly available website in lieu of providing them directly to the issuer.

(c) An issuer or the staff of the Listing Department may file a request to disqualify an Adjudicator. Such a request shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Adjudicator's fairness might reasonably be questioned, and shall be accompanied by a statement setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the party learned of those facts. Such a request shall be filed (1) not later than two business days after the party was provided with the name and biographical information of the Adjudicator, or (2) if the name and biographical information of the Adjudicator has been posted on a website, not later than two business days after the issuer requested Listing Council review or received notice of discretionary review by the Listing Council or the Exchange Board. A request for disqualification of an Adjudicator shall be decided by the party with authority to order disqualification of such Adjudicator, who shall promptly investigate whether disqualification is required and issue a written response to the request.

**5000. Reserved**

**6000. Other Systems and Programs**

**6950. Order Audit Trail System**

**6951. Definitions**

For purposes of the Rule 6950 Series:



(a) "Bunched Order" shall mean two or more orders that are aggregated prior to execution.

(b) "Customer" shall mean a person other than a broker or dealer.

(c) "NASDAQ OMX BX Equities Market" shall mean the service provided by the Exchange that provides for the automated execution and reporting of transactions in securities listed on the Exchange and other exchanges.

(d) "Electronic Communication Network" shall mean any electronic system that widely disseminates to third parties orders entered therein by an exchange market maker or over-the-counter market maker, and permits such orders to be executed in whole or in part, and as further defined in Securities Exchange Act Rule 600.

(e) "Electronic Order" shall mean an order captured by a member in an electronic order-routing or execution system.

(f) "Index Arbitrage Trade" shall mean an arbitrage trading strategy involving the purchase or sale of a "basket" or group of securities in conjunction with the purchase or sale, or intended purchase or sale, of one or more cash-settled options or futures contracts on index stock groups, or options on any such futures contracts in an attempt to profit by the price difference, as further defined in New York Stock Exchange Rule 80A.

(g) "Intermarket sweep order" shall have the same meaning as contained in SEC Rule 600 adopted pursuant to the Act.

(h) "Manual Order" shall mean an order that is captured by a member other than in an electronic order-routing or execution system.

(i) "Order" shall mean any oral, written, or electronic instruction to effect a transaction in an equity security listed on the Exchange or Nasdaq that is received by a member from another person for handling or execution, or that is originated by a department of a member for execution by the same or another member, other than any such instruction to effect a proprietary transaction originated by a trading desk in the ordinary course of a member's market making activities.

(j) "Order Audit Trail System" shall mean the automated system owned and operated by FINRA that is designed to capture order information in equity securities listed on the Exchange and Nasdaq reported by members for integration with trade and quotation information to provide FINRA with an accurate time sequenced record of orders and transactions.

(k) "Program Trade" shall mean a trading strategy involving the related purchase or sale of a group of 15 or more securities having a total market value of \$1 million or more, as further defined in New York Stock Exchange Rule 80A.

(l) "Reporting Agent" shall mean a third party that enters into any agreement with a member pursuant to which the Reporting Agent agrees to fulfill such member's obligations under Rule 6955.

(m) "Reporting Member" shall mean a member that receives or originates an order and has an obligation to record and report information under Rules 6954 and 6955. A member shall not be considered a Reporting Member in connection with an order, if the following conditions are met:

(1) the member engages in a non-discretionary order routing process, pursuant to which it immediately routes, by electronic or other means, all of its orders to a single receiving Reporting Member;

(2) the member does not direct and does not maintain control over subsequent routing or execution by the receiving Reporting Member;

(3) the receiving Reporting Member records and reports all information required under Rules 6954 and 6955 with respect to the order; and

(4) the member has a written agreement with the receiving Reporting Member specifying the respective functions and responsibilities of each party to effect full compliance with the requirements of Rules 6954 and 6955.

(n) "Proprietary Trading Firm" shall mean an Exchange member that trades its own capital and that does not have "customers," as that term is defined in Equity Rule 0210(g), and that is not a FINRA member. The funds used by a Proprietary Trading firm must be exclusively firm funds and all trading must be in the firm's accounts. Traders must be owners of, employees of, or contractors to the firm.

### **6952. Applicability**

(a) Unless otherwise indicated, the requirements of the Rule 6950 Series are in addition to the requirements contained elsewhere in the Rules of the Exchange.

(b) Unless otherwise indicated, the requirements of the Rule 6950 Series shall apply to all Exchange Members and to their associated persons.

(c) Unless otherwise indicated, the requirements of the Rule 6950 Series shall apply to all executed or unexecuted orders for equity securities listed on the Exchange or on Nasdaq.

### **6953. Synchronization of Member Business Clocks**

(a) Exchange members shall comply with NASD Rule 6953 as if such Rule were part of the Exchange's rules.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 6953 are transferred into the FINRA rulebook, then Equity Rule 6953 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 6953 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to "the By-Laws or other rules of the Association" shall be construed as references to "the Rules of the Exchange."

#### **6954. Recording of Order Information**

(a) With respect to orders for securities listed on Nasdaq, Exchange members and persons associated with a member shall comply with NASD Rule 6954 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 6954 are transferred into the FINRA rulebook, then Equity Rule 6954 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 6954 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) With respect to orders for securities listed on the Exchange, Exchange members and persons associated with a member shall comply with NASD Rule 6954 as if such Rule applied to orders for securities listed on the Exchange and such Rule were part of the Rules of the Exchange.

(c) The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 6954 by complying with NASD Rule 6954 as written and as applied to securities listed on the Exchange by Equity Rule 6954, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 6954 are being performed by FINRA on behalf of the Exchange.

(d) For purposes of this Rule, references to Rules 6952 through 6957 shall be construed as references to Equity Rules 6952 through 6957.

(e) Exchange members shall assign and enter a unique order identifier, in the form prescribed by the Exchange, to all orders that are electronically transmitted to NASDAQ OMX BX Equities Market. An order identifier shall not be required for orders that are manually transmitted.

#### **6955. Order Data Transmission Requirements**

(a) Except as provided in paragraph (b), with respect to orders for securities listed on Nasdaq, Exchange members and persons associated with a member shall comply with NASD Rule 6955 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 6955 are transferred into the FINRA rulebook, then Equity Rule 6955 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 6955 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) Proprietary Trading Firms and their associated persons shall be required to comply with NASD Rule 6955 as if such Rule were part of the Exchange's rules only when they receive a request from the Exchange's Regulation Department to submit order information with respect to specific time periods identified in such request. Nothing in this Rule shall be construed to limit the obligations of Proprietary Trading Firms and their associated persons under any other Rule of the 6950 Series, including but not limited to, Rule 6954.

(c) With respect to orders for securities listed on the Exchange, Exchange members and their associated persons shall be required to comply with NASD Rule 6955 as if such Rule applied to orders for securities listed on the Exchange and such Rule were part of the Rules of the Exchange, but only when they receive a request from the Exchange's Regulation Department to submit order information with respect to specific time periods identified in such request. Nothing in this Rule shall be construed to limit the obligations of Exchange members and their associated persons under any other Rule of the 6950 Series, including but not limited to, Rule 6954.

(d) The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 6955 by complying with NASD Rule 6955 as written and as applied to securities listed on the Exchange by Equity Rule 6955, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 6955 are being performed by FINRA on behalf of the Exchange.

(e) For purposes of this Rule, references to Rules 6954 shall be construed as references to Equity Rule 6954.

#### **6956. Violation of Order Audit Trail System Rules**

Failure of a member or person associated with a member to comply with any of the requirements of Rule 6951 through Rule 6957 may be considered conduct that is inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of Rule 2110.

**6957. Effective Date**

(a) Exchange members and persons associated with a member shall comply with NASD Rule 6957 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 6957 are transferred into the FINRA rulebook, then Equity Rule 6957 shall be construed to require Exchange members and persons associated with a member to comply with the FINRA rule corresponding to NASD Rule 6957 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) For purposes of this Rule, references to Rule 6953, Rule 6954, and Rule 3110 shall be construed as references to Equity Rule 6953, Equity Rule 6954, and Equity Rule 3110.

**6958. Exemption to the Order Recording and Data Transmission Requirements**

(a) Pursuant to the Rule 9600 Series, the Exchange, for good cause shown after taking into consideration all relevant factors, may exempt subject to specified terms and conditions, a member from the recording and order data transmission requirements of Rules 6954 and 6955, respectively, for manual orders, if such exemption is consistent with the protection of investors and the public interest, and the member meets the following criteria:

(1) the member and current control affiliates and associated persons of the member have not been subject within the last five years to any final disciplinary action, and within the last ten years to any disciplinary action involving fraud;

(2) the member has annual revenues of less than \$2 million;

(3) the member does not conduct any market making activities in equity securities listed on the Exchange;

(4) the member does not execute principal transactions with its customers (with limited exception for principal transactions executed pursuant to error corrections); and

(5) the member does not conduct clearing or carrying activities for other firms.

(b) An exemption provided pursuant to this Rule shall not exceed a period of two years. At or prior to the expiration of a grant of exemptive relief under this Rule, a member meeting the criteria set forth in paragraph (a) above may request, pursuant to the

9600 Series, a subsequent exemption, which will be considered at the time of the request consistent with the protection of investors and the public interest.

(c) This Rule shall be in effect until July 10, 2011.

## **7000. Reserved**

## **8000. Investigations and Sanctions**

### **8001. Regulation of the Exchange and its Members**

The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions described in these rules on behalf of the Exchange. Exchange rules that refer to the Exchange's Regulation Department, Exchange Regulation staff, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

Notwithstanding the fact that the Exchange has entered into the Regulatory Contract with FINRA to perform some of the Exchange's functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions.

### **8100. General Provisions**

#### **8110. Availability of Manual to Customers**

Members shall keep and maintain current paper or electronic copies of the NASD and the Exchange Manuals in a readily accessible place and shall make them available for examination by customers upon request.

#### **8120. Definitions**

(a) Unless otherwise provided, terms used in the Rule 8000 Series shall have the meaning as defined in Rule 0120.

(b) The term "Adjudicator" shall have the meaning as defined in Rule 9120.

### **8200. Investigations**

#### **8210. Provision of Information and Testimony and Inspection and Copying of Books**

(a) Authority of the Exchange's Regulation Department, Including FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the By-Laws or Equity Rules, the Exchange's Regulation Department, including FINRA staff shall have the right to:

(1) require a member, person associated with a member, or person subject to the Exchange's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by the Exchange's Regulation Department, including FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

(b) Other SROs and Regulators

The Exchange's Regulation Department, including FINRA staff, also may exercise the authority set forth in paragraph (a) for the purpose of an investigation, complaint, examination, or proceeding conducted by another domestic or foreign self-regulatory organization, association, securities or contract market, or regulator of such markets with which the Exchange has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.

(c) Requirement to Comply

No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

(d) Notice

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Exchange's Regulation Department staff, including FINRA staff, responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository, and

(2) any other more current address of the member or the person known to the Adjudicator or the Exchange's Regulation Department, including FINRA staff who is responsible for mailing or otherwise transmitting the notice.

(e) Electronic Interface

In carrying out its responsibilities under this Rule, the Exchange may, as appropriate, establish programs for the submission of information to FINRA on a regular basis through a direct or indirect electronic interface between FINRA and Exchange members.

(f) Inspection and Copying

A witness, upon proper identification, may inspect the official transcript of the witness' own testimony. Upon written request, a person who has submitted documentary evidence or testimony in an investigation may procure a copy of the person's documentary evidence or the transcript of the person's testimony upon payment of the appropriate fees, except that prior to the issuance of a complaint arising from the investigation, the Exchange's Regulation Department, including FINRA staff, may for good cause deny such request.

**8211. Automated Submission of Trading Data**

(a) A member shall submit the trade data specified below in automated format as may be prescribed by the Exchange's Regulation Department, including FINRA staff, from time to time. This information shall be supplied with respect to any transaction or transactions that are the subject of a request for information made by the Exchange's Regulation Department, including FINRA staff.

(b) If the transaction was a proprietary transaction effected or caused to be effected by the member for any account in which such member, or person associated with a member, is directly or indirectly interested, such member shall submit or cause to be submitted the following information:

(1) Clearing house number, or alpha symbol as used by the member submitting the data;

(2) Clearing house number(s), or alpha symbol(s) as may be used from time to time, of the members(s) on the opposite side of the transaction;

(3) Identifying symbol assigned to the security;

(4) Date transaction was executed;

(5) Number of shares, or quantity of bonds or options contracts for each specific transaction and whether each transaction was a purchase, sale, short sale, or, if an options contract, whether open long or short or close long or short;

(6) Transaction price;



(7) Account number; and

(8) Market center where transaction was executed.

(c) If the transaction was effected or caused to be effected by the member for any customer account, such member shall submit or cause to be submitted the following information:

(1) The data described in subparagraphs (b)(1) through (8) above;

(2) The customer name, address(es), branch office number, registered representative number, whether order was solicited or unsolicited, date account opened, employer name, and the tax identification number(s); and

(3) If the transaction was effected for another member, whether the other member was acting as principal or agent.

(d) In addition to the above trade data, a member shall submit such other information in such automated format as may from time to time be required by the Exchange's Regulation Department.

(e) Pursuant to the Rule 9600 Series, the Exchange may exempt a member from the requirement that the data prescribed in paragraphs (b) through (d) above be submitted to the Exchange's Regulation Department, including FINRA staff, in an automated format for good cause shown.

### **8212. Reserved**

### **8213. Reserved**

### **8220. Reserved**

### **8300. Sanctions**

#### **8310. Sanctions for Violation of the Rules**

(a) Imposition of Sanction

After compliance with the Rule 9000 Series, the Exchange may impose one or more of the following sanctions on a member or person associated with a member for each violation of the federal securities laws, rules or regulations thereunder, or the Equity Rules, or may impose one or more of the following sanctions on a member or person associated with a member for any neglect or refusal to comply with an order, direction, or decision issued under the Equity Rules:

(1) censure a member or person associated with a member;

(2) impose a fine upon a member or person associated with a member;

(3) suspend the membership of a member or suspend the registration of a person associated with a member for a definite period or a period contingent on the performance of a particular act;

(4) expel a member, cancel the membership of a member, or revoke or cancel the registration of a person associated with a member;

(5) suspend or bar a member or person associated with a member from association with all members;

(6) impose a temporary or permanent cease and desist order against a member or a person associated with a member; or

(7) impose any other fitting sanction.

(b) Assent to Sanction

Each party to a proceeding resulting in a sanction shall be deemed to have assented to the imposition of the sanction unless such party files a written application for appeal, review, or relief pursuant to the Rule 9000 Series.

#### **IM-8310-1. Effect of a Suspension, Revocation, Cancellation, or Bar**

If the Exchange or the Commission issues an order that imposes a suspension, revocation, or cancellation of the registration of a person associated with a member or bars a person from further association with any member, a member shall not allow such person to remain associated with it in any capacity, including a clerical or ministerial capacity. If the Exchange or the Commission suspends a person associated with a member, the member also shall not pay or credit any salary, or any commission, profit, or other remuneration that results directly or indirectly from any securities transaction, that the person associated with a member might have earned during the period of suspension.

#### **IM-8310-2. Reserved**

#### **IM-8310-3 Release of Disciplinary Complaints, Decisions and Other Information**

(a) The Exchange's Regulation Department shall, in response to a request, release to the requesting party a copy of any identified disciplinary complaint or disciplinary decision issued by the Exchange or any committee thereof; provided, however, that each copy of:

(1) a disciplinary complaint shall be accompanied by the following statement: "The issuance of a disciplinary complaint represents the initiation of a formal proceeding by NASDAQ OMX BX in which findings as to the allegations

in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. Because this complaint is unadjudicated, you may wish to contact the respondent before drawing any conclusions regarding the allegations in the complaint."

(2) a disciplinary decision that is released prior to the expiration of the time period provided under the Rule 9000 Series for appeal or call for review within the Exchange or while such an appeal or call for review is pending, shall be accompanied by a statement that the findings and sanctions imposed in the decision may be increased, decreased, modified, or reversed by the Exchange;

(3) a final decision of the Exchange that is released prior to the time period provided under the Act for appeal to the Commission or while such an appeal is pending, shall be accompanied by a statement that the findings and sanctions of the Exchange are subject to review and modification by the Commission; and

(4) a final decision of the Exchange that is released after the decision is appealed to the Commission shall be accompanied by a statement as to whether the effectiveness of the sanctions has been stayed pending the outcome of proceedings before the Commission.

(b) (1) The Exchange's Regulation Department shall release to the public information with respect to any disciplinary complaint initiated by the Department of Enforcement or the Department of Market Regulation of FINRA containing an allegation of a violation of a designated statute, rule or regulation of the Commission or the Exchange, as determined by the Chief Regulatory Officer of the Exchange (a "Designated Rule"); and may also release such information with respect to any disciplinary complaint or group of disciplinary complaints that involve a significant policy or enforcement determination where the release of information is deemed by the Chief Regulatory Officer to be in the public interest.

(2) Information released to the public pursuant to paragraph (b)(1) shall be accompanied by the statement required under paragraph (a)(1).

(c) (1) The Exchange's Regulation Department shall release to the public information with respect to any disciplinary decision issued pursuant to the Rule 9000 Series imposing a suspension, cancellation or expulsion of a member; or suspension or revocation of the registration of a person associated with a member; or suspension or barring of a member or person associated with a member from association with all members; or imposition of monetary sanctions of \$10,000 or more upon a member or person associated with a member; or containing an allegation of a violation of a Designated Rule; and may also release such information with respect to any disciplinary decision or group of decisions that involve a significant policy or enforcement determination where the release of information is deemed by the Chief Regulatory Officer to be in the public interest. The Exchange's Regulation Department also may release to the public

information with respect to any decision issued pursuant to the Rule 9550 Series imposing a suspension or cancellation of the member or a suspension or bar of the association of a person with a member, unless the Exchange's Regulation Department determines otherwise. The Exchange's Regulation Department may, in its discretion, determine to waive the requirement to release information with respect to a disciplinary or other decision under those extraordinary circumstances where the release of such information would violate fundamental notions of fairness or work an injustice. The Exchange's Regulation Department also shall release to the public information with respect to any temporary cease and desist order issued pursuant to the Rule 9800 Series. The Exchange's Regulation Department may release to the public information on any disciplinary or other decision issued pursuant to the Rule 9000 Series, not specifically enumerated in this paragraph, regardless of sanctions imposed, so long as the names of the parties and other identifying information is redacted.

(A) The Exchange's Regulation Department shall release to the public, in unredacted form, information with respect to any disciplinary decision issued pursuant to the Rule 9300 Series that does not meet one or more of the criteria in IM-8310-3(c)(1) for the release of information to the public, provided that the underlying decision issued pursuant to the Rule 9200 Series meets one or more of the criteria in IM-8310-3(c)(1) for the release of information to the public, and information regarding such decision has been released to the public in unredacted form.

(B) In the event there is more than one respondent in a disciplinary decision issued pursuant to the Rule 9000 Series, and sanctions imposed on one or more, but not all, of the respondents meet one or more of the criteria in IM-8310-3(c)(1) for the release of information to the public, the Exchange's Regulation Department shall release to the public, in unredacted form, information with respect to the respondent(s) who meet such criteria, and may release to the public, in redacted form, information with respect to the respondent(s) who do not meet such criteria. Notwithstanding the foregoing, the Exchange's Regulation Department shall release to the public, in unredacted form, information with respect to any respondent in a disciplinary decision issued pursuant to the Rule 9300 Series if the sanctions imposed on such respondent in the underlying decision issued pursuant to the Rule 9200 Series meet one or more of the criteria for release of information to the public, and information with respect to that respondent has been released in unredacted form.

(2) Information released to the public pursuant to paragraph (c)(1) shall be accompanied by a statement to the extent required for that type of information under paragraphs (a)(2)–(4).

(d) If a decision issued pursuant to the Rule 9000 Series other than by the Exchange Review Council is not appealed to or called for review by the Exchange

Review Council, the decision shall become effective on a date set by the Exchange's Regulation Department but not before the expiration of 45 days after the date of decision.

(e) Notwithstanding paragraph (d), expulsions and bars imposed pursuant to the provisions of Rules 9216 and 9270 shall become effective upon approval or acceptance by the Exchange Review Council, and information regarding any sanctions imposed pursuant to those Rules may be released to the public pursuant to paragraph (c) immediately upon such approval or acceptance.

(f) If a decision issued pursuant to the Rule 9000 Series is called for review by the Exchange Board, the decision shall be stayed pending a final determination and decision by the Board.

(g) If a decision of the Exchange imposing monetary sanctions of \$10,000 or more or a penalty of expulsion, revocation, or suspension of a member and/or barring of a person from being associated with all members is appealed to the Commission, notice thereof shall be given to the membership and to the press as soon as possible after receipt by the Exchange of notice from the Commission of such appeal and the Exchange's notice shall state whether the effectiveness of the Board's decision has been stayed pending the outcome of proceedings before the Commission.

(h) In the event an appeal to the courts is filed from a decision by the Commission in a case previously appealed to it from a decision of the Exchange, involving the imposition of monetary sanctions of \$10,000 or more or a penalty of expulsion, revocation, or suspension of a member and/or barring of a person from being associated with all members, notice thereof shall be given to the membership as soon as possible after receipt by the Exchange of a formal notice of appeal. Such notice shall include a statement whether the order of the Commission has been stayed.

(i) Any order issued by the Commission of revocation or suspension of a member's broker/dealer registration with the Commission; or the suspension or expulsion of a member from the Exchange; or the barring of a person associated with a member from association with all broker/dealers or membership; or the imposition of monetary sanctions of \$10,000 or more shall be released to the public through a notice containing the effective date thereof sent as soon as possible after receipt by the Exchange of the order of the Commission.

(j) Cancellations of membership or registration pursuant to the Rules of the Exchange shall be released to the public as soon after the effective date of the cancellation as possible.

(k) Releases to the public referred to in paragraphs (b) and (c) above shall identify the Rules of the Exchange or SEC Rules violated, and shall describe the conduct constituting such violation. Releases may also identify the member with which an individual was associated at the time the violations occurred if such identification is determined by the Exchange's Regulation Department to be in the public interest.

(1) The Exchange's Regulation Department shall release to the public, in the form issued by the Exchange Review Council, information with respect to any decision issued by the Exchange Review Council pursuant to Rule 1015. In its discretion, the Exchange Review Council may have redacted certain information from such decisions prior to their issuance.

### **8320. Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay**

#### (a) Payment to Treasurer

All fines and other monetary sanctions shall be paid to the Treasurer of the Exchange.

#### (b) Summary Suspension or Expulsion

After seven days notice in writing, the Exchange may summarily suspend or expel from membership a member that fails to:

(1) pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable; or

(2) terminate immediately the association of a person who fails to pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or a cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable.

#### (c) Summary Revocation of Registration

After seven days notice in writing, the Exchange may summarily revoke the registration of a person associated with a member if such person fails to pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or a cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable.

### **8330. Costs of Proceedings**

A member or person associated with a member disciplined pursuant to Rule 8310 shall bear such costs of the proceeding, as the Adjudicator deems fair and appropriate under the circumstances.

### **9000. Code of Procedure**

#### **9001. Regulatory Contract with FINRA**

The Exchange and FINRA are parties to the FINRA Regulatory Contract, pursuant to which FINRA has agreed to perform certain functions described in the Rule 9000 Series on behalf of the Exchange. Equity Rules that refer to the Exchange's Regulation Department, the Exchange's Regulation Department staff, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

Notwithstanding the fact that the Exchange has entered into the FINRA Regulatory Contract with FINRA to perform some of the Exchange's functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions.

## **9100. Application and Purpose**

### **9110. Application**

#### **(a) Proceedings**

The Rule 9000 Series is the Code of Procedure and includes proceedings for disciplining a member or person associated with a member; proceedings for regulating the activities of a member experiencing financial or operational difficulties; proceedings for summary or non-summary suspensions, cancellations, bars, prohibitions, or limitations; and proceedings for obtaining relief from the eligibility requirements of the Exchange By-Laws and the Equity Rules. The Rule 9100 Series is of general applicability to all proceedings set forth in the Rule 9000 Series, unless a Rule specifically provides otherwise.

#### **(b) Rights, Duties, and Obligations of Members and Associated Persons**

Unless otherwise specified, a person associated with a member shall have the same rights as a member and shall be subject to the same duties and obligations under the Code of Procedure.

Except as otherwise permitted under the By-Laws or the Act and as set forth in more detail in the Rule 9000 Series, in any disciplinary proceeding under the Rules, any Exchange member or person associated with an Exchange member shall be given the opportunity to have a hearing at which such Exchange member or person associated with an Exchange member shall be entitled to be heard in person or by counsel or by a representative as provided in the Rules. Such persons may present any relevant material in accordance with the Rules. In any such proceeding against an Exchange member or against a person associated with an Exchange member to determine whether the Exchange member or the person associated with an Exchange member shall be disciplined:

(1) specific charges shall be brought;

(2) such Exchange member or person associated with an Exchange member shall be notified of and be given an opportunity to defend against such charges;

(3) a record shall be kept; and

(4) any determination shall include a statement setting forth:

(i) any act or practice, in which such Exchange member or person associated with an Exchange member may be found to have engaged, or which such Exchange member or person associated with an Exchange member may be found to have omitted;

(ii) the rule, regulation, or statutory provision of which any such act or practice, or omission to act, is deemed to be in violation;

(iii) the basis upon which any findings are made; and \_\_\_\_\_

(iv) the sanction imposed.

### **(c) Incorporation of Defined Terms and Cross References**

Unless otherwise provided, terms used in the Rule 9000 Series shall have the meaning as defined in Rule 0120 and Rule 9120.

### **9120. Definitions**

#### **(a) "Adjudicator"**

The term "Adjudicator" means:

(1) a body, board, committee, group, or natural person that presides over a proceeding and renders a decision;

(2) a body, board, committee, group, or natural person that presides over a proceeding and renders a recommended or proposed decision which is acted upon by an Adjudicator described in (1); or

(3) a natural person who serves on a body, board, committee, or group described in (1) or (2).

The term includes a Review Subcommittee as defined in paragraph (cc), a Subcommittee as defined in paragraph (ee), an Extended Proceeding Committee as defined in paragraph (n), and a Statutory Disqualification Committee as defined in paragraph (dd).



**(b) "Chief Hearing Officer"**

The term "Chief Hearing Officer" means the Hearing Officer that manages the Office of Hearing Officers, or his or her delegatee.

**(c) "Chief Regulatory Officer"**

The term "Chief Regulatory Officer" means the Chief Regulatory Officer of the Exchange, or his or her delegatee, who shall be a person who reports to the Chief Regulatory Officer of the Exchange.

**(d) "Code"**

The term "Code" refers to the Code of Procedure.

**(e) "Counsel to the Exchange Review Council"**

The term "Counsel to the Exchange Review Council" means an attorney that reports to the Chief Regulatory Officer of the Exchange who is responsible for advising the Exchange Review Council, the Review Subcommittee, a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the Exchange Review Council.

**(f) "Department of Enforcement"**

The term "Department of Enforcement" means the Department of Enforcement of NASD Regulation, acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

**(g) "Department of Market Regulation"**

The term "Department of Market Regulation" means the Department of Market Regulation of FINRA, acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

**(h) "Department of Member Regulation"**

The term "Department of Member Regulation" means the Department of Member Regulation of FINRA, acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

**(i) "Director"**

The term "Director" means a member of the Board of Directors of the Exchange.

**(j) "Document"**

The term "Document" means writing, drawing, graph, chart, photograph, recording, or any other data compilation, including data stored by computer, from which information can be obtained.

**(k) "Extended Hearing"**

The term "Extended Hearing" means a disciplinary proceeding described in Rule 9231(c).

**(l) "Extended Hearing Panel"**

The term "Extended Hearing Panel" means an Adjudicator that is constituted under Rule 9231(c) to conduct a disciplinary proceeding that is classified as an "Extended Hearing" and is governed by the Rule 9200 Series.

**(m) "Extended Proceeding"**

The term "Extended Proceeding" means a disciplinary proceeding described in Rule 9331(a)(2).

**(n) "Extended Proceeding Committee"**

The term "Extended Proceeding Committee" means an appellate Adjudicator that is constituted under Rule 9331 to participate in the Exchange Review Council's consideration of a disciplinary proceeding that is classified as an "Extended Proceeding" and governed by the Rule 9300 Series.

**(o) "Head of Enforcement"**

The term "Head of Enforcement" means the individual that manages the Department of Enforcement of FINRA, or his or her delegatee in the Department of Enforcement.

**(p) "Head of Market Regulation"**

The term "Head of Market Regulation" means the individual that manages the Department of Market Regulation of FINRA, or his or her delegatee in the Department of Market Regulation.

**(q) "Head of Member Regulation"**

The term "Head of Member Regulation" means the individual that manages the Department of Member Regulation of FINRA, or his or her delegatee in the Department of Member Regulation.

**(r) "Hearing Officer"**

The term "Hearing Officer" means an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties described in the Rule 9200 Series regarding disciplinary proceedings, the Rule 9550 Series regarding expedited proceedings, and the Rule 9800 Series regarding temporary cease and desist proceedings brought against members and associated persons.

**(s) "Hearing Panel"**

The term "Hearing Panel" means an Adjudicator that is constituted under Rule 9231 to conduct a disciplinary proceeding governed by the Rule 9200 Series or that is constituted under the Rule 9520 Series or the Rule 9550 Series to conduct a proceeding.

**(t) "Interested Staff"**

The term "Interested Staff" means, in the context of:

(1) a disciplinary proceeding under the Rule 9200 Series and the Rule 9300 Series:

(A) the Head of Enforcement;

(B) an employee of the Exchange's Regulation Department or a FINRA employee of the Department of Enforcement who reports, directly or indirectly, to the Head of Enforcement;

(C) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in the authorization of the complaint;

(D) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports;

(E) the Head of the Department of Market Regulation; or

(F) an employee of the Department of Market Regulation who reports, directly or indirectly, to the Head of the Department of Market Regulation;

(2) a proceeding under the Rule 9520 Series or Rule 9550 Series:

(A) the head of the department or office that issues the notice or is designated as a Party;

(B) an employee of the Exchange's Regulation Department or a FINRA employee who reports, directly or indirectly, to such person;

(C) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in the authorization or initiation of the proceeding; or

(D) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific proceeding, and a district director or department head to whom such employee reports; or

(3) a proceeding under the Rule 9600 Series:

(A) the head of the department or office that issues the decision granting or denying an exemption or is designated as a Party;

(B) an employee of the Exchange's Regulation Department or a FINRA employee who reports, directly or indirectly, to such person;

(C) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in the exemption proceeding; or

(D) an employee of the Exchange's Regulation Department or a FINRA employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific exemption proceeding, and a district director or department head to whom such employee reports.

**(u) "Market Regulation Committee"**

The term "Market Regulation Committee" means the committee designated under the Exchange's By-laws to consider the federal securities laws and the rules and regulations adopted thereunder and various Exchange Rules and policies relating to:

(1) the quotations of securities;

(2) the execution of transactions;

(3) the reporting of transactions; and

(4) trading practices, including rules prohibiting manipulation and insider trading, and those Rules designated as Trading Rules (Rule 3300 Series).

Exchange Listing Rules and NASDAQ OMX BX Equities Market Rules (Rule 4000 Series), and Other Systems and Programs Rules (Rule 6000 Series).

**(v) "the Exchange Board"**

The term "the Exchange Board" means the Board of Directors of the Exchange.

**(w) "the Exchange's Regulation Department"**

The term "the Exchange's Regulation Department" means the Department of the Exchange that administers the Code.

**(x) "Office of Disciplinary Affairs"**

The term "Office of Disciplinary Affairs" means the Office of Disciplinary Affairs for FINRA, acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

**(y) "Office of Hearing Officers"**

The term "Office of Hearing Officers" means the Office of Hearing Officers of FINRA, acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

**(z) "Panelist"**

The term "Panelist," as used in the Rule 9200 Series, means a member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer. As used in the Rule 9300 Series, the term means a current or former member of the Exchange Review Council or a former Director who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.

**(aa) "Party"**

With respect to a particular proceeding, the term "Party" means:

(1) in the Rule 9200 Series, the Rule 9300 Series, and the Rule 9800 Series, the Department of Enforcement or the Department of Market Regulation or a Respondent;

(2) in the Rule 9520 Series, the Department of Member Regulation or a member that is the subject of a notice or files an application under Rule 9522;

(3) in the Rule 9550 Series, the Exchange department or office that issued the notice or, if another Exchange department or office is named as the party handling the matter on behalf of the issuing department or office, the Exchange

department or office that is so designated or a member or person that is the subject of a notice under the Rule 9550 Series; or

(4) in the Rule 9600 Series, the department or office designated under Rule 9620 to issue the decision granting or denying an exemption or a member that seeks the exemption under Rule 9610.

**(bb) "Respondent"**

The term "Respondent" means, in a disciplinary proceeding governed by the Rule 9200 Series and in an appeal or review governed by the Rule 9300 Series, an Exchange member or associated person against whom a complaint is issued.

**(cc) "Review Subcommittee"**

The term "Review Subcommittee" means a body appointed by the Exchange Review Council pursuant to the Exchange By-Laws.

**(dd) "Statutory Disqualification Committee"**

The term "Statutory Disqualification Committee" means a Subcommittee of the Exchange Review Council that makes a recommended decision to grant or deny an application for relief from the eligibility requirements of the Exchange to the Exchange Review Council pursuant to the Rule 9520 Series.

**(ee) "Subcommittee"**

The term "Subcommittee" means an Adjudicator that is:

(1) constituted under Rule 9331(a) to participate in the Exchange Review Council's consideration of an appeal or a review of a disciplinary proceeding pursuant to the Rule 9300 Series;

(2) constituted under Rule 9559(q) or Rule 9630 to conduct a review proceeding.

**9130. Service; Filing of Papers**

**9131. Service of Complaint and Document Initiating a Proceeding**

**(a) Service on Each Party**

A complaint shall be served on each Party by the Department of Enforcement or the Department of Market Regulation. A document initiating a proceeding shall be served on each Party by the Party or person initiating such proceeding or his or her counsel or representative.

**(b) How Served**

A complaint or document initiating a proceeding shall be served pursuant to Rule 9134.

**(c) Filing Requirement**

A complaint that is served upon a Respondent and each document initiating a proceeding that is served upon a Party, along with the certificate of service executed in connection with the service upon such Respondent or Party, shall be filed with the Exchange's Regulation Department pursuant to Rule 9135.

**9132. Service of Orders, Notices, and Decisions by Adjudicator****(a) Service on Each Party**

An order, notice, or decision issued by a Hearing Officer, Hearing Panel or Extended Hearing Panel under the Rule 9200 Series shall be served on each Party, or each Party's counsel, or other person the Party designates to represent him or her in a proceeding by the Office of Hearing Officers. An order, notice, or decision issued by any other Adjudicator shall be served by that Adjudicator.

**(b) How Served**

An order, notice, or decision shall be served pursuant to Rule 9134.

**(c) Service Upon Counsel or Other Person Acting In Representative Capacity**

Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

**9133. Service of Papers Other Than Complaints, Orders, Notices, or Decisions****(a) Service on Each Party**

Other than a complaint, order, notice, or decision, any paper, including an answer and a motion, shall be served on each Party by the Party on whose behalf such paper was prepared or by his or her counsel or representative.

**(b) How Served**

The paper shall be served pursuant to Rule 9134.

**(c) Filing Requirement**

The paper that is served upon a Party, along with the certificate of service executed in connection with the service upon such Party, shall be filed with the Exchange's Regulation Department pursuant to Rule 9135.

**(d) Service upon Counsel or Other Person Acting in Representative Capacity**

Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

**9134. Methods of, Procedures for Service**

**(a) Methods**

The following methods of service are permitted:

(1) Personal Service

Personal service may be accomplished by handing a copy of the papers to the person required to be served; leaving a copy at the person's office with an employee or other person in charge thereof; or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein;

(2) Service by Mail by U.S. Postal Service

Service by mail may be accomplished by mailing the papers through the U.S. Postal Service by using first class mail, first class certified mail, first class registered mail, or Express Mail, except that a complaint shall be served upon a Respondent by U.S. Postal Service first class certified mail or Express Mail; or

(3) Service by Courier

Service by courier may be accomplished by sending the papers through a courier service that generates a written confirmation of receipt or of attempts at delivery.

**(b) Procedures**

(1) Service on Natural Persons

Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository



address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated. Papers may also be served at the business address of the entity with which the natural person is employed or affiliated, as reflected in the Central Registration Depository, or at a business address, such as a branch office, at which the natural person is employed, or at which the natural person is physically present during a normal business day. The Hearing Officer may waive the requirement of serving documents (other than complaints) at the addresses listed in the Central Registration Depository if there is evidence that these addresses are no longer valid, and there is a more current address available. If a natural person is represented by counsel or a representative, papers served on the natural person, excluding a complaint or a document initiating a proceeding, shall be served on the counsel or representative.

### (2) Service on Entities

Papers served on an entity shall be made by service on an officer, partner of a partnership, managing or general agent, a contact employee as set forth on Form BD, or any other agent authorized by appointment or by law to accept service. Such papers shall be served at the entity's business address as reflected in the Central Registration Depository, if applicable; provided, however, that when the Party or other person responsible for serving such entity has actual knowledge that an entity's Central Registration Depository address is out of date, duplicate copies shall be served at the entity's last known address. If an entity is represented by counsel or a representative, papers served on such entity, excluding a complaint or document initiating a proceeding, shall be served on such counsel or representative.

### (3) When Service Is Complete

Personal service and service by courier or express delivery are complete upon delivery. Service by mail is complete upon mailing.

## **9135. Filing of Papers with Adjudicator: Procedure**

### **(a) When to File**

Papers that are required to be filed with an Adjudicator within a time limit specified by the Adjudicator or within a time limit set forth in the Rules shall be deemed timely if received within the time limit, unless otherwise ordered by an Adjudicator, except complaints, which shall be deemed timely filed upon mailing or delivery to the Office of Hearing Officers. Other papers that are required to be filed shall be deemed timely if, on the same day such papers are served, they are also hand-delivered, mailed via U.S. Postal service first class mail, or sent by courier to the Office of Hearing Officers.

**(b) Where to File**

All papers required to be filed pursuant to the Rule 9200 Series and any notice of appeal or review required to be filed pursuant to the Rule 9300 Series shall be filed with the Office of Hearing Officers. All other papers required to be filed pursuant to the Rule 9000 Series shall be filed where specified in the Rule, or if not specified in the Rule, with the Adjudicator, unless the Adjudicator orders otherwise.

**(c) Certificate of Service**

Papers filed with an Adjudicator or the Office of Hearing Officers shall be accompanied by a certificate of service stating the name of the person or persons served, the date on which service is made, the method of service and, if service is not made in person, the address to which service is made. Such certificate shall be executed by the person who made the service. If the method of service on a Party is different from the method of service on any other Party, the certificate shall state why such different method was used.

**9136. Filing of Papers: Form****(a) Specifications**

Papers filed in connection with any proceeding under the Rule 9200 Series and the Rule 9300 Series shall:

(1) be on unglazed white paper measuring 8 ½ x 11 inches, but to the extent that the reduction of a larger document would render it illegible, such document may be filed on larger paper;

(2) be typewritten or printed in either 10 or 12 point typeface or otherwise reproduced by a process that produces a permanent and plainly legible copy;

(3) include at the head of the paper, or on a title page, the title of the proceeding, the names of the Parties, the subject of the particular paper or pleading, and the number assigned to the proceeding;

(4) be paginated at the bottom of the page and with all margins at least one inch wide;

(5) be double-spaced, with double-spaced footnotes and single-spaced indented quotations; and

(6) be stapled, clipped, or otherwise fastened in the upper left corner, but not bound.

**(b) Signature Required**

All papers shall be signed and dated pursuant to Rule 9137.

**(c) Number of Copies**

A signed original and three copies of all papers shall be filed with the Adjudicator.

**(d) Form of Briefs**

A brief containing more than ten pages shall include a table of contents, and an alphabetized table of cases, statutes, and other authorities cited, with references to the pages of the brief wherein they are cited.

**(e) Scandalous or Impertinent Matter**

Any scandalous or impertinent matter contained in any brief, pleading, or other filing, or in connection with any oral presentation in a proceeding may be stricken on order of an Adjudicator. Any matter stricken by an Adjudicator by this Rule shall be marked "Stricken" and preserved. Matters stricken in a proceeding governed by the Rule 9200 Series shall be preserved under Rule 9267(b).

**9137. Filing of Papers: Signature Requirement and Effect**

**(a) General Requirements**

Following the issuance of a complaint in a disciplinary proceeding, or the initiation of another proceeding, every filing of a Party represented by counsel or a representative shall be signed by at least one counsel or representative of record in his or her name and shall state the business address and telephone number of such counsel or representative. A Party who appears on his or her own behalf shall sign his or her individual name and state his or her address and telephone number on every filing.

**(b) Effect of Signature**

(1) The signature of a counsel, representative, or Party shall constitute a certification that:

(A) the person signing the filing has read the filing;

(B) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(C) the filing is not made for any improper purpose, such as to harass, cause unnecessary delay, or needlessly to increase the cost of adjudication.

(2) If a filing is not signed, an Adjudicator may strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

### **9138. Computation of Time**

#### **(a) Calendar Day**

In the Rule 9000 Series, "day" means calendar day.

#### **(b) Formula**

In computing any period of time, the day of the act, event, or default from which the period of time designated in the Code begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall be excluded from the computation when the period prescribed is ten days or less, not including any additional time for service by mail allowed by paragraph (c).

#### **(c) Additional Time For Service by Mail**

If service is made by U.S. Postal Service first class, certified, or registered mail, three days shall be added to the prescribed period for response.

### **9140. Proceedings**

### **9141. Appearance and Practice; Notice of Appearance**

#### **(a) Representing Oneself**

In any proceeding, a person may appear on his or her own behalf. When a person first makes any filing or otherwise appears on his or her own behalf before an Adjudicator in a proceeding, he or she shall file with the Adjudicator, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

#### **(b) Representing Others**

A person shall not be represented before an Adjudicator, except as provided in this paragraph. Subject to the prohibitions of Rules 9150 and 9280, a person may be

represented in any proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. When a person first makes any filing or otherwise appears in a representative capacity before an Adjudicator in a proceeding, that person shall file with the Adjudicator, and keep current a Notice of Appearance. The Notice of Appearance is a written notice stating the name of the proceeding; the representative's name, business address, and telephone number; and the name and address of the person or persons represented. Any individual appearing or practicing in a representative capacity before an Adjudicator may be required to file a power of attorney with the Adjudicator showing his or her authority to act in such capacity.

#### **9142. Withdrawal by Attorney or Representative**

An attorney for a Party or other person authorized to represent others by Rule 9141 may withdraw by giving notice to the Adjudicator. The notice shall be in writing, set forth the good cause for withdrawal, and, unless circumstances do not permit, be given at least 30 days prior to withdrawal.

#### **9143. Ex Parte Communications**

##### **(a) Prohibited Communications**

Unless on notice and opportunity for all Parties to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rule 9000 Series:

(1) No Party, or counsel to or representative of a Party, or Interested Staff shall make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding to an Adjudicator who is participating in a decision with respect to that proceeding, or to Exchange Staff who is participating or advising in the decision of an Adjudicator with respect to that proceeding; and

(2) No Adjudicator who is participating in a decision with respect to a proceeding, or no Exchange Staff who is participating or advising in the decision of an Adjudicator with respect to a proceeding shall make or knowingly cause to be made to a Party, a counsel or representative to a Party, or Exchange Staff an ex parte communication relevant to the merits of that proceeding.

##### **(b) Disclosure of Prohibited Communication**

An Adjudicator who is participating in a decision with respect to a proceeding, or Exchange Staff who is participating or advising in the decision of an Adjudicator, who receives, makes, or knowingly causes to be made a communication prohibited by this Rule shall place in the record of the proceeding:

(1) all such written communications;

(2) memoranda stating the substance of all such oral communications; and

(3) all written responses and memoranda stating the substance of all oral responses to all such communications.

**(c) Remedies**

Upon receipt of a communication made or knowingly caused to be made by any Party, any counsel or representative to a Party, or any Interested Staff in violation of subparagraph (a)(1), the Exchange's Regulation Department or an Adjudicator may, to the extent consistent with the interests of justice, the policies underlying the Act, and the Rules of the Exchange, order the Party responsible for the communication, or the Party who may benefit from the ex parte communication made, to show cause why the Party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such ex parte communication. All participants to a proceeding may respond to any allegations or contentions contained in a prohibited ex parte communication placed in the record. Such responses shall be placed in the record.

**(d) Timing**

In a disciplinary proceeding governed by the Rule 9200 Series and the Rule 9300 Series, the prohibitions of this Rule shall apply beginning with the authorization of a complaint as provided in Rule 9211, unless the person responsible for the communication has knowledge that the complaint shall be authorized, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

**(e) Waiver of Ex Parte Prohibition**

(1) Offer of Settlement

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) Letter of Acceptance, Waiver, and Consent

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any

claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

### (3) Minor Rule Violation Plan Letter

If a member or a person associated with a member submits an executed minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim that the prohibitions against ex parte communications by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter, or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule plan violation letter.

## **9144. Separation of Functions**

### **(a) Interested Staff**

Except as counsel or a witness in a proceeding or as provided in the Rule 9550 Series, Interested Staff is prohibited from advising an Adjudicator regarding a decision or otherwise participating in a decision of an Adjudicator. An Adjudicator is prohibited from advising Interested Staff regarding a decision or otherwise participating in a decision of Interested Staff, including the decision to issue a complaint and a decision whether to appeal or cross-appeal a disciplinary proceeding to the Exchange Review Council.

### **(b) Separation of Adjudicators**

A Hearing Officer, including the Chief Hearing Officer, or a Panelist of a Hearing Panel or an Extended Hearing Panel, is prohibited from participating in: a decision whether to issue a complaint pursuant to Rule 9211; a decision whether to appeal or cross-appeal a disciplinary proceeding to the Exchange Review Council pursuant to Rule 9311; and a discussion or decision relating to a call for review, a review, or an appeal pursuant to the Rule 9300 Series. A Director is prohibited from participating in a discussion or a decision relating to the above referenced acts with the Review Subcommittee or the Adjudicators referenced above.

### **(c) Waiver of Prohibitions of Separation of Functions**

#### (1) Offer of Settlement

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) Letter of Acceptance, Waiver, and Consent

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the proposed letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(3) Minor Rule Violation Plan Letter

If a member or a person associated with a member submits an executed minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

**9145. Rules of Evidence; Official Notice**

**(a) Rules of Evidence**

The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.

**(b) Official Notice**

In a proceeding governed by the Rule 9000 Series, an Adjudicator may take official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of the Exchange as an expert body. Before an Adjudicator proposes to take official notice of a matter, it shall permit a Party the opportunity to oppose or otherwise comment upon the proposal to take official notice.

**9146. Motions**



**(a) General Requirement for Motions**

A Party may make a written or oral motion, subject to limitations set forth below. A Party or other person may make a motion under Rule 9146(k), subject to limitations set forth below.

**(b) Adjudicator May Require a Written Motion**

If a Party makes an oral motion, an Adjudicator may order that such motion be set forth in writing, after considering the facts and circumstances, including whether:

(1) the hearing or conference in which the Party makes such motion is being recorded; and

(2) the opposing Parties shall be fully informed and shall have adequate notice and opportunity to respond to such motion.

**(c) Specificity**

All motions shall state the specific relief requested and the basis therefor.

**(d) Time For Filing Opposition or Other Response to Motion**

Unless otherwise ordered by an Adjudicator, any Party may file an opposition or other response to a written motion and the opposition or response shall be filed within 14 days after service of the motion. If no response is filed within the response period, the Party failing to respond shall be deemed to have waived any objection to the granting of the motion. A Party shall be afforded an opportunity to respond to an oral motion at the time the oral motion is made, unless the Adjudicator orders that the Party shall be granted additional time to respond.

**(e) Oral Argument**

An Adjudicator may allow oral argument on motions. Oral argument may take place in person or by telephone.

**(f) Frivolous Motions**

An Adjudicator may deny dilatory, repetitive, or frivolous motions without awaiting a response.

**(g) No Stay**

Unless otherwise ordered by an Adjudicator, the filing of a motion does not stay a proceeding.

**(h) Reply**

The moving Party shall have no right to reply to the opposition or other response of the other Parties unless an Adjudicator permits a reply to be filed. Unless otherwise ordered by an Adjudicator, a movant's reply submission shall be filed within five days after the Adjudicator serves the order granting the motion to file a reply or a Party serves the opposition or other response to which the Adjudicator previously ordered that a reply could be filed.

**(i) Page Limit, Format Requirements**

Unless otherwise ordered by an Adjudicator, submissions in support of or in opposition to motions shall not exceed ten double-spaced pages, including double-spaced footnotes, exclusive of pages containing any table of contents, table of authorities, or addenda.

**(j) Disposition of Procedural Motions; Disposition of Motions for Summary Disposition**

(1) In the Rule 9200 Series, a motion on a procedural matter may be decided by a Hearing Officer. A motion for summary disposition of a cause of action set forth in a complaint shall be decided by a majority vote of the Hearing Panel or, if applicable, the Extended Hearing Panel.

(2) In the Rule 9300 Series, a motion on a procedural matter may be decided by Counsel to the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or the Exchange Review Council. A motion for disposition of a cause of action shall be decided by the Exchange Review Council, except that a motion to dismiss a case for abandonment made under Rule 9344 may be decided by the Review Subcommittee.

(3) In the Rule 9500 Series, a motion shall be decided by an Adjudicator.

**(k) Motion For Protective Order**

(1) A Party, a person who is the owner, subject, or creator of a Document subject to production under Rule 8210 or any other Rule which may be introduced as evidence in a disciplinary proceeding, or a witness who testifies at a hearing in a disciplinary proceeding may file a motion requesting a protective order to limit disclosure or prohibit from disclosure to other Parties, witnesses or other persons, except the Department of Enforcement and the Department of Market Regulation and the Exchange's Regulation Department staff, Documents or testimony that contain confidential information. The motion shall include a general summary or extract of the Documents or testimony without revealing confidential details. If the movant seeks a protective order against disclosure to other Parties, copies of

the Documents shall not be served on the other Parties. Unless the Documents are unavailable, the movant shall file for in camera inspection a sealed copy of the Documents for which the order is sought. If the movant is not a Party, the motion shall be served on each Party by the movant using a method in Rule 9134(a) and filed with the Adjudicator. A motion for a protective order shall be granted only upon a finding that disclosure of the Document or testimony would have a demonstrated adverse business effect on the movant or would involve an unreasonable breach of the movant's personal privacy.

(2) If a protective order is granted, the order shall set forth the restrictions on use and disclosure of such Document or testimony. An Adjudicator does not have the authority to issue a protective order that would limit in any manner the use by the staff of the Exchange's Regulation Department of such Documents or testimony in the Exchange's Regulation Department staff's performance of their regulatory and self-regulatory responsibilities and functions, including the transmittal, without restriction to the recipient, of such Documents or testimony to state, federal, or foreign regulatory authorities or other self-regulatory organizations. An Adjudicator does not have the authority to issue a protective order that purports to protect from production such Documents or testimony in the event that the Exchange is subject to a subpoena requiring that the Documents or testimony be produced.

### **(1) General**

All motions, oppositions or responses, replies, and any other filings made in a proceeding shall comply with Rules 9133, 9134, 9135, 9136 and 9137.

### **9147. Rulings On Procedural Matters**

The Exchange Board, the Exchange Review Council, a Hearing Officer, or any other Adjudicator shall have full authority, except as otherwise provided by the Code, to rule on a procedural motion and any other procedural or administrative matter arising during the course of a proceeding conducted pursuant to the Code, subject to the rights of review or appeal provided by the Code.

### **9148. Interlocutory Review**

Except as provided in Rule 9280, there shall be no interlocutory review of a ruling or order issued by any Adjudicator in a proceeding governed by the Code. If an Adjudicator grants interlocutory review of a ruling or order, such review shall not stay a proceeding, except under Rule 9280 or as otherwise ordered by the Adjudicator.

### **9150. Exclusion from Rule 9000 Series Proceeding**

#### **(a) Exclusion**

An Adjudicator may exclude an attorney for a Party or other person authorized to represent others by Rule 9141 from acting as counsel, acting in any representative capacity, or otherwise appearing in a particular Rule 9000 Series proceeding for contemptuous conduct under Rule 9280 or unethical or improper professional conduct in that proceeding. If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or person may seek review by the Exchange Review Council of such exclusion under Rule 9280(c).

**(b) Other Proceedings Not Precluded**

Prohibiting an attorney or other person authorized to represent others by Rule 9141 from practicing or appearing in an Exchange proceeding shall not preclude the Exchange from initiating other proceedings against such person.

**9160. Recusal or Disqualification**

No person shall participate as an Adjudicator in a matter governed by the Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case the person shall recuse himself or herself, or shall be disqualified as follows:

**(a) Exchange Board**

The Chair of the Exchange Board shall have authority to order the disqualification of a Director, and a majority of the Exchange Board excluding the Chair of the Exchange Board, shall have authority to order the disqualification of the Chair;

**(b) Exchange Review Council, Review Subcommittee, or Certain Subcommittees**

The Chair of the Exchange Review Council shall have authority to order the disqualification of a member of the Exchange Review Council or the Review Subcommittee, a member of a Subcommittee appointed pursuant to Rule 9559(q) or the Rule 9600 Series, a Hearing Panel appointed pursuant to the Rule 9520 Series, and the Statutory Disqualification Committee; and a majority of the Exchange Review Council excluding the Chair of the Exchange Review Council shall have authority to order the disqualification of the Chair of the Exchange Review Council;

**(c) Rule 9331 Subcommittee or Extended Proceeding Committee**

Disqualification of a Panelist of a Subcommittee or Extended Proceeding Committee appointed under the Rule 9300 Series shall be governed by Rule 9332;

**(d) Reserved**

**(e) Panelist of Hearing Panel or Extended Hearing Panel**

Disqualification of a Panelist of a Hearing Panel or Extended Hearing Panel appointed under the Rule 9200 Series shall be governed by Rule 9234; and

**(f) Hearing Officer**

Disqualification of a Hearing Officer of a Hearing Panel or an Extended Hearing Panel shall be governed by Rule 9233.

**9200. Disciplinary Proceedings****9210. Complaint and Answer****9211. Authorization of Complaint****(a) Complaint**

(1) If the Department of Enforcement or the Department of Market Regulation believes that any Exchange member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Exchange has jurisdiction to enforce, the Exchange's Regulation Department, including the Department of Enforcement or the Department of Market Regulation may request authorization from the Office of Disciplinary Affairs to issue a complaint.

(2) The Exchange Board shall have the authority to direct the Exchange's Regulation Department, including the Office of Disciplinary Affairs, to authorize and the Department of Enforcement or the Department of Market Regulation to issue a complaint when, on the basis of information and belief, the Exchange Board is of the opinion that any Exchange member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Exchange has jurisdiction to enforce.

**(b) Commencement of Disciplinary Proceeding**

A disciplinary proceeding shall begin when the complaint is served and filed.

**9212. Complaint Issuance — Requirements, Service, Amendment, Withdrawal, and Docketing****(a) Form, Content, Notice, Docketing, and Service**

(1) If a complaint is authorized, the Department of Enforcement or the Department of Market Regulation shall issue the complaint. Each complaint shall be in writing and signed by the Department of Enforcement or the Department of Market Regulation. The complaint shall specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated. If the complaint consists of several causes of action, each cause shall be stated separately. Complaints shall be served by the Department of Enforcement or the Department of Market Regulation on each Party pursuant to Rules 9131 and 9134, and filed at the time of service with the Office of Hearing Officers pursuant to Rules 9135, 9136, and 9137.

(2) At the time of issuance of a complaint, the Department of Enforcement or the Department of Market Regulation may propose an appropriate location for the hearing.

#### **(b) Amendments to Complaint**

The Department of Enforcement or the Department of Market Regulation may file and serve an amended complaint once as a matter of course at any time before the Respondent answers the complaint. Otherwise, upon motion by the Department of Enforcement or the Department of Market Regulation, the Hearing Officer may permit the Department of Enforcement or the Department of Market Regulation to amend the complaint, including amendments so as to make the complaint conform to the evidence presented, after considering whether the Department of Enforcement or the Department of Market Regulation has shown good cause for the amendment and whether any Respondent will suffer any unfair prejudice if the amendment is allowed. Amendments to complaints will be freely granted when justice so requires.

#### **(c) Withdrawal of Complaint**

With prior leave of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation may withdraw a complaint. If the Department of Enforcement or the Department of Market Regulation withdraws the complaint before the earlier of (1) the Hearing Panel's or, if applicable, the Extended Hearing Panel's, issuance of a ruling on a motion for summary disposition, or (2) the start of the hearing on the merits, the withdrawal of the complaint by the Department of Enforcement or the Department of Market Regulation shall be without prejudice and the Department of Enforcement or the Department of Market Regulation shall be permitted to refile a case based on allegations concerning the same facts and circumstances that are set forth in the withdrawn complaint. If the Department of Enforcement or the Department of Market Regulation requests to withdraw such complaint after the occurrence of either of the two events set forth in (1) and (2) in this paragraph, the Hearing Panel or, if applicable, the Extended Hearing Panel, after considering the facts and circumstances of the request, shall determine whether the withdrawal shall be granted with prejudice.

**(d) Disciplinary Proceeding Docket**

The Office of Hearing Officers shall promptly record each complaint filed with it in the Exchange's disciplinary proceeding docket, and record in the disciplinary proceeding docket each event, filing, and change in the status of a disciplinary proceeding.

**9213. Assignment of Hearing Officer and Appointment of Panelists to Hearing Panel or Extended Hearing Panel****(a) Assignment of Hearing Officer**

As soon as practicable after the Department of Enforcement or the Department of Market Regulation has filed a complaint with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the disciplinary proceeding and shall serve the Parties with notice of the Hearing Officer's assignment pursuant to Rule 9132.

**(b) Appointment of Panelists**

As soon as practicable after assigning a Hearing Officer to preside over a disciplinary proceeding, the Chief Hearing Officer shall appoint Panelists pursuant to Rules 9231 and 9232 to a Hearing Panel or, if the Chief Hearing Officer determines that an Extended Hearing Panel should be appointed, to an Extended Hearing Panel.

**9214. Consolidation or Severance of Disciplinary Proceedings****(a) Consolidation Initiated by Chief Hearing Officer**

The Chief Hearing Officer may order the consolidation of two or more disciplinary proceedings, upon his or her own motion, under circumstances where such consolidation would further the efficiency of the disciplinary process, and where the subject complaints involve common questions of law or fact, or one or more of the same Respondents. In determining whether to order the consolidation of such disciplinary proceedings, the Chief Hearing Officer shall consider:

(1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings;

(2) whether the proposed consolidation would conserve the time and resources of the Parties; and

(3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation.

If the Chief Hearing Officer proposes to consolidate two or more disciplinary proceedings, the Chief Hearing Officer shall serve upon the Parties notice of the proposed consolidation of disciplinary proceedings, together with a copy of each relevant complaint and any answer that has been filed thereto, pursuant to Rule 9132. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation.

**(b) Consolidation Initiated by a Party**

A Party may file a motion to consolidate two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact or one or more of the same Respondents, or if one or more of the factors favoring consolidation set forth in paragraph (a) appear to be present. If a Party moves to consolidate two or more disciplinary proceedings, the Party shall file such motion, together with a copy of each relevant complaint and any answer thereto that has been filed, with the Office of Hearing Officers, and, pursuant to Rule 9133, shall serve the same upon the Parties in each of the cases proposed to be consolidated. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation, and shall serve the response upon the Parties in each of the cases proposed to be consolidated. The Chief Hearing Officer shall issue an order approving or denying the request for consolidation.

**(c) Impact on Hearing Panel or Extended Hearing Panel**

If the Chief Hearing Officer issues an order to consolidate two or more disciplinary proceedings for which Hearing Panels or, if applicable, Extended Hearing Panels, have been appointed, the Chief Hearing Officer's order shall specify which Hearing Panel or, if applicable, Extended Hearing Panel, shall preside over the consolidated disciplinary proceeding, or shall appoint a new Hearing Panel or, if applicable, Extended Hearing Panel, to preside, based on the criteria set forth in Rules 9231 and 9232.

**(d) Severance Initiated by Chief Hearing Officer**

The Chief Hearing Officer may order the severance of a disciplinary proceeding into two or more disciplinary proceedings, upon his or her own motion. In determining whether to order the severance of such disciplinary proceedings, the Chief Hearing Officer shall consider:

(1) whether the same or similar evidence reasonably would be expected to be offered at each of the possible hearings;

(2) whether the severance would conserve the time and resources of the Parties; and



(3) whether any unfair prejudice would be suffered by one or more Parties if the severance is (not) ordered.

If the Chief Hearing Officer proposes to sever a disciplinary proceeding, the Chief Hearing Officer shall serve upon the Parties notice of the proposed severance of disciplinary proceedings pursuant to Rule 9132. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to severance.

**(e) Severance Initiated by a Party**

A Party may file a motion to sever a disciplinary proceeding if one or more of the factors favoring severance set forth in paragraph (d) appear to be present. If a Party moves to sever a disciplinary proceeding, the Party shall file such motion with the Office of Hearing Officers, and, pursuant to Rule 9133, shall serve the same upon each of the parties to the action proposed to be severed. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to severance, and shall serve the response upon the Parties in the case proposed to be severed. The Chief Hearing Officer shall issue an order approving or denying the request for severance.

**(f) Impact on Hearing Panel or Extended Hearing Panel of Severance**

If the Chief Hearing Officer issues an order to sever a disciplinary proceeding for which a Hearing Panel or, if applicable, Extended Hearing Panel, has been appointed, the Chief Hearing Officer's order shall specify whether the same Hearing Panel or, if applicable, Extended Hearing Panel, shall preside over the severed disciplinary proceedings, or shall appoint a new Hearing Panel(s) or, if applicable, Extended Hearing Panel(s), to preside over any or all of the severed proceedings, based on the criteria set forth in Rules 9231 and 9232.

**9215. Answer to Complaint**

**(a) Form, Service, Notice**

Pursuant to Rule 9133, each Respondent named in a complaint shall serve an answer to the complaint on all other Parties within 25 days after service of the complaint on such Respondent, and at the time of service shall file such answer with the Office of Hearing Officers pursuant to Rules 9135, 9136 and 9137. The Hearing Officer assigned to a disciplinary proceeding pursuant to Rule 9213 may extend such period for good cause. Upon the receipt of a Respondent's answer, the Office of Hearing Officers shall promptly send written notice of the receipt of such answer to all Parties.

**(b) Content, Affirmative Defenses**

Unless otherwise ordered by the Hearing Officer, an answer shall specifically admit, deny, or state that the Respondent does not have and is unable to obtain sufficient information to admit or deny, each allegation in the complaint. When a Respondent

intends to deny only part of an allegation, the Respondent shall specify so much of it as is admitted and deny only the remainder. A statement of lack of information shall be deemed a denial. Any allegation not denied in whole or in part shall be deemed admitted. Any affirmative defense shall be asserted in the answer.

**(c) Motion for More Definite Statement**

A Respondent may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state why each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

**(d) Amendments to Answer**

Upon motion by a Respondent, the Hearing Officer may, after considering good cause shown by the Respondent and any unfair prejudice which may result to any other Party, permit an answer to be amended.

**(e) Extension of Time to Answer Amended Complaint**

If a complaint is amended pursuant to Rule 9212(b), the time for filing an answer or amended answer shall be the greater of the original time period within which the Respondent is required to respond, or 14 days after service of the amended complaint. If any Respondent has already filed an answer, such Respondent shall have 14 days after service of the amended complaint, unless otherwise ordered by the Hearing Officer, within which to file an amended answer.

**(f) Failure to Answer, Default**

If a Respondent does not file an answer or make any other filing or request related to the complaint with the Office of Hearing Officers within the time required, the Department of Enforcement or the Department of Market Regulation shall send a second notice to such Respondent requiring an answer within 14 days after service of the second notice. The second notice shall state that failure of the Respondent to reply within the period specified shall allow the Hearing Officer, in the exercise of his or her discretion, pursuant to Rule 9269 to: (1) treat as admitted by the Respondent the allegations in the complaint; and (2) issue a default decision against the Respondent. If the Respondent fails to file an answer with the Office of Hearing Officers within the time required, the Hearing Officer may issue, a default decision against the Respondent pursuant to Rule 9269.

**9216. Acceptance, Waiver, and Consent; Plan Pursuant to SEC Rule 19d-1(c)(2)**

**(a) Acceptance, Waiver, and Consent Procedures**

(1) Notwithstanding Rule 9211, if the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and the member or associated person does not dispute the violation, the Department of Enforcement or the Department of Market Regulation may prepare and request that the member or associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Exchange Review Council, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed. Unless the letter states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by the Exchange's Regulation Department staff.

(2) (A) If a member or person associated with a member submits an executed letter of acceptance, waiver, and consent, by the submission such member or person associated with a member also waives:

(i) any right of such member or person associated with a member to claim bias or prejudgment of the Chief Regulatory Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent; and

(ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(B) If a letter of acceptance, waiver, and consent is rejected, the member or associated person shall be bound by the waivers made under subparagraphs (a)(1) and (a)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the letter of acceptance, waiver, and consent was executed and submitted and ending upon the rejection of the letter of acceptance, waiver, and consent.

(3) If the member or associated person executes the letter of acceptance, waiver, and consent, it shall be submitted to the Exchange Review Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such letter or refer it to the Exchange Review Council for acceptance or rejection by the Exchange Review Council. The Review Subcommittee may reject such letter or refer it to the Exchange Review Council for acceptance or rejection by the Exchange Review Council.

(4) If the letter is accepted by the Exchange Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter. If the letter is rejected by the Review Subcommittee or the Exchange Review Council, the Exchange's Regulation Department may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the letter of acceptance, waiver, and consent under subparagraph (a)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

**(b) Procedure for Violation Under Plan Pursuant to SEC Rule 19d-1(c)(2)**

(1) Notwithstanding Rule 9211, the Exchange Review Council may, subject to the requirements set forth in subparagraphs (b)(2) through (b)(4) and in SEC Rule 19d-1(c)(2), impose a fine (not to exceed \$2,500) and/or a censure on any member or associated person with respect to any rule listed in IM-9216. If the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and if the member or associated person does not dispute the violation, the Department of Enforcement or the Department of Market Regulation may prepare and request that the member or associated person execute a minor rule violation plan letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Exchange Review Council, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed. Unless the letter states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by the Exchange's Regulation Department staff.

(2) (A) If a member or person associated with a member submits an executed minor rule violation plan letter, by the submission such member or person associated with a member also waives:

(i) any right of such member or person associated with a member to claim bias or prejudgment of the Chief Regulatory

Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter; and

(ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

(B) If a minor rule violation plan letter is rejected, the member or person associated with a member shall be bound by the waivers made under subparagraphs (b)(1) and (b)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the minor rule violation plan letter was executed and submitted and ending upon the rejection of the minor rule violation plan letter.

(3) If the member or associated person executes the minor rule violation plan letter, it shall be submitted to the Exchange Review Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such letter or refer it to the Exchange Review Council for acceptance or rejection by the Exchange Review Council. The Review Subcommittee may reject such letter or refer it to the Exchange Review Council for acceptance or rejection by the Exchange Review Council.

(4) If the letter is accepted by the Exchange Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and the Exchange shall report the violation to the Commission as required by the Commission pursuant to a plan approved under SEC Rule 19d-1(c)(2). If the letter is rejected by the Review Subcommittee or the Exchange Review Council, the Exchange's Regulation Department may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the minor rule violation plan letter under subparagraph (b)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

**IM-9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)**

- Rules 2210 and 2211 and IM-2210-1, -2210-4 — Communications with the public.
- Rule 3360 — Failure to timely file reports of short positions on Form NS-1.
- Rule 3110 — Failure to keep and preserve books, accounts, records, memoranda, and correspondence in conformance with all applicable laws, rules, regulations and statements of policy promulgated thereunder, and with the Rules of the Exchange.
- Rule 8211 — Failure to submit trading data as requested.
- Rule 1013 — Failure to timely submit amendments to Form BD.
- Rule 1031 — Failure to timely submit amendments to Form U4.
- Rule 1013 — Failure to timely submit amendments to Form U5.
- Rule 1120 — Failure to comply with the Firm Element of the continuing education requirements.
- Rule 3010(b) — Failure to timely file reports pursuant to the Taping Rule.
- Rule 3070 — Failure to timely file reports.
- Rule 4619(e) — Failure to timely file notifications pursuant to SEC Regulation M.
- Rules 6954 and 6955 — Failure to submit data in accordance with the Order Audit Trail System ("OATS").
- Rule 11870 — Failure to abide by Customer Account Transfer Contracts.
- Failure to provide or update contact information as required by the Rules of the Exchange.
- SEC Exchange Act Rule 604 — Failure to properly display limit orders.
- SEC Exchange Act Rule 602(b)(5) — Failure to properly update published quotations in certain Electronic Communication Networks ("ECNs").
- SEC Exchange Act Rule 17a-5 — Failure to timely file FOCUS reports and annual audit reports.
- SEC Exchange Act Rule 17a-10 — Failure to timely file Schedule I.

## **9220. Request for Hearing; Extensions of Time, Postponements, Adjournments**

### **9221. Request for Hearing**

**(a) Respondent Request for Hearing**

With the filing of any Respondent's answer, such Respondent may:

- (1) request a hearing; and
- (2) propose an appropriate location for the hearing.

If a Respondent requests a hearing, a hearing shall be granted. A Respondent who fails to request a hearing with the filing of his or her answer waives the right to a hearing unless a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel, grants, for good cause shown, a later filed motion by such Respondent requesting a hearing.

**(b) Hearing Officer Order Requiring Hearing**

In the absence of a request for a hearing from any Respondent, the Hearing Officer may order any complaint set down for hearing.

**(c) Authority of Hearing Panel, Extended Hearing Panel to Order Hearing**

If all Respondents waive a hearing, and the Hearing Officer does not order a hearing on his or her own motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may order a hearing or may consider the matter on the record, as defined in Rule 9267. If fewer than all Respondents waive a hearing, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may, in the exercise of its discretion, order that a hearing be held as to all Respondents. Alternatively, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may conduct a hearing as to only those Respondents who requested a hearing and consider the matter on the record as to those Respondents who waived a hearing.

**(d) Notice of Hearing**

The Hearing Officer shall issue a notice stating the date, time, and place of the hearing, and whether the hearing shall be held before a Hearing Panel or an Extended Hearing Panel, and shall serve such notice on the Parties at least 28 days before the hearing, unless:

- (1) in the discretion of the Hearing Officer, he or she determines that extraordinary circumstances require a shorter notice period; or
- (2) the Parties waive the notice period.

**9222. Extensions of Time, Postponements, and Adjournments****(a) Availability**

At any time prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel, the Hearing Officer may, for good cause shown, extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with paragraph (b), postpone or adjourn any hearing.

**(b) Limitations on Postponements, Adjournments, and Extensions**

A hearing shall begin at the time and place ordered, unless the Hearing Officer, for good cause shown, changes the place of the hearing, postpones the commencement of the hearing, or adjourns a convened hearing for a reasonable period of time, subject to the limitations in subparagraph (b)(2).

(1) Additional Considerations

In considering a motion for the postponement of the start of a hearing or, adjournment once a hearing has begun, the Hearing Officer shall consider:

(A) the length of the proceeding to date;

(B) the number of postponements, adjournments, or extensions already granted;

(C) the stage of the proceedings at the time of the request;

(D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and

(E) such other matters as justice may require.

(2) Time Limit

Postponements, adjournments, or extensions of time for filing papers shall not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary.

**9230. Appointment of Hearing Panel, Extended Hearing Panel**

**9231. Appointment by the Chief Hearing Officer of Hearing Panel or Extended Hearing Panel or Replacement Hearing Officer**

**(a) Appointment**

The Chief Hearing Officer shall appoint a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision.

**(b) Hearing Panel**



The Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in paragraph (e) and in Rule 9234(a), (c), (d), or (e). The Hearing Officer shall serve as the chair of the Hearing Panel. Each Panelist shall be associated with a member of the Exchange or retired therefrom.

(1) Except as provided in (2), the Chief Hearing Officer shall select as a Panelist a person who:

(A) previously served on the Exchange Review Council;

(B) previously served on a disciplinary subcommittee of the Exchange Review Council, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees;

(C) previously served as a Director, or as a Governor of the Exchange prior to its acquisition by The NASDAQ OMX Group, Inc., but does not serve currently in that position; or

(D) currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed.

#### **(c) Extended Hearing Panel**

Upon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material, the Chief Hearing Officer may determine that a matter shall be designated an Extended Hearing, and that such matter shall be considered by an Extended Hearing Panel. The Extended Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234(a), (c), (d), or (e). The Hearing Officer will serve as the chair of the Extended Hearing Panel. The Panelists shall be associated with a member of the Exchange, or retired therefrom. The Chief Hearing Officer shall have discretion to compensate any or all Panelists of an Extended Hearing Panel at the rate then in effect for arbitrators appointed under the Rule 10000 Series. The Chief Hearing Officer shall select as a Panelist a person who meets the criteria set forth in paragraph (b)(1).

#### **(d) Observer**

A person who is qualified to serve as a Panelist may be designated by the Chief Hearing Officer to serve as an observer to a Hearing Panel or an Extended Hearing Panel. If the Chief Hearing Officer designates more than two people to serve as observers to a Hearing Panel or an Extended Hearing Panel, the Chief Hearing Officer shall obtain the consent of the Parties. An observer may attend any hearing of a disciplinary proceeding

and observe the proceeding, but may not vote or participate in any other manner in the hearing or the deliberations of the Hearing Panel or the Extended Hearing Panel, or participate in the administration of the disciplinary proceeding.

**(e) Appointment of Replacement Hearing Officer**

In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement Hearing Officer is appointed after the hearing has commenced, the replacement Hearing Officer has discretion to exercise the following powers:

(1) Allow the Hearing Panelists to resolve the issues in the proceeding and issue a decision without the participation of the replacement Hearing Officer in the decision. The replacement Hearing Officer may advise the Hearing Panelists regarding legal issues, and shall exercise the powers of the Hearing Officer under Rule 9235(a), including preparing and signing the decision on behalf of the Hearing Panel, in accordance with Rule 9268; or

(2) Certify familiarity with the record and participate in the resolution of the issues in the case and in the issuance of the decision. In exercising this power, the replacement Hearing Officer may recall any witness before the Hearing Panel.

**9232. Criteria for Selection of Panelists and Replacement Panelists**

The Chief Hearing Officer shall select Panelists from the categories of persons eligible to serve as Panelists as set forth in Rule 9231(b)(1) based upon the following criteria:

(1) expertise;

(2) the absence of any conflict of interest or bias, and any appearance thereof;

(3) availability; and,

(4) the frequency with which a person has served as a Panelist on a Hearing Panel or an Extended Hearing Panel during the past two years, favoring the selection of a person as a Panelist who has never served or served infrequently as a Panelist during the period.

**9233. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Hearing Officers**

**(a) Recusal, Withdrawal of Hearing Officer**

If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter. In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer. In such a case, the replacement Hearing Officer shall proceed according to Rule 9231(e).

**(b) Motion for Disqualification**

A Party may move for the disqualification of a Hearing Officer. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) when the Party learned of the facts believed to constitute the disqualification; or

(2) when the Party was notified of the assignment of the Hearing Officer.

**(c) Disposition of Disqualification Motion**

A motion for disqualification of a Hearing Officer shall be decided by the Chief Hearing Officer who shall promptly investigate whether disqualification is required and issue a written ruling on the motion. In the event of a disqualification of the Hearing Officer, the Chief Hearing Officer shall appoint a replacement Hearing Officer.

**9234. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Panelists**

**(a) Recusal, Withdrawal of Panelist**

If at any time a Panelist of a Hearing Panel or an Extended Hearing Panel determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Panelist shall notify the Hearing Officer and the Hearing Officer shall issue and serve on the Parties a notice stating that the Panelist has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer may, in the exercise of discretion, determine whether to appoint a replacement Panelist. In the event that both Panelists withdraw, are incapacitated, or otherwise are unable to continue service after being appointed, the Chief Hearing Officer shall appoint two replacement Panelists.

**(b) Disqualification: Motion of Party; Order of Chief Hearing Officer**

(1) A Party may file a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts.

(2) Such motions shall be filed not later than 15 days after the later of:

(A) when the Party learned of the facts believed to constitute the disqualification; or

(B) when the Party was notified of the appointment of the Panelist.

(3) The Chief Hearing Officer may order the disqualification of a Panelist of a Hearing Panel or an Extended Hearing Panel if the Chief Hearing Officer determines that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall state the facts constituting the grounds for disqualification.

**(c) Disposition of Disqualification Motion: Challenge to Single Member of Hearing Panel**

If a Party files a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist.

**(d) Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel**

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event one Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists.

**(e) Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel and Hearing Officer**

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, and the Hearing Officer, the Chief Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists. In the event a Hearing Officer and a Panelist are disqualified, the Chief Hearing Officer shall promptly appoint a replacement Hearing Officer. In the event both Panelists and the Hearing Officer are disqualified, the Chief Hearing Officer shall promptly appoint a replacement Hearing Officer and two persons as replacement Panelists.

**(f) Criteria for Replacement Panelist**

If the Chief Hearing Officer appoints a replacement Panelist by operation of this Rule, the Chief Hearing Officer shall do so using the criteria set forth in Rule 9232.

**9235. Hearing Officer Authority**

**(a) Hearing Officer Authority**

The Hearing Officer shall be selected by the Chief Hearing Officer and shall have authority to do all things necessary and appropriate to discharge his or her duties. In addition to the powers exercised by all members of the Hearing Panel or, if applicable, the Extended Hearing Panel, the powers of the Hearing Officer include, but are not limited to:

(1) holding pre-hearing and other conferences and requiring the attendance at any such conference of at least one representative of each Party who has authority to negotiate the resolution of issues in controversy;

(2) regulating the course of the hearing;

(3) ordering the Parties to present oral arguments at any stage of the disciplinary proceeding;

(4) resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions, subject to any limitations set forth elsewhere in the Code;

(5) reopening any hearing, upon notice to all Parties, prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel;

(6) creating and maintaining the official record of the disciplinary proceeding; and

(7) drafting a decision that represents the views of the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel.

**(b) Authority in the Absence of Hearing Officer**

If the Hearing Officer appointed to a case is temporarily unavailable or unable for any reason to discharge his or her duties in a particular proceeding under conditions not requiring the appointment of a replacement Hearing Officer, the Chief Hearing Officer or the Deputy Chief Hearing Officer in his or her discretion may exercise the necessary authority in the same manner as if he or she had been appointed Hearing Officer in the particular proceeding.

**9240. Pre-Hearing Conference and Submission**

**9241. Pre-Hearing Conference**

**(a) Purposes**

The purposes of a pre-hearing conference include, but are not limited to:

- (1) expediting the disposition of the proceeding;
- (2) establishing procedures to manage the proceeding efficiently; and
- (3) improving the quality of the hearing through more thorough preparation.

**(b) Procedure**

On his or her own motion or at the request of a Party, the Hearing Officer may, in his or her discretion, order counsel or any Party to meet for a pre-hearing conference. Such conferences also may be held with one or more persons participating by telephone or other remote means.

**(c) Subjects to be Discussed**

At a pre-hearing conference, the Hearing Officer shall schedule an expedited proceeding as required by Rule 9290, and may consider and take action with respect to any or all of the following:

- (1) simplification and clarification of the issues;
- (2) exchange of witness and exhibit lists and copies of exhibits;
- (3) stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

- (4) matters of which official notice may be taken;
- (5) the schedule for exchanging pre-hearing motions or briefs, if any;
- (6) the method of service and filing of papers by the Parties;
- (7) determination of hearing dates;
- (8) amendments to the complaint or answers thereto;
- (9) production of documents as set forth in Rule 9251; and
- (10) such other matters as may aid in the orderly and expeditious disposition of the proceeding.

**(d) Scheduling**

An initial pre-hearing conference, unless determined by the Hearing Officer to be unnecessary or premature, shall be held within 21 days after filing of an answer, or after the expiration of the second period provided for filing an answer as set forth in Rule 9215(f). When a complaint names multiple Respondents, the 21-day period shall commence from the later of (i) the date on which the last timely answer was filed, or (ii) if one or more Respondents have failed to answer, from the expiration of the second period provided for filing an answer under Rule 9215(f).

**(e) Pre-hearing Order**

At or following the conclusion of any conference held pursuant to this Rule, the Hearing Officer shall enter a written ruling or order that recites any agreements reached and any procedural determinations made by the Hearing Officer.

**(f) Failure to Appear: Default**

The Hearing Officer may issue a default decision, pursuant to Rule 9269, against a Party that fails to appear, in person or through counsel or a representative, at a pre-hearing conference of which the Party has been due notice.

**9242. Pre-Hearing Submission**

**(a) Requirement to Furnish Information**

Prior to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, the Hearing Officer, in the exercise of his or her discretion, may order a Party to furnish to all other Parties and the Hearing Panel or, if applicable, the Extended Hearing Panel, such information as deemed appropriate, including any or all of the following:

- (1) an outline or narrative summary of a Party's case or defense;
- (2) the legal theories upon which a Party shall rely;
- (3) a list and copies of documents that a Party intends to introduce at the hearing;
- (4) a list of witnesses who shall testify on a Party's behalf, including the witnesses' names, occupations, addresses, and a brief summary of their expected testimony; and,
- (5) if a witness shall be called to testify as an expert, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to the other Parties and the Hearing Panel or, if applicable, the Extended Hearing Panel.

## **9250. Discovery**

### **9251. Inspection and Copying of Documents in Possession of Staff**

#### **(a) Documents to be Available for Inspection and Copying**

(1) Unless otherwise provided by this Rule, or by order of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested Staff in connection with the investigation that led to the institution of proceedings. Such Documents include but are not limited to:

- (A) requests for information issued pursuant to Rule 8210;
- (B) every other written request directed to persons not employed by the Exchange to provide Documents or to be interviewed;
- (C) the Documents provided in response to any such requests described in (A) and (B) above;
- (D) all transcripts and transcript exhibits; and
- (E) all other Documents obtained from persons not employed by the Exchange.

(2) The Department of Enforcement or the Department of Market Regulation shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are



issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted. If Interested Staff receives Documents pursuant to a request for information under Rule 8210 after Documents have been made available to a Respondent for inspection and copying as set forth in paragraph (a), and if such Documents are material and relevant to the disciplinary proceeding in which such Respondent is a Party, the additional Documents shall be made available to the Respondent not later than 14 days after the Interested Staff receives such Documents. If a hearing on the merits is scheduled to begin, Interested Staff shall make the additional Documents available to the Respondent not less than ten days before the hearing. If Interested Staff receives such Documents ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, Interested Staff shall make the additional Documents available immediately to the Respondent.

(3) Nothing in subparagraph (a)(1) shall limit the discretion of the Department of Enforcement or the Department of Market Regulation to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.

**(b) Documents That May Be Withheld**

(1) The Department of Enforcement or the Department of Market Regulation may withhold a Document if:

(A) the Document is privileged or constitutes attorney work product;

(B) the Document is an examination or inspection report, an internal memorandum, or other note or writing prepared by an Exchange employee that shall not be offered in evidence;

(C) the Document would disclose (i) an examination, investigatory or enforcement technique or guideline of the Exchange, a federal, state, or foreign regulatory authority, or any self-regulatory organization; (ii) the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; or (iii) an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by the Exchange, a federal, state, or foreign regulatory authority, or a self-regulatory organization; or

(D) the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

(2) Nothing in subparagraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence.

**(c) Withheld Document List**

The Hearing Officer may require the Department of Enforcement or the Department of Market Regulation to submit to the Hearing Officer a list of Documents withheld pursuant to subparagraphs (b)(1)(A) through (D) or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement or the Department of Market Regulation to make the list or any Document withheld available to the other Parties for inspection and copying. A motion to require the Department of Enforcement or the Department of Market Regulation to produce a list of Documents withheld pursuant to paragraph (b) shall be based upon some reason to believe that a Document is being withheld in violation of the Code.

**(d) Timing of Inspection and Copying**

The Hearing Officer shall determine the schedule of production of documents pursuant to this Rule. Unless otherwise ordered by the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall commence making Documents available to a Respondent for inspection and copying pursuant to this Rule not later than 21 days after service of the Respondent's answer or, if there are multiple Respondents, not later than 21 days after the last timely answer is filed. If a Respondent in a multi-Respondent case fails to answer, the Department of Enforcement or the Department of Market Regulation shall make Documents available to all other Respondents not later than the later of:

(1) 21 days after the filing date of the last timely answer, or

(2) the expiration of the second period provided for filing an answer as set forth in Rule 9215(f).

**(e) Place and Time of Inspection and Copying**

Documents subject to inspection and copying pursuant to this Rule shall be made available to the Respondent for inspection and copying at the Exchange office where they are ordinarily maintained, or at such other location as the Hearing Officer, in his or her discretion, shall designate, or as the Parties otherwise agree. A Respondent shall be given access to the Documents during normal business hours. A Respondent shall not be given custody of or be permitted to remove the Documents.

**(f) Copying Costs**

A Respondent may obtain a photocopy of all Documents made available for inspection. A Respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made at the request of a Respondent shall be at a rate to be established by the Exchange.

**(g) Failure to Make Documents Available — Harmless Error**

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to make the document available was not harmless error.

**9252. Requests for Information****(a) Content and Timing of Requests**

A Respondent who requests that the Exchange invoke Rule 8210 to compel the production of Documents or testimony at the hearing shall do so in writing and serve copies on all Parties. Such request shall: be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to the Exchange's jurisdiction.

**(b) Standards for Issuance**

A request that the Exchange's Regulation Department compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to the Exchange's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

**(c) Limitations on Requests**

If, after consideration of all the circumstances, the Hearing Officer determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only upon such conditions as fairness requires. In making the foregoing determination, the Hearing Officer may inquire of the other Parties whether they shall stipulate to the facts sought to be proved by the Documents or testimony sought. If the Hearing Officer grants the request, the Hearing Officer shall order that requested Documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the Documents or testimony shall be produced immediately to all Parties.

### **9253. Production of Witness Statements**

#### **(a) Availability**

Notwithstanding the provisions of Rule 9251(b),

(1) A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any statement of any person called or to be called as a witness by the Department of Enforcement or the Department of Market Regulation that pertains, or is expected to pertain, to his or her direct testimony and which is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. § 3500(e)(2).

(2) A Respondent in a disciplinary proceeding may also file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any contemporaneously written statement made by an Interested Staff member during a routine examination or inspection about the substance of oral statements made by a non-Exchange person when (a) either the Interested Staff member or non-Exchange person is called as a witness by the Department of Enforcement or the Department of Market Regulation, and (b) that portion of the statement for which production is sought directly relates to the Interested Staff member's testimony or the testimony of the non-Exchange witness.

#### **(b) Failure to Produce — Harmless Error**

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement or the Department of Market Regulation, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the

Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to provide any statement was not harmless error.

## **9260. Hearing and Decision**

### **9261. Evidence and Procedure in Hearing**

#### **(a) Submission of Documentary Evidence and List of Witnesses Before Hearing**

No later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence and the names of the witnesses each Party intends to present at the hearing.

#### **(b) Party's Right to Be Heard**

If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party's representative.

#### **(c) Request to Submit Additional Evidence**

Notwithstanding paragraph (a), a Party, for good cause shown, may seek to submit any additional evidence at the hearing as the Hearing Officer, in his or her discretion, determines may be relevant and necessary for a complete record.

### **9262. Testimony**

A person who is subject to the jurisdiction of the Exchange shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

### **9263. Evidence: Admissibility**

#### **(a) Criteria for Receiving and Excluding Evidence**

The Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

#### **(b) Objections**

Objections to the admission or exclusion of evidence shall be made on the record and shall succinctly state the grounds relied upon. Excluded material shall be deemed a

supplemental document, which shall be attached to the record and retained under Rule 9267.

#### **9264. Motion for Summary Disposition**

##### **(a) Pre-hearing**

After a Respondent's answer has been filed and Documents have been made available to that Respondent for inspection and copying pursuant to Rule 9251, the Respondent or the Department of Enforcement or the Department of Market Regulation, without leave of the Hearing Officer, may make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent, as well as any defense raised in a Respondent's answer. All pre-hearing motions for summary disposition and supporting papers shall be filed at least 21 days before the time set for the hearing, or at such earlier time as ordered by the Hearing Officer. Notwithstanding the provisions of Rule 9146(d), any opposition or response to a pre-hearing motion for summary disposition shall be filed at least seven days before the time set for the hearing.

##### **(b) After Commencement of Hearing on Merits**

After a hearing on the merits has commenced, a Respondent or the Department of Enforcement or the Department of Market Regulation may make a motion for summary disposition of any or all of the causes of action in the complaint with respect to that Respondent or defenses raised in that Respondent's answer only with leave of the Hearing Officer.

##### **(c) Case Not Fully Adjudicated on Motion**

If on motion under this rule a decision is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the Hearing Panel or, if applicable, the Extended Hearing Panel, at the hearing of the motion, by examining the pleadings and the evidence before it and by questioning counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. Upon the hearing of the action the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

##### **(d) Form of Papers**

A motion for summary disposition pursuant to paragraph (a) shall be accompanied by the following: a statement of undisputed facts; a supporting memorandum of points and authorities; and affidavits or declarations that set forth such facts as would be admissible at the hearing and show affirmatively that the affiant is competent to testify to the matters stated therein. A memorandum of points and authorities in support or opposition shall not exceed 35 pages.

**(e) Rulings on Motion**

The Hearing Officer may promptly deny or defer decisions on any motion for summary disposition, however, only the Hearing Panel or, if applicable, the Extended Hearing Panel, may grant a motion for summary disposition, except the Hearing Officer may grant motions for summary disposition with respect to questions of jurisdiction. The Hearing Panel or, if applicable, the Extended Hearing Panel, may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law. If a Party files a motion under paragraph (a), the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145. If a Party opposing a motion for summary disposition made under paragraph (a) cannot present, by affidavit prior to the hearing, facts essential to justify the Party's opposition to the motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may deny the motion for summary disposition or defer the decision on the motion.

**9265. Record of Hearing****(a) Recordation**

A hearing shall be recorded by a court reporter and a transcript shall be prepared. Unless otherwise ordered by a Hearing Officer, a pre-hearing conference shall be recorded by a court reporter and a transcript shall be prepared.

**(b) Availability of a Transcript**

A transcript of a pre-hearing conference and a transcript of a hearing shall be available to a Party for purchase from the court reporter at prescribed rates. A witness may purchase from the court reporter a transcript of his or her own testimony.

**(c) Transcript Correction**

Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as ordered by the Hearing Officer, a Party or witness may seek to correct his or her transcript. A proposed correction of the transcript shall be submitted to the Hearing Officer by affidavit. Upon notice to all Parties to the disciplinary proceeding, the Hearing Officer may order the correction to the transcript as requested or sua sponte.

**9266. Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs****(a) Discretion of Hearing Officer to Require Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs**

At the discretion of the Hearing Officer, the Parties may be ordered to file proposed findings of facts and conclusions of law, or post-hearing briefs, or both. The Hearing Officer may order that such proposed findings and conclusions be filed together with, or as part of, post-hearing briefs.

**(b) Reference to Record Required**

Proposed findings of fact or other statements of fact in briefs shall be supported by specific references to the record.

**(c) Period for Filing**

In any case in which the Hearing Officer ordered the filing of proposed findings or conclusions of law, or post-hearing briefs, the Hearing Officer shall, after consultation with the Parties, prescribe the period within which proposed findings and conclusions of law and post-hearing briefs are to be filed. Such period shall be reasonable under all the circumstances but the total period allowed for the filing of post-hearing submissions shall not exceed 60 days after the conclusion of the hearing unless the Hearing Officer, for good cause shown, permits a different period and sets forth in an order the reasons why a longer period is necessary.

**(d) Form, Length of Papers**

Unless the Hearing Officer orders otherwise, each post-hearing submission shall not exceed 25 pages, exclusive of cover sheets, tables of contents, and tables of authorities.

**9267. Record; Supplemental Documents Attached to Record; Retention**

**(a) Contents of the Record, Retention**

The record shall consist of:

(1) the complaint, answers, each notice of hearing, pre-hearing order, and any amendments thereto;

(2) each application, motion, submission, and other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) each transcript of a pre-hearing conference and of a hearing, and each stipulation, transcript of testimony, Document, and other item admitted into evidence;

(4) each written communication accepted at the discretion of the Hearing Officer;



(5) with respect to a motion to disqualify a Hearing Officer under Rule 9233 or a Panelist under Rule 9234, each affidavit or transcript of testimony taken and the ruling made in connection with the request;

(6) all proposed findings and conclusions;

(7) each written ruling, order, and decision issued by the Chief Hearing Officer, Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel; and,

(8) any other Document or item accepted into the record by the Hearing Officer, the Hearing Panel or, if applicable, the Extended Hearing Panel.

**(b) Supplemental Documents Attached To Record; Retention**

(1) A supplemental Document attached to the record is any Document submitted to the Hearing Officer that did not become part of the record, including:

(A) a Document not admitted by the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel;

(B) any matter stricken from any filing or stricken during an oral presentation, including any matter stricken from any filing or stricken during any oral presentation because the Adjudicator determined it was scandalous or impertinent as provided in Rule 9136(e); and

(C) a list of Documents, if any, that a Respondent unsuccessfully sought by motion to inspect and copy under Rule 9251(c).

(2) A supplemental Document attached to the record shall not constitute part of the record, but shall be retained until the date upon which the Exchange's decision becomes final disciplinary action or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

**(c) Substitution of Copies**

Parties may submit to the Hearing Officer for substitution a true copy of a Document in the record.

**9268. Decision of Hearing Panel or Extended Hearing Panel**

**(a) Majority Decision**

Within 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer shall prepare a written decision that

reflects the views of the Hearing Panel or, if applicable, the Extended Hearing Panel, as determined by majority vote.

**(b) Contents of Decision**

The decision shall include:

(1) a statement describing the investigative or other origin of the disciplinary proceeding;

(2) the specific statutory or rule provisions that were alleged to have been violated;

(3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;

(4) the conclusions of the Hearing Panel, or Extended Hearing Panel, as to whether the Respondent violated any provision alleged in the complaint;

(5) a statement of the Hearing Panel, or the Extended Hearing Panel, in support of the disposition of the principal issues raised in the proceeding; and

(6) a statement describing any sanction imposed, the reasons therefor, and the date upon which such sanction shall become effective. Unless otherwise provided in the decision, the sanction(s) shall become effective on a date to be determined by the Exchange's Regulation Department staff.

**(c) Dissenting Opinion**

Within 65 days after the final date allowed for filing proposed findings of fact and conclusions of law, and post-hearings briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer or any Panelist may prepare a written dissenting opinion.

**(d) Service, Notice, And Dissemination Requirements**

The Office of Hearing Officers shall promptly serve the decision of the Hearing Panel, or the Extended Hearing Panel, and any dissenting opinion on the Parties; publish notice of the decision and any dissenting opinion in the Central Registration Depository; and provide a copy of the decision and any dissenting opinion to each member of the Exchange with which a Respondent is associated.

**(e) Appeal or Review**

(1) If not timely appealed pursuant to Rule 9311 or timely called for review pursuant to Rule 9312, the majority decision shall constitute final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1).

(2) The majority decision with respect to an Exchange member that is an affiliate of the Exchange within the meaning of Rule 2140 shall constitute final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1) and may not be appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312.

## **9269. Default Decisions**

### **(a) Issuance of Default Decisions**

(1) The Hearing Officer may issue a default decision against a Respondent that fails to answer the complaint within the time afforded under Rule 9215, or a Party that fails to appear at any hearing that a Party is required to attend under the Rule 9200 Series of which the Party has due notice.

(2) If the defaulting Party is the Respondent, the Hearing Officer may deem the allegations against that Respondent admitted. If the Defaulting Party is the Department of Enforcement or the Department of Market Regulation, the Hearing Officer may issue a default decision ordering that the complaint be dismissed with prejudice.

(3) The Hearing Officer may order a Party that fails to appear at the pre-hearing conference or the hearing to pay the costs incurred by other Parties in connection with their appearance.

### **(b) Contents of Decision**

The contents of a default decision shall conform to the requirements of Rule 9268(b).

### **(c) Review of Default Decision**

A Party may, for good cause shown, file a motion to set aside a default, dismissal, and the imposition of costs. Upon a showing of good cause, the Hearing Officer that entered the original order shall decide the motion. If the Hearing Officer that issued the original order is not available, the Chief Hearing Officer shall appoint another Hearing Officer to decide the motion.

### **(d) Final Disciplinary Action of the Exchange; Effectiveness of Sanctions**

(1) If a default decision is not appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312 within 25 days after the date the Office of Hearing

Officers serves it on the Parties, the default decision shall become the final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1). Unless otherwise provided in the default decision, the sanctions shall become effective on a date to be determined by the Exchange's Regulation Department staff, except that a bar or expulsion shall become effective immediately upon the default decision becoming the final disciplinary action of the Exchange. The decision shall be served on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar or an expulsion.

(2) A default decision with respect to an Exchange member that is an affiliate of the Exchange within the meaning of Rule 2140 shall constitute final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1) and may not be appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312.

## **9270. Settlement Procedure**

### **(a) When Offer Allowed; No Stay of Proceeding**

A Respondent who is notified that a proceeding has been instituted against him or her may propose in writing an offer of settlement at any time. If a Respondent proposes an offer of settlement before the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Officer. If a Respondent proposes an offer of settlement after the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Panel or, if applicable, the Extended Hearing Panel.

### **(b) Settlement Offer Shall Conform to Rule**

A Respondent who makes an offer of settlement shall do so in conformity with the provisions of this Rule and shall not make such an offer of settlement frivolously or propose a sanction inconsistent with the seriousness of the violations to be found.

### **(c) Content and Signature Requirements**

An offer of settlement shall be in writing and signed by the person making the offer, and, if the person is represented by counsel or a representative, signed also by the counsel or representative. The offer of settlement shall contain in reasonable detail:

(1) a statement describing the investigative or other origin of the disciplinary action;

(2) the specific statutory or rule provisions that the member or associated person is alleged to have violated;

(3) a statement containing the acts or practices which the member or associated person is alleged to have engaged in or omitted;

(4) a statement consenting to findings of fact and violations consistent with the statements contained in the offer of settlement required by subparagraphs (c)(2) and (c)(3);

(5) a proposed sanction to be imposed that is consistent with the current sanction guidelines or, if inconsistent with the sanction guidelines, a detailed statement supporting the proposed sanction; and,

(6) the effective date of any sanction(s) imposed, or a statement that the effective date of the sanction(s) will be a date to be determined by the Exchange's Regulation Department staff.

**(d) Waiver**

(1) If a Respondent submits an offer of settlement, by the submission such Respondent waives:

(A) any right of such Respondent to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Exchange Review Council, the Commission, and the courts, or any right otherwise to challenge or contest the validity of the order issued, if the offer of settlement and order of acceptance are accepted;

(B) any right of such Respondent to claim bias or prejudgment of the Chief Hearing Officer, Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, a Panelist on a Hearing Panel, or, if applicable, an Extended Hearing Panel, the Chief Regulatory Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance, or rejection of such offer of settlement and order of acceptance; and

(C) any right of such Respondent to claim that a person or body violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of settlement, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) If an offer of settlement and an order of acceptance are rejected, the Respondent shall be bound by the waivers made in this paragraph (d) for conduct by persons or bodies occurring during the period beginning from the date the offer of settlement was submitted and ending upon the rejection of the offer of settlement and order of acceptance.

**(e) Uncontested Offers of Settlement**

If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation does not oppose it, the offer of settlement is uncontested. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation before a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the uncontested offer of settlement and a proposed order of acceptance to the Exchange Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140) with its recommendation. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation after a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the offer of settlement and a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel for acceptance or rejection. If accepted by the Hearing Panel or, if applicable, Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the Exchange Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140) to accept or reject.

(1) A proposed order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement.

(2) Before an offer of settlement and an order of acceptance shall become effective, they shall be submitted to and accepted by the Exchange Review Council or the Office of Disciplinary Affairs. The Review Subcommittee may accept or reject such offer of settlement and order of acceptance or refer them to the Exchange Review Council for acceptance or rejection by the Exchange Review Council. In the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140, the offer of settlement and order of acceptance shall be accepted or rejected by the Office of Disciplinary Affairs and shall not be referred to the Exchange Review Council.

(3) If the offer of settlement and order of acceptance are accepted by the Exchange Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, they shall become final and the Director of the Office of Disciplinary Affairs shall issue the order and notify the Office of Hearing Officers.

**(f) Contested Offers of Settlement**

If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation opposes it, the offer of settlement is contested. When the Department of Enforcement or the Department of Market Regulation opposes an offer of settlement, the Respondent's written offer and the Department of Enforcement's or the Department of Market Regulation's written opposition shall be submitted to a Hearing Panel or, if applicable, an Extended Hearing Panel. The Hearing Panel or, if applicable, the Extended Hearing Panel, may order the Department of Enforcement or the Department of Market Regulation and the Respondent to attend a settlement conference.

(1) If a contested offer of settlement is approved by the Hearing Panel or, if applicable, Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement. The order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement. The offer of settlement, any written opposition thereto, and the order of acceptance shall be forwarded to the Exchange Review Council (or to the Office of Disciplinary Affairs, in the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140) to accept or reject.

(2) Before an offer of settlement and order of acceptance shall become effective, they shall be submitted to, and accepted by, the Exchange Review Council or the Office of Disciplinary Affairs. The Review Subcommittee may accept or reject such offer of settlement and order of acceptance or refer them to the Exchange Review Council for acceptance or rejection by the Exchange Review Council. In the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140, the offer of settlement and order of acceptance shall be accepted or rejected by the Office of Disciplinary Affairs and shall not be referred to the Exchange Review Council.

(3) If the offer of settlement and order of acceptance are accepted by the Office of Disciplinary Affairs, the Exchange Review Council or the Review Subcommittee, the Chief Regulatory Officer shall issue the order and notify the Office of Hearing Officers.

**(g) Final Disciplinary Action**

The proceeding shall conclude as of the date the order of acceptance is issued. The order of acceptance shall constitute final disciplinary action of the Exchange. The sanction shall take effect as set forth in the order.

**(h) Rejection of Offer of Settlement**

If an uncontested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Exchange Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. If a contested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Exchange Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. The rejected offer and proposed order of acceptance shall not constitute a part of the record in any proceeding against the Respondent making the offer.

**(i) Disciplinary Proceeding With Multiple Respondents**

When a disciplinary proceeding names multiple Respondents, settlement offers may be accepted or rejected as to any one or all of the Respondents submitting offers. The proceedings shall thereafter be terminated as to those Respondents whose offers of settlement are accepted, but such Respondents may be required to participate in any hearing conducted as to those Respondents that did not submit offers of settlement or whose offers of settlement were rejected.

**(j) No Prejudice from Rejected Offer of Settlement**

If an offer of settlement is rejected by a Hearing Panel or, if applicable, an Extended Hearing Panel, the Review Subcommittee, the Office of Disciplinary Affairs, or the Exchange Review Council, the Respondent shall not be prejudiced by the offer, which may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint or in any other proceeding.

**9280. Contemptuous Conduct**

**(a) Persons Subject to Sanctions**

If a Party, attorney for a Party, or other person authorized to represent others by Rule 9141, engages in conduct in violation of an order of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, or other contemptuous conduct during a proceeding, a Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may:

(1) subject the Party, attorney for a Party, or other person authorized to represent others by Rule 9141, to the sanctions set forth in paragraph (b); and

(2) exclude an attorney for a Party, or other person authorized to represent others by Rule 9141, under Rule 9150.

**(b) Sanctions Other Than Exclusion**



A Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may make such orders as are just in regard to a Party, an attorney for a Party, or other person authorized to represent others by Rule 9141.

(1) Such orders may include:

(A) an order providing that the matters on which the order is made or any other designated facts shall be taken to be established for the purposes of the disciplinary proceeding in accordance with the claim of the Party obtaining the order;

(B) an order providing that the disobedient Party may not support or oppose designated claims or defenses, or may not introduce designated matters in evidence;

(C) an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the Party subject to the order obeys it;

(D) in lieu of any of the foregoing orders or in addition thereto, an order providing that contemptuous conduct includes the failure to obey any order; and

(E) an order as provided in subparagraphs (A), (B), and (C) where a Party has failed to comply with an order to produce a person for examination, unless the Party failing to comply shows that such Party is unable to produce such person for examination.

(2) A Party that without substantial justification fails to disclose information required by the Rule 9240 Series and the Rule 9250 Series or otherwise required by order of the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, shall not, unless such failure is harmless, be permitted to use as evidence at a hearing, in a motion or in any other filing of papers, or in oral argument, any witness or information not so disclosed. In addition to, or in lieu of this sanction, the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. These sanctions may include any of the sanctions provided for in subparagraphs (b)(1)(A) through (C).

**(c) Exchange Review Council Review of Exclusions**

If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or other person may seek review of the exclusion by filing a motion to vacate

with the Exchange Review Council. Such motion to vacate shall be filed and served on all Parties within five days after service of the exclusion order. Any response shall be filed with the Exchange Review Council and served on all Parties within five days after the service of the motion to vacate. The Exchange Review Council or the Review Subcommittee shall consider such motion on an expedited basis and promptly issue a written order. The filing of a motion to vacate shall stay all aspects of the disciplinary proceeding until at least seven days after service of the order of the Exchange Review Council or the Review Subcommittee. The review proceedings shall be conducted on the basis of the written record without oral argument.

#### **(d) Adjournment**

The hearing, conferences, or other activities relating to the disciplinary proceeding shall be stayed pending the review by the Exchange Review Council or the Review Subcommittee of an exclusion order in paragraph (c). In the event that the Exchange Review Council or the Review Subcommittee upholds an exclusion of an attorney or other person authorized to represent others by Rule 9141, the Hearing Officer may, upon motion by a Party represented by an attorney or other person subject to an order of exclusion, grant an adjournment to allow the retention of new counsel or selection of a new representative. In determining whether to grant an adjournment or the length of an adjournment, the Hearing Officer shall consider whether there are other counsel or representatives of record on behalf of the Party, the availability of other counsel or other members of an excluded attorney's firm, or the availability of other representatives for the Party, and any other relevant factors.

#### **9290. Expedited Disciplinary Proceedings**

For any disciplinary proceeding, the subject matter of which also is subject to a temporary cease and desist proceeding initiated pursuant to Rule 9810 or a temporary cease and desist order, hearings shall be held and decisions shall be rendered at the earliest possible time. An expedited hearing schedule shall be determined at a pre-hearing conference held in accordance with Rule 9241.

#### **9300. Review of Disciplinary Proceeding by the Exchange Review Council and the Exchange Board; Application for Commission Review**

#### **9310. Appeal to or Review by the Exchange Review Council**

#### **9311. Appeal by Any Party; Cross-Appeal**

##### **(a) Time to File Notice of Appeal**

A Respondent or the Department of Enforcement or the Department of Market Regulation may file a written notice of appeal within 25 days after service of a decision issued pursuant to Rule 9268 or Rule 9269; provided, however, that a decision with

respect to a Respondent that is an affiliate of the Exchange within the meaning of Rule 2140 may not be appealed to the Exchange Review Council.

**(b) Effect**

An appeal to the Exchange Review Council from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the Exchange Review Council issues a decision pursuant to Rule 9349 or, in cases called for discretionary review by the Exchange Board, until a decision is issued pursuant to Rule 9351. Any such appeal, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

**(c) Notice of Appeal Content and Signature Requirements**

A Party appealing pursuant to this Rule shall file a written notice of appeal with the Office of Hearing Officers and serve the notice on the Parties. The notice of appeal shall be signed by the appealing Party, or his or her counsel or representative, and shall contain:

- (1) the name of the disciplinary proceeding;
- (2) the disciplinary proceeding docket number;
- (3) the name of the Party on whose behalf the appeal is made;
- (4) a statement on whether oral argument before the Exchange Review Council is requested; and
- (5) a brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.

**(d) Notice of Cross-Appeal**

A Party who is served with a notice of appeal may file a written notice of cross-appeal and serve the notice of cross-appeal on the Parties. The notice of cross-appeal shall be filed within five days after service of the notice of appeal. The notice of cross-appeal shall be signed by the Party cross-appealing, or his or her counsel, and shall contain the information set forth in subparagraphs (c)(1), (c)(2), (c)(4), and (c)(5), and the name of the Party on whose behalf the cross-appeal is made.

**(e) Waiver of Issues Not Raised**

The Exchange Review Council may, in its discretion, deem waived any issue not raised in the notice of appeal or cross-appeal. The Exchange Review Council, the Review Subcommittee, a Subcommittee, the Chief Regulatory Officer or, if applicable, an Extended Proceeding Committee, shall provide the Parties with notice of, and an

opportunity to submit briefs on, any issue that shall be considered by the Exchange Review Council if such issue was not previously set forth in the notice of appeal. Parties may submit motions to either the Review Subcommittee or the Exchange Review Council challenging requests for briefing made by the Chief Regulatory Officer under this Rule of issues that were not previously set forth in the notice of appeal.

**(f) Withdrawal of Notice of Appeal or Cross-Appeal**

A Party may withdraw a notice of appeal or a notice of cross-appeal filed by him or her at any time by filing a written notice of withdrawal of appeal or cross-appeal with the Office of Hearing Officers and serving notice thereof on the Parties. The notice of withdrawal of appeal or cross-appeal shall contain: the name of the disciplinary proceeding; the disciplinary proceeding docket number; and the name of the Party on whose behalf the notice of appeal or cross-appeal was filed previously. The notice of withdrawal of appeal or cross-appeal shall be signed by the Party, or his or her counsel or representative. Upon the withdrawal of a notice of appeal, any outstanding cross-appeal shall be treated as an appeal unless it is withdrawn.

**9312. Review Proceeding Initiated By the Exchange Review Council**

**(a) Call for Review**

(1) Rule 9268 Decision

A decision issued pursuant to Rule 9268 may be subject to a call for review by any member of the Exchange Review Council or, pursuant to authority delegated from the Exchange Review Council, by any member of the Review Subcommittee. A decision issued pursuant to Rule 9268 shall be subject to a call for review within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Exchange Review Council.

(2) Rule 9269 Decision

A default decision issued pursuant to Rule 9269 shall be subject to a call for review by the Chief Regulatory Officer, on his or her own motion within 25 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Exchange Review Council.

(3) Decision Regarding Affiliate of the Exchange

Notwithstanding anything herein to the contrary, a decision with respect to a member that is an affiliate of the Exchange within the meaning of Rule 2140 may not be called for review by the Exchange Review Council.

**(b) Effect**

Institution of review by a member of the Exchange Review Council on his or her own motion, a member of the Review Subcommittee on his or her own motion, or the Chief Regulatory Officer, on his or her own motion, shall operate as a stay of a final decision issued pursuant to Rule 9268 or Rule 9269 as to all Parties subject to the notice of review, until the Exchange Review Council issues a decision pursuant to Rule 9349, or, in cases called for discretionary review by the Exchange Board, until a decision is issued pursuant to Rule 9351. Institution of any such review, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

**(c) Requirements**

(1) If a member of the Exchange Review Council, a member of the Review Subcommittee, or, for a disciplinary proceeding decided under Rule 9269, the Chief Regulatory Officer determines to call a case for review, a written notice of review shall be served promptly on each Party to the proceeding and filed with the Office of Hearing Officers. Such notice of review shall contain:

(A) the name of the disciplinary proceeding;

(B) the disciplinary proceeding docket number; and

(C) a brief statement of the findings, conclusions, or sanctions with respect to which the Exchange Review Council, the Review Subcommittee, or the Chief Regulatory Officer determined that a call for review was necessary.

(2) The statement contained in the notice of review shall not limit the scope of the Exchange Review Council's authority under Rule 9346 to review any issues raised in the record. The Exchange Review Council, the Review Subcommittee, a Subcommittee, the Chief Regulatory Officer or, if applicable, an Extended Proceeding Committee, shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the Exchange Review Council if such issue was not previously set forth in the notice of review. Parties may submit motions to either the Review Subcommittee or the Exchange Review Council challenging requests for briefing made by the Chief Regulatory Officer under this Rule of issues that were not previously set forth in the notice of appeal.

**(d) Effect of Withdrawal of Notice of Appeal, Cross-Appeal**

If the review of a disciplinary proceeding by the Exchange Review Council is terminated before the Exchange Review Council issues a decision on the merits because all appealing Parties file a notice of withdrawal of appeal and no Party previously filed a notice of cross-appeal, or all Parties who previously filed a notice of cross-appeal file a notice of withdrawal of cross-appeal:

(1) a member of the Exchange Review Council or the Review Subcommittee shall have the right to call for review a decision issued pursuant to Rule 9268 in accordance with Rule 9312(a)(1), except that the 45 day period during which a call for review may be made shall begin on the day the Exchange receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal; and,

(2) the Chief Regulatory Officer shall have the right to call for review a decision issued pursuant to Rule 9269 in accordance with Rule 9312(a)(2), except that the 25 day period during which a call for review may be made shall begin on the day the Exchange receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal.

### **9313. Counsel to the Exchange Review Council**

#### **(a) Authority**

A Counsel to the Exchange Review Council shall have authority to take ministerial and administrative actions to further the efficient administration of a proceeding, including the authority to:

(1) direct the Office of Hearing Officers to complete and transmit a record of a disciplinary proceeding to the Exchange Review Council in accordance with Rule 9267;

(2) establish or amend a briefing schedule under Rule 9347(b) but not shorten a briefing schedule except with the consent of the Parties;

(3) permit a brief or any other document required to be filed to vary from the requirements of the Rule 9130 Series as provided in Rule 9347(a);

(4) establish the date, time, and location of an oral argument and provide for notice of the hearing under Rule 9341;

(5) for other than a Party and counsel or a person acting in a representative capacity, determine who may attend a hearing;

(6) rule on a motion by a Party to request to lengthen or shorten a period of time prescribed by the Code for the filing of any papers, or request that a hearing be postponed or adjourned under Rule 9322, except that a period may not be shortened and a hearing may not be postponed or adjourned without the consent of the Parties; and

(7) create and maintain the official record of the disciplinary proceeding on appeal or review.

**(b) Review**

A Party seeking the review of a decision of a Counsel to the Exchange Review Council may make a motion to the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee.

**9320. Transmission of Record; Extensions of Time, Postponements, Adjournments****9321. Transmission of Record**

Within 21 days after the filing of a notice of appeal or notice of review, or at such later time as the Exchange Review Council may designate, the Office of Hearing Officers shall assemble and prepare an index to the record, transmit the record and the index to the Exchange Review Council, and serve copies of the index upon all Parties. The Hearing Officer who participated in the disciplinary proceeding, or the Chief Hearing Officer, shall certify that the record transmitted to the Exchange Review Council is complete.

**9322. Extensions of Time, Postponements, Adjournments****(a) Availability**

At any time prior to the issuance of a decision pursuant to Rule 9349, the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council, for good cause shown, may extend or shorten a period prescribed by the Code for the filing of any papers, except that Counsel to the Exchange Review Council may shorten a period so prescribed only with the consent of the Parties. The Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council, for good cause shown, may postpone or adjourn a hearing consistent with paragraph (b), except that Counsel to the Exchange Review Council may postpone or adjourn a hearing only with the consent of the Parties.

**(b) Limitations on Postponements, Adjournments, and Changes in Location**

Oral argument shall begin at the time and place ordered, unless the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council, for good cause shown, postpones, adjourns, or changes the location of the oral argument, except that Counsel to the Exchange Review Council may postpone or adjourn the oral argument only with the consent of the Parties. In considering a motion for the postponement or adjournment of an oral argument, the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council shall consider, in addition to any other relevant factors:

(1) the length of time the disciplinary proceeding has been pending to date, and the timeliness of the request for a postponement, an adjournment, or an extension;

(2) the number of postponements, adjournments, or extensions already granted;

(3) the stage of the proceedings at the time of the request;

(4) the prejudice to the other Parties;

(5) the potential harm to the investing public if an extension of time, an adjournment, or a postponement is granted; and

(6) any other matter that justice may require.

**9330. Appointment of Subcommittee or Extended Proceeding Committee; Disqualification and Recusal**

**9331. Appointment of Subcommittee or Extended Proceeding Committee**

**(a) Appointment by the Exchange Review Council**

Following the filing of a notice of appeal pursuant to Rule 9311 or a notice of review pursuant to Rule 9312, the Exchange Review Council or the Review Subcommittee shall appoint a Subcommittee or an Extended Proceeding Committee to participate, subject to Rule 9345, in a disciplinary proceeding appealed or called for review.

(1) Subcommittee

Except as provided in subparagraph (2), for each disciplinary proceeding appealed or called for review, the Exchange Review Council or the Review Subcommittee shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. A Subcommittee shall be composed of two or more persons who shall be current or former members of the Exchange Review Council or former Directors.

(2) Extended Proceeding Committee

Upon consideration of the volume and complexity of the certified record, or other factors the Exchange Review Council or the Review Subcommittee deems material, the Exchange Review Council or the Review Subcommittee may determine that a disciplinary proceeding appealed or called for review shall be designated an Extended Proceeding and shall appoint an Extended Proceeding Committee to participate, subject to Rule 9345, in the appeal or review. The



Extended Proceeding Committee shall be composed of two or more persons who shall be current or former members of the Exchange Review Council or former Directors. The Review Subcommittee shall have discretion to compensate any or all Panelists of an Extended Proceeding Committee at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

**(b) Function**

If a hearing is held, the Subcommittee or, if applicable, the Extended Proceeding Committee, shall hear oral arguments and consider, if allowed under Rule 9346(b), any new evidence. Based on the hearing and the record on appeal or review, the Subcommittee or, if applicable, the Extended Hearing Committee, shall make a recommendation to the Exchange Review Council regarding the disposition of all matters on appeal, cross-appeal, or review. The recommendation shall be in the form of a written recommended decision.

**9332. Disqualification and Recusal**

**(a) Recusal, Withdrawal of Member or Panelist**

If at any time a member of the Exchange Review Council, including a member of the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Exchange Review Council determines that the member, the Panelist, or the Counsel to the Exchange Review Council has a conflict of interest or bias or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the Exchange Review Council might reasonably be questioned, the member, the Panelist, or the Counsel to the Exchange Review Council shall notify the Chair of the Exchange Review Council, and the Chair of the Exchange Review Council shall issue and serve on the Parties a notice stating that the member, the Panelist, or the Counsel to the Exchange Review Council has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or is otherwise unable to continue service after a hearing has been convened, the Chair of the Exchange Review Council shall appoint a replacement Panelist. In the event that a member of the Review Subcommittee withdraws, is incapacitated, or is otherwise unable to continue service after assignment, the Chair of the Exchange Review Council shall appoint another member of the Exchange Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the withdrawal action was taken. The replacement member of the Review Subcommittee must have the same classification (Industry or Non-Industry) as the member who withdrew. In the event that a Counsel to the Exchange Review Council withdraws, is incapacitated, or is otherwise unable to continue service after assignment, the Chief Regulatory Officer shall assign a replacement Counsel to the Exchange Review Council.

**(b) Motion for Disqualification**

A Party may move for the disqualification of a member of the Exchange Review Council, the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Exchange Review Council. All such motions shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the Exchange Review Council might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) when the Party learned of the facts believed to constitute the disqualification; or

(2) when the Party was notified of the composition of the Subcommittee or, if applicable, the Extended Proceeding Committee or the assignment to the disciplinary proceeding of the Counsel to the Exchange Review Council.

**(c) Disposition of Disqualification Motions: Challenges to Single Member of the Exchange Review Council or Review Subcommittee, Single Panelist of Subcommittee or Extended Hearing Committee, or Counsel to the Exchange Review Council**

Motions for disqualification of a member of the Exchange Review Council, including a member of the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Exchange Review Council shall be decided by the Chair of the Exchange Review Council, who shall promptly determine whether disqualification is required and issue a written ruling on the motion. If a member of the Review Subcommittee is disqualified, the Chair of the Exchange Review Council shall appoint another member of the Exchange Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion was made. The replacement member of the Review Subcommittee must have the same classification (Member, Industry or Non-Industry) as the member being replaced. If a Panelist is disqualified, the Chair of the Exchange Review Council shall appoint a replacement Panelist. If a Counsel is disqualified, the Chief Regulatory Officer shall assign a replacement Counsel to the Exchange Review Council.

**(d) Disposition of Disqualification Motions: Challenges to Multiple Members or Panelists**

(1) the Exchange Review Council

If a Party files a motion to disqualify more than one member of the Exchange Review Council, the Chair of the Exchange Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. In the event of such disqualification,

the remaining members of the Exchange Review Council shall consider the review or appeal of the disciplinary matter.

(2) Review Subcommittee

If a Party files a motion to disqualify more than one member of the Review Subcommittee, the Chair of the Exchange Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. If members of the Review Subcommittee are disqualified, the Chair of the Exchange Review Council shall appoint other members of the Exchange Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion was made. The replacement members of the Review Subcommittee must have the same classification (Member, Industry or Non-Industry) as the members being replaced.

(3) Subcommittee; Extended Proceeding Committee

If a Party files a motion to disqualify more than one Panelist of a Subcommittee or an Extended Proceeding Committee, the Chair of the Exchange Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the motion. If multiple Panelists are disqualified, the Chair of the Exchange Review Council shall appoint replacement Panelists.

**9340. Proceedings**

**9341. Oral Argument**

**(a) Request for Oral Argument**

A Party may request oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee. Oral argument shall be requested in writing either in the Party's notice of appeal or cross-appeal or within 15 days after service of the Exchange Review Council's notice of review. Subject to the limitations of Rules 9342 and 9344, oral argument shall be granted if timely requested. The right to oral argument set forth in this Rule is unaffected by a Party's waiver of, or failure to request, a hearing pursuant to the Rule 9200 Series.

**(b) Discretion to Proceed With or Without Oral Argument**

In the absence of a request for oral argument, the Subcommittee or, if applicable, the Extended Proceeding Committee, in its discretion, may order that a matter be set down for oral argument or may consider the matter on the basis of the record.

**(c) Notice Regarding Oral Argument**

If oral argument is held, a notice stating the date, time, and location of the oral argument shall be served on the Parties at least 21 days before the hearing. The Parties may agree in writing to waive the notice period or, in extraordinary circumstances, the Subcommittee or, if applicable, the Extended Proceeding Committee, or Counsel to the Exchange Review Council may provide for a shorter notice period, except that Counsel to the Exchange Review Council may provide for a shorter notice period only with the consent of the Parties.

**(d) Attendance Required**

The Parties shall make oral arguments before the Subcommittee or, if applicable, the Extended Proceeding Committee. Unless otherwise agreed to by all of the Parties, all Panelists comprising the Subcommittee or, if applicable, the Extended Proceeding Committee shall be present for the oral argument.

**(e) Time Limits**

Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, orders otherwise for good cause shown, each Party's oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee, shall be limited to a total of 30 minutes.

**(f) Recordation; Transcript Correction**

(1) Oral arguments shall be recorded by a court reporter and a transcript shall be prepared.

(2) A transcript of a hearing shall be available to a Party for purchase from the court reporter at prescribed rates. A witness may purchase a transcript of his or her own testimony from the court reporter.

(3) Prior to the filing of post-hearing briefs or within such earlier time as reasonably ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, a Party or witness may seek to correct his or her transcript. A proposed correction of the transcript shall be submitted by affidavit to the Subcommittee or, if applicable, the Extended Proceeding Committee. Upon notice to all Parties to the disciplinary proceeding, the Subcommittee or, if applicable, the Extended Proceeding Committee may order the correction to the transcript as requested or sua sponte.

**9342. Failure to Appear at Oral Argument**

A Party who requests oral argument but fails to appear after being duly notified shall be deemed to have waived any opportunity for oral argument provided under the

Rule 9300 Series. The Subcommittee or, if applicable, the Extended Proceeding Committee, shall permit argument to go forward as to those Parties who appear. The Subcommittee or, if applicable, the Extended Proceeding Committee, in the exercise of its discretion, may consider the matter on the basis of the record without oral argument as to those Parties who failed to appear.

### **9343. Disposition Without Oral Argument**

If an oral argument is not held, the matter shall be considered by a Subcommittee or, if applicable, an Extended Proceeding Committee, on the basis of the record, as defined in Rule 9267, and supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council in connection with the appeal, cross-appeal, or call for review.

### **9344. Failure to Participate Below; Abandonment of Appeal**

#### **(a) Failure to Participate Below**

When an appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, but shows good cause for the failure to participate, the Exchange Review Council or the Review Subcommittee may dismiss the appeal and remand the matter for further proceedings, or may order that the appeal proceed. If the appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, and fails to show good cause for the failure to participate, the matter shall be considered by the Subcommittee or, if applicable, the Extended Proceeding Committee, and the Exchange Review Council on the basis of the record and other documents, as provided in Rules 9346 and 9347. Alternatively, the Exchange Review Council or Review Subcommittee may remand the disciplinary proceeding with instructions. For purposes of this paragraph, failure to participate shall include failure to file an answer or otherwise respond to a complaint, or failure to appear at a scheduled hearing, but shall not include failure to request a hearing pursuant to Rule 9221.

#### **(b) Abandonment of Appeal**

If an appealing Party fails to advise the Exchange Review Council or the Review Subcommittee of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the Exchange Review Council or the Review Subcommittee may dismiss the appeal as abandoned, and the decision of the Hearing Officer, the Hearing Panel or, if applicable, the Extended Hearing Panel, shall become the final disciplinary action of the Exchange. If a cross-appealing Party fails to advise the Exchange Review Council or the Review Subcommittee of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the Exchange Review Council or the Review Subcommittee may dismiss the cross-appeal as

abandoned. Upon a showing of good cause, the Exchange Review Council may withdraw any dismissal entered pursuant to this Rule.

### **9345. Subcommittee or Extended Proceeding Committee Recommended Decision to the Exchange Review Council**

A Subcommittee or, if applicable, an Extended Proceeding Committee, shall present a recommended decision in writing to the Exchange Review Council before the meeting of the Exchange Review Council at which the disciplinary proceeding shall be considered.

### **9346. Evidence in the Exchange Review Council Proceedings**

#### **(a) Scope of Review**

Except as otherwise set forth in this paragraph, the Exchange Review Council's review shall be limited to consideration of:

(1) the record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee or, if applicable, the Extended Proceeding Committee, and the Exchange Review Council; and

(2) any oral argument permitted under this Code.

A Party may introduce additional evidence only with prior approval of the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council, upon a showing that extraordinary circumstances exist under paragraph (b). If an appealing Party shows good cause for failure to participate in the disciplinary proceeding below, the Exchange Review Council may hear evidence and consider the disciplinary proceeding pursuant to Rule 9344(a).

#### **(b) Leave to Introduce Additional Evidence**

A Party may apply to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council for leave to introduce additional evidence by motion filed not later than 30 days after the Office of Hearing Officers transmits to the Exchange Review Council and serves upon all Parties the index to the record, pursuant to Rule 9321. The motion shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, demonstrate why the evidence is material to the proceeding, and be filed and served. The Party may attach the documentary evidence as an exhibit to the motion. By a motion filed in accordance with Rule 9146, a Party may request an extension of the period during which a Party may file a motion for leave to introduce additional evidence. A Party shall demonstrate that there was good cause for failing to file the motion for leave to introduce additional evidence during the period prescribed.

**(c) Motion In Opposition; Motion to Introduce Rebuttal Evidence**

A Party may file an opposition to a motion, as provided in Rule 9146(d), for leave to introduce new evidence, and may move for leave to introduce rebuttal evidence in response to the proposed new evidence. A Party who moves to introduce rebuttal evidence in response to the proposed new evidence of another Party shall describe each item of proposed rebuttal evidence and explain why the evidence is material to the proceeding, and shall file and serve such motion.

**(d) Discretion Regarding Review of Additional Evidence**

Upon consideration of any motion to introduce additional evidence and any opposition thereto, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council may permit the evidence to be introduced into the record on review, or the Exchange Review Council may remand the disciplinary proceeding for further proceedings consistent with its ruling or for further fact finding.

**(e) Requirements for Submitting Additional Documentary Evidence**

A Party that is permitted to introduce additional documentary evidence before the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council pursuant to paragraph (d) shall make copies of the evidence available to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council, and to all Parties at such time as the Subcommittee or, if applicable, the Extended Proceeding Committee, the Exchange Review Council, or Counsel to the Exchange Review Council may specify.

**(f) Subcommittee or Extended Proceeding Committee Order Requiring Additional Evidence**

On its own motion, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council may order that the record be supplemented with such additional evidence as it may deem relevant. Among other things, the Subcommittee, or if applicable, the Extended Proceeding Committee, or the Exchange Review Council may order a Respondent who asserts his or her inability to pay a monetary sanction to file a sworn financial statement and to keep such statement current as ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council.

**(g) Rules of Evidence Not Applicable**

The formal rules of evidence shall not apply.

**(h) Testimony**

A person who is subject to the jurisdiction of the Exchange shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

### **9347. Filing of Papers in the Exchange Review Council Proceedings**

#### **(a) Briefs; Reply Briefs; Requirements**

Parties may file briefs in connection with proceedings governed by the Rule 9300 Series. Briefs shall be confined to the particular matters at issue. An exception to findings, conclusions, or sanctions shall be supported by citation to the relevant portions of the record, including references to specific pages relied upon, and by concise argument, including citation of such statutes, decisions, and other authorities as may be relevant. If an exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, an appendix thereto, or by citation to the record. Parties may file reply briefs. If a Party files a reply brief, such brief shall be limited to matters in reply. All briefs shall conform to the requirements of the Rule 9130 Series, and, except with advance leave of the Subcommittee or, if applicable, the Extended Proceeding Committee, the Exchange Review Council, the Review Subcommittee, or Counsel to the Exchange Review Council, exclusive of pages containing tables of contents or tables of authorities, a brief other than a reply brief shall not exceed 25 double-spaced pages, and a reply brief shall not exceed 12 double-spaced pages.

#### **(b) Timely Filing of Briefs**

Briefs shall be due upon dates established by the Subcommittee or, if applicable, the Extended Proceeding Committee, the Exchange Review Council, the Review Subcommittee, or Counsel to the Exchange Review Council in a scheduling order. Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, the Exchange Review Council, the Review Subcommittee, or Counsel to the Exchange Review Council specifies otherwise, opening briefs shall be submitted not less than 21 days from the date of the scheduling order, and answering briefs shall be submitted 21 days thereafter. When reply briefs are submitted, such briefs shall be filed not later than ten days after service of the answering brief. Counsel to the Exchange Review Council may not shorten a period previously established for the filing of briefs except with the consent of the Parties. The time periods listed in this provision are only applicable to the filing of opening briefs, answering briefs, and reply briefs.

### **9348. Powers of the Exchange Review Council on Review**

In any appeal or review proceeding pursuant to the Rule 9300 Series, the Exchange Review Council may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions. The Exchange Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction.



**9349. Exchange Review Council Formal Consideration; Decision****(a) Decision of the Exchange Review Council, Including Remand**

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the Exchange Review Council, after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The Exchange Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the Exchange Review Council or the Review Subcommittee may remand the disciplinary proceeding with instructions. The Exchange Review Council shall prepare a proposed written decision pursuant to paragraph (b).

**(b) Contents of Decision**

The decision shall include:

- (1) a statement describing the investigative or other origin of the disciplinary proceeding;
- (2) the specific statutory or rule provisions that were alleged to have been violated;
- (3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;
- (4) the conclusions as to whether the Respondent violated any provision alleged in the complaint;
- (5) a statement in support of the disposition of the principal issues raised in the proceeding; and
- (6) a statement describing any sanction imposed, the reasons therefor, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

**(c) Issuance of Decision After Expiration of Call for Review Period**

The Exchange Review Council shall provide its proposed written decision to the Exchange Board. The Exchange Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the Exchange Board does not call the disciplinary proceeding for review, the proposed written decision of the Exchange Review Council shall become final, and the Exchange Review Council shall serve its written decision on the Parties and provide a copy to each member of the Exchange with which a Respondent is associated.

The decision shall constitute the final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1), unless the Exchange Review Council remands the proceeding.

### **9350. Discretionary Review by Board**

### **9351. Discretionary Review by the Exchange Board**

#### **(a) Call for Review by Director**

A Director may call a disciplinary proceeding for review by the Exchange Board if the call for review is made within the period prescribed in paragraph (b); provided, however, that a decision with respect to a member that is an affiliate of the Exchange within the meaning of Rule 2140 may not be called for review.

#### **(b) 15 Day Period; Waiver**

(1) A Director shall make his or her call for review not later than the next meeting of the Exchange Board that is at least 15 days after the date on which the Exchange Board receives the proposed written decision of the Exchange Review Council.

#### (2) Waiver

By a unanimous vote of the Exchange Board, the Exchange Board may shorten the period in subparagraph (1) to less than 15 days. By an affirmative vote of the majority of the Exchange Board then in office, the Exchange Board may, during the 15 day period in subparagraph (1), vote to extend the period in subparagraph (1) to more than 15 days.

#### **(c) Review at Next Meeting**

If a Director calls a disciplinary proceeding for review within the period prescribed in paragraph (b), the Exchange Board shall review the disciplinary proceeding not later than the next meeting of the Exchange Board. The Exchange Board may order the Parties (excluding any Respondent who did not appeal or cross-appeal, or as to whom the issues appealed or called for review do not apply) to file briefs in connection with the review proceedings pursuant to this Rule.

#### **(d) Decision of the Exchange Board, Including Remand**

After review, the Exchange Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council. The Exchange Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the Exchange Board may remand the disciplinary proceeding with instructions. The Exchange Board shall prepare a written decision that includes all of the elements described in Rule 9349(b)(1) through (6).

**(e) Issuance of Decision After Expiration of Call for Review Period**

The Exchange Board shall issue and serve its written decision on the Parties and provide a copy to each member of the Exchange with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1), unless the Exchange Board remands the proceeding.

**9360. Effectiveness of Sanctions**

Unless otherwise provided in the decision issued under Rule 9349 or Rule 9351, a sanction (other than a bar, an expulsion, or a permanent cease and desist order) specified in a decision constituting final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1) shall become effective on a date to be determined by the Exchange staff (or the Hearing Panel, Extended Hearing Panel, or Office of Disciplinary Affairs in the case of a decision with respect to an affiliate of the Exchange within the meaning of Rule 2140). A bar, an expulsion, or a permanent cease and desist order shall become effective upon service of the decision constituting final disciplinary action of the Exchange, unless otherwise specified therein. The Exchange shall serve the decision on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar, an expulsion, or a permanent cease and desist order.

**9370. Application to Commission for Review****(a) Appeal to Commission; Effect**

A Respondent aggrieved by final disciplinary action pursuant to the Rule 9200 Series or the Rule 9300 Series may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing with the Commission of an application for review by the Commission shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1).

**(b) Notification to Member**

The Exchange shall promptly notify any member with which a Respondent is associated if the Respondent files an application for review to the Commission.

**9400. Reserved****9500. Other Proceedings****9510. Reserved****9520. Eligibility Proceedings****9521. Purpose and Definitions**

**(a) Purpose**

The Rule 9520 Series sets forth procedures for a person to become or remain associated with a member, notwithstanding the existence of a statutory disqualification as defined in the Exchange By-Laws and for a current member or person associated with a member to obtain relief from the eligibility or qualification requirements of the Exchange By-Laws and the Equity Rules. Such actions hereinafter are referred to as "eligibility proceedings."

**(b) Definitions**

(1) The term "Application" means FINRA's Form MC-400 for individuals or Form MC-400A for members, filed with the Central Registration Depository/Public Disclosure.

(2) The term "disqualified member" means a broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member that is or becomes subject to a disqualification or is otherwise ineligible for membership under the Rules of the Exchange.

(3) The term "disqualified person" means an associated person or person seeking to become an associated person who is or becomes subject to a disqualification or is otherwise ineligible for association under the Rules of the Exchange.

(4) The term "sponsoring member" means the member or applicant for membership pursuant to Rule 1013 that is sponsoring the association or continued association of a disqualified person to be admitted, readmitted, or permitted to continue in association.

**9522. Initiation of Eligibility Proceeding; Member Regulation Consideration****(a) Initiation****(1) Issuance of Notice of Disqualification or Ineligibility**

If the Exchange's Regulation Department staff has reason to believe that a disqualification exists or that a member or person associated with a member otherwise fails to meet the eligibility requirements of the Exchange, the Exchange's Regulation Department staff shall issue a written notice to the member or applicant for membership under Rule 1013. The notice shall specify the grounds for such disqualification or ineligibility.

**(2) Notice Regarding a Member**

A notice issued to a disqualified member shall state that the disqualified member may apply for relief by filing an application or, in the case of a matter set forth in Rule 9522(e)(1), a written request for relief, within ten business days after service of the notice. If the member fails to file the application or, where appropriate, the written request for relief, within the 10-day period, the membership of the member shall be canceled, unless the Department of Member Regulation grants an extension for good cause shown.

### (3) Notice Regarding an Associated Person

A notice issued regarding a disqualified person to a member or applicant for membership under Rule 1013 shall state that such member or applicant for membership may file an application on behalf of itself and such person or, in the case of a matter set forth in Rule 9522(e)(1), a written request for relief, within ten business days after service of the notice. If the member fails to file the application or, where appropriate, the written request for relief, within the 10-day period, the registration of the disqualified person shall be revoked, unless the Department of Member Regulation grants an extension for good cause shown.

### (4) Service

A notice issued under this section shall be served by facsimile or pursuant to Rules 9131 and 9134.

### **(b) Obligation of Member to Initiate Proceeding**

A member shall file an application or, in the case of a matter set forth in Rule 9522(e)(1), a written request for relief, with the Central Registration Depository/ Public Disclosure, if the member determines prior to receiving a notice under paragraph (a) that:

(1) it has become a disqualified member;

(2) a person associated with such member or whose association is proposed by an applicant for membership under Rule 1013 has become a disqualified person; or

(3) the member or applicant for membership under Rule 1013 wishes to sponsor the association of a person who is a disqualified person.

### **(c) Withdrawal of Application**

A member may withdraw its application or written request for relief prior to a hearing by filing a written notice with the Central Registration Depository/Public Disclosure pursuant to Rules 9135, 9136, and 9137. A member may withdraw its application after the start of a hearing but prior to the issuance of a decision by the Exchange Review Council with prior written consent of the Exchange Review Council.

**(d) Ex Parte Communications**

The prohibitions against ex parte communications set forth in Rule 9143 shall become effective under the Rule 9520 Series when the Exchange's Regulation Department staff has initiated the eligibility proceeding and the Exchange's Regulation Department staff has knowledge that a member intends to file an application or written request for relief pursuant to the Rule 9520 Series.

**(e) Member Regulation Consideration**

(1) Matters that may be Approved by the Department of Member Regulation without the Filing of an Application

The Department of Member Regulation, as it deems consistent with the public interest and the protection of investors, may grant a written request for relief from the eligibility requirements by a disqualified member or a sponsoring member without the filing of an application by such disqualified member or sponsoring member if a disqualified member or disqualified person is subject to one or more of the following conditions but is not otherwise subject to disqualification:

(A) a disqualified member or disqualified person is subject to a disqualification based on an injunction that was entered ten or more years prior to the proposed admission or continuance by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any of the above, entity or person required to be registered under the Commodity Exchange Act, or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(B) a sponsoring member makes a request to change the supervisor of a disqualified person; or

(C) a disqualified member or sponsoring member is a member of both the Exchange and another self-regulatory organization; and:

(i) the other self-regulatory organization intends to file a Notice under SEC Rule 19h-1 approving the membership

continuance of the disqualified member or, in the case of a sponsoring member, the proposed association or continued association of the disqualified person; and

(ii) the Department of Member Regulation concurs with that determination.

(2) Matters that may be Approved by the Department of Member Regulation after the Filing of an Application

The Department of Member Regulation, as it deems consistent with the public interest and the protection of investors, may approve an application filed by a disqualified member or sponsoring member if a disqualified member or disqualified person is subject to one or more of the following conditions but is not otherwise subject to disqualification (other than a matter set forth in subparagraph(e)(1)):

(A) The disqualified person is already a participant in, a member of, or a person associated with a member of, a self-regulatory organization (other than the Exchange), and the terms and conditions of the proposed admission to the Exchange are the same in all material respects as those imposed or not disapproved in connection with such person's prior admission or continuance pursuant to an order of the Commission under SEC Rule 19h-1 or other substantially equivalent written communication;

(B) The Department of Member Regulation finds, after reasonable inquiry, that except for the identity of the employer concerned, the terms and conditions of the proposed admission or continuance are the same in all material respects as those imposed or not disapproved in connection with a prior admission or continuance of the disqualified person pursuant to an order of the Commission under SEC Rule 19h-1 or other substantially equivalent written communication, and that there is no intervening conduct or other circumstance that would cause the employment to be inconsistent with the public interest or the protection of investors;

(C) The disqualification previously was a basis for the institution of an administrative proceeding pursuant to a provision of the federal securities laws, and was considered by the Commission in determining a sanction against such disqualified person in the proceeding; and the Commission concluded in such proceeding that it would not restrict or limit the future securities activities of such disqualified person in the capacity now proposed, or, if it imposed any such restrictions or limitations for a specified time period, such time period has elapsed; or

(D) The disqualification consists of a court order or judgment of injunction or conviction, and such order or judgment:

(i) expressly includes a provision that, on the basis of such order or judgment, the Commission will not institute a proceeding against such person pursuant to Section 15(b) or 15B of the Act or that the future securities activities of such persons in the capacity now proposed will not be restricted or limited; or

(ii) includes such restrictions or limitations for a specified time period and such time period has elapsed; or

(E) The disqualified person's functions are purely clerical and/or ministerial in nature.

(3) Rights of Disqualified Member, Sponsoring Member, Disqualified Person, and Department of Member Regulation

(A) In the event the Department of Member Regulation does not approve a written request for relief from the eligibility requirements pursuant to subparagraph (e)(1), the disqualified member or sponsoring member may file an application, and such member shall have the right to proceed under Rule 9523 or 9524, as applicable. The Department of Member Regulation may require a disqualified member or sponsoring member to file an application with the Central Registration Depository/Public Disclosure, notwithstanding the provisions of subparagraph (e)(1).

(B) In the event the Department of Member Regulation does not approve an application pursuant to subparagraph (e)(2), the disqualified member or sponsoring member shall have the right to proceed under Rule 9523 or 9524, as applicable.

**9523. Acceptance of Member Regulation Recommendations and Supervisory Plans by Consent Pursuant to SEC Rule 19h-1**

(a) After an application is filed, the Department of Member Regulation may recommend the membership or continued membership of a disqualified member or sponsoring member or the association or continuing association of a disqualified person pursuant to a supervisory plan where the disqualified member, sponsoring member, and/or disqualified person, as the case may be, consent to the recommendation and the imposition of the supervisory plan. The disqualified member, sponsoring member, and/or disqualified person, as the case may be, shall execute a letter consenting to the imposition of the supervisory plan.



(b) (1) If a disqualified member, sponsoring member, and/or disqualified person submitted an executed letter consenting to a supervisory plan, by the submission of such letter, the disqualified member, sponsoring member and/or disqualified person waive:

(A) the right to a hearing before a Hearing Panel and any right of appeal to the Exchange Review Council, the Commission, and the courts, or otherwise challenge the validity of the supervisory plan, if the supervisory plan is accepted.

(B) any right of the disqualified member, sponsoring member, and/or disqualified person to claim bias or prejudice by the Department of Member Regulation, the Chief Regulatory Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the Department of Member Regulation's recommendation or the supervisory plan, or other consideration of the recommendation or supervisory plan, including acceptance or rejection of such recommendation or supervisory plan; and

(C) any right of the disqualified member, sponsoring member, and/or disqualified person to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the recommendation or supervisory plan, or other consideration of the recommendation or supervisory plan, including acceptance or rejection of such recommendation or supervisory plan.

(2) If a recommendation or supervisory plan is rejected, the disqualified member, sponsoring member, and/or disqualified person shall be bound by the waivers made under subparagraph (b)(1) for conduct by persons or bodies occurring during the period beginning on the date the supervisory plan was submitted and ending upon the rejection of the supervisory plan and shall have the right to proceed under this rule and Rule 9524, as applicable.

(c) If the disqualified member, sponsoring member, and/or disqualified person execute the letter consenting to the supervisory plan, it shall be submitted to the Exchange's Regulation Department by the Department of Member Regulation with a proposed Notice under SEC Rule 19h-1, where required. The Exchange's Regulation Department shall forward the supervisory plan and proposed Notice under SEC Rule 19h-1, if any, to the Chairman of the Statutory Disqualification Committee, acting on behalf of the Exchange Review Council (or to the Office of Disciplinary Affairs in the case of a supervisory plan with respect an affiliate of the Exchange within the meaning of Rule 2140). The Chairman of the Statutory Disqualification Committee may accept or reject the recommendation of the Department of Member Regulation and the supervisory plan

or refer them to the Exchange Review Council for acceptance or rejection by the Exchange Review Council, and the Office of Disciplinary Affairs may accept or reject the recommendation of the Department of Member Regulation and the supervisory plan.

(d) If the recommendation and supervisory plan is accepted by the Exchange Review Council, the Chairman of the Statutory Disqualification Committee, or the Office of Disciplinary Affairs, it shall be deemed final and, where required, the proposed Notice under SEC Rule 19h-1 will be filed by the Exchange. If the recommendation and supervisory plan are rejected by the Chairman of the Statutory Disqualification Committee, the Exchange Review Council, or the Office of Disciplinary Affairs, the Exchange's Regulation Department may take any other appropriate action with respect to the disqualified member, sponsoring member, and/or disqualified person. If the recommendation and supervisory plan are rejected, the disqualified member, sponsoring member, and/or disqualified person shall not be prejudiced by the execution of the letter consenting to the supervisory plan under subparagraph (a) and the letter may not be introduced into evidence in any proceeding.

#### **9524. Exchange Review Council Consideration**

##### **(a) Hearing Panel Consideration**

###### (1) Appointment of Hearing Panel

When the disqualified member, sponsoring firm, or applicant requests a hearing, the Exchange Review Council or the Review Subcommittee shall appoint a Hearing Panel composed of two or more members, who shall be current or former members of the Exchange Review Council or the Statutory Disqualification Committee or former Directors (provided, however, that current members of the Exchange Review Council shall not serve on a Hearing Panel with respect to an affiliate of the Exchange within the meaning of Rule 2140). The Hearing Panel shall conduct a hearing and recommend a decision on the request for relief.

###### (2) Notice of Hearing

The disqualified member or sponsoring member, as the case may be, and the Department of Member Regulation shall be notified via mail, facsimile, or overnight courier of the location, time, and date of the hearing not less than fourteen business days before the hearing, unless the parties agree to shorten the time period.

###### (3) Transmission of Documents

(A) Upon receipt of an application, the Central Registration Depository shall gather all of the information necessary to process the application, including (i) the Central Registration Depository records for

the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the proposed supervisor; and (ii) all of the information submitted by the disqualified member or sponsoring member in support of the application. The Central Registration Depository will prepare an index of these documents, and simultaneously provide this index and copies of the documents to the disqualified member or sponsoring member, as the case may be, the Exchange's Regulation Department, and the Department of Member Regulation. Such documents shall be served on the disqualified member or sponsoring member, as the case may be, by mail, facsimile, or overnight courier as soon as practicable. The Department of Member Regulation shall serve its recommendation and its supporting documents on the Exchange's Regulation Department and the disqualified member or sponsoring member, as the case may be, within ten business days of the hearing, unless the Parties agree otherwise. The disqualified member or sponsoring member, as the case may be, shall serve its documents on the Exchange's Regulation Department and the Department of Member Regulation within ten business days of the hearing, unless the Parties agree otherwise. The Exchange's Regulation Department shall forward all documents transmitted to it pursuant to this subparagraph (a)(3) to the Hearing Panel.

(B) Not less than ten business days before the hearing, the Department of Member Regulation, which shall act as a Party in the eligibility proceeding, and the disqualified member or sponsoring member, as the case may be, shall serve proposed exhibit and witness lists on each other and the Exchange's Regulation Department. The exhibit and witness lists shall be served by facsimile or overnight courier.

(C) At any time prior to the issuance of its recommendation, the Hearing Panel may order the Parties to supplement the record with any additional information that the Hearing Panel deems necessary.

#### (4) Rights of Disqualified Member, Sponsoring Member, Disqualified Person, and Department of Member Regulation

The disqualified member, sponsoring member, and/or disqualified person, as the case may be, and, the Department of Member Regulation, shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence.

#### (5) Extensions of Time, Postponements, and Adjournments

At any time prior to the issuance of the decision of the Hearing Panel, after obtaining consent of all the Parties, the Hearing Panel may extend or shorten any time limits prescribed by the Code for the filing of any papers and may postpone or adjourn any hearing.

(6) Recordation of Hearing

The hearing shall be recorded and a transcript prepared by a court reporter. The disqualified member, sponsoring member, and/or disqualified person, as the case may be, may purchase a copy of the transcript from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Panel within a reasonable time determined by the Hearing Panel. Upon notice to the participants in the hearing, the Hearing Panel may order corrections to the transcript as requested or sua sponte.

(7) Record

The record shall consist of:

(A) the notice issued pursuant to Rule 9522(a), if applicable;

(B) all documents relied upon in issuing the notice under Rule 9522(a), if applicable;

(C) the application for relief filed pursuant to Rule 9522(b);

(D) any other submissions by the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation;

(E) any evidence considered at the hearing; and

(F) the transcript of the hearing and any corrections thereto.

(8) Custodian of the Record

The custodian of the record shall be the Exchange's Regulation Department .

(9) Evidence Not Admitted

Evidence that is proffered but not admitted during the hearing shall not be part of the record, but shall be retained by the custodian of the record until the date when the Exchange's decision becomes final or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

(10) Recommendation

On the basis of the record, the Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the record and recommendation of the Hearing Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the Exchange Review Council. Notwithstanding the foregoing, with respect to an Exchange member that is an affiliate of the Exchange within the meaning of Rule 2140, the Hearing Panel shall prepare a final decision meeting the requirements of Rule 9524(b)(2), which shall not be reviewed by the Statutory Disqualification Committee or the Exchange Review Council, and may not be called for review by the Exchange Board pursuant to Rule 9525.

**(b) Decision**

(1) Decision of the Exchange Review Council

After considering all matters presented in the request for relief, the Statutory Disqualification Committee's recommended decision, the public interest, and the protection of investors, the Exchange Review Council may grant or deny the request for relief, and, if relief is granted, impose conditions on the disqualified member, sponsoring member, and/or disqualified person, as the case may be. At any time prior to the issuance of its recommendation, the Exchange Review Council may order the Parties to supplement the record with any additional information that the Exchange Review Council deems necessary. Alternatively, the Exchange Review Council may remand the eligibility proceeding. The Exchange Review Council shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) a description of the origin of the eligibility proceeding and the nature of the disqualification;

(B) a description of the prospective business or employment requested to be engaged in; and

(C) a statement in support of the disposition of the request for relief, which, if granted, includes any of the applicable elements under SEC Rule 19h-1(e) and a description of any conditions that are imposed on the disqualified member, sponsoring member, or disqualified person, as the case may be.

(3) Issuance of Decision After Expiration of Call for Review Period

The Exchange Review Council shall provide its proposed written decision to the Exchange Board. The Exchange Board may call the eligibility proceeding for review pursuant to Rule 9525. If the Exchange Board does not call the eligibility proceeding for review, the proposed written decision of the Exchange Review Council shall become final, and the Exchange Review Council shall serve its written decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. In the case of a decision with respect to an Exchange member that is an affiliate of the Exchange within the meaning of Rule 2140, the decision of the Hearing Panel shall become final without being provided to the Exchange Board, and the Hearing Panel shall serve its written decision.

The decision shall constitute final action of the Exchange, unless the Exchange Review Council remands the eligibility proceeding. A decision to deny re-entry or continued association shall be effective immediately. A decision to approve shall be effective after the Commission issues an acknowledgment letter or, in cases involving Commission ordered sanctions, an order.

### **9525. Discretionary Review by the Exchange Board**

#### **(a) Call for Review by Director**

A Director may call an eligibility proceeding for review by the Exchange Board if the call for review is made within the period prescribed in paragraph (b).

#### **(b) 15 Day Period; Waiver**

A Director shall make his or her call for review not later than the next meeting of the Exchange Board that is at least 15 days after the date on which the Exchange Board receives the proposed written decision of the Exchange Review Council. By a unanimous vote of the Exchange Board, the Exchange Board may shorten the period to less than 15 days. By an affirmative vote of the majority of the Exchange Board then in office, the Exchange Board may, during the 15 day period, vote to extend the period to more than 15 days.

#### **(c) Review at Next Meeting**

If a Director calls an eligibility proceeding for review within the period prescribed in paragraph (b), the Exchange Board shall review the eligibility proceeding not later than the next meeting of the Exchange Board. The Exchange Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

#### **(d) Decision of the Exchange Board, Including Remand**

After review, the Exchange Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council. Alternatively, the Exchange Board may remand the eligibility proceeding with instructions. The Exchange Board shall prepare a written decision that includes all of the elements described in Rule 9524(b)(2).

**(e) Issuance of Decision**

The Exchange Board shall issue and serve its written decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Exchange, unless the Exchange Board remands the proceeding. A decision to deny re-entry or continued association shall be effective immediately. A decision to approve shall be effective after the Commission issues an acknowledgment letter or, in cases involving Commission-ordered sanctions, an order.

**9526. Expedited Review**

**(a) Direction by Executive Committee**

Notwithstanding Rules 9524 and 9525, the Exchange Board Executive Committee, upon request of the Statutory Disqualification Committee, may direct an expedited review of a recommended written decision of the Statutory Disqualification Committee if the Exchange Board Executive Committee determines that expedited review is necessary for the protection of investors.

**(b) Call for Review Period**

If a recommended decision is subject to expedited review, a Director may call the eligibility proceeding for review within seven days after receipt of the recommended written decision.

**(c) No Call for Review**

If no Director calls the proceeding for review within the time prescribed, the decision shall become final, and the Statutory Disqualification Committee shall serve the decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall constitute final action of the Exchange. The decision shall be effective upon approval by the Commission.

**(d) Call for Review**

If a Director calls the eligibility proceeding for review within the prescribed time, a review panel shall meet and conduct a review not later than 14 days after the call for review. The review panel shall be composed of the Exchange Board Executive Committee, except that the Director who calls the proceeding for review shall serve on

the review panel in lieu of a member of the Executive Committee who has the same classification (Member, Industry, Non-Industry, or Public) as such Director. The review panel may affirm, modify, or reverse the recommended written decision of the Statutory Disqualification Committee or remand the eligibility proceeding with instructions. The review panel shall prepare, issue, and serve its decision pursuant to Rule 9525(d) and (e).

### **9527. Application to Commission for Review**

The right to have any action taken pursuant to this Rule Series reviewed by the Commission is governed by Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by the Exchange, unless the Commission otherwise orders.

### **9530. Reserved**

### **9531. Reserved**

### **9532. Reserved**

### **9533. Reserved**

### **9534. Reserved**

### **9535. Reserved**

### **9536. Reserved**

### **9537. Reserved**

### **9550. Expedited Proceedings**

### **9551. Reserved**

### **9552. Failure to Provide Information or Keep Information Current**

#### **(a) Notice of Suspension of Member, Person Associated with a Member or Person Subject to the Exchange's Jurisdiction if Corrective Action is Not Taken**

If a member, person associated with a member or person subject to the Exchange's jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the Exchange's By-Laws or Equity Rules, or fails to keep its membership application or supporting documents current, the Exchange's Regulation Department staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member.



**(b) Service of Notice of Suspension**

The Exchange's Regulation Department staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension**

The suspension referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Request for Termination of the Suspension**

A member or person subject to a suspension pursuant to this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The head of the appropriate department or office may grant relief for good cause shown.

**(g) Settlement Procedure**

Uncontested offers of settlement shall be permitted under this Rule and shall conform to the requirements of Rule 9270, except that, if an uncontested offer of settlement, made under Rule 9270(e) after a hearing on the merits has begun, is accepted by the Hearing Officer, the Hearing Officer shall issue the order of acceptance, which shall constitute final Exchange action. Contested offers of settlement shall not be considered in proceedings initiated under this Rule.

#### **(h) Defaults**

A member or person who is suspended under this Rule and fails to request termination of the suspension within six months of issuance of the original notice of suspension will automatically be expelled or barred.

### **9553. Failure to Pay the Exchange Dues, Fees and Other Charges**

#### **(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to the Exchange's jurisdiction fails to pay any fees, dues, assessment or other charge required to be paid under the Exchange By-Laws or Rules, or to submit a required report or information related to such payment, the Exchange's Regulation Department staff may issue a written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

#### **(b) Service of Notice of Suspension, Cancellation or Bar**

The Exchange's Regulation Department staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

#### **(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

#### **(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective 21 days after service of the notice and the notice shall constitute final Exchange action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9554. Failure to Comply with an Arbitration Award or Related Settlement**

**(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to the Exchange's jurisdiction fails to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under the Exchange By-Laws, the Exchange's Regulation Department staff may provide written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

**(b) Service of Notice of Suspension, Cancellation or Bar**

The Exchange's Regulation Department staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective 21 days after the service of the notice and the notice shall constitute final Exchange action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9555. Failure to Meet the Eligibility or Qualification Standards or Prerequisites for Access to Services**

**(a) Notice to Member or Person of Suspension, Cancellation, Bar, or Limitation or Prohibition on Access to Services**

(1) If a member or an associated person does not meet the eligibility or qualification standards set forth in the Exchange By-Laws or Rules, the Exchange's Regulation Department staff may provide written notice to such member or person stating that the failure to become eligible or qualified will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

(2) If a member, associated person, or other person does not meet the prerequisites for access to services offered by the Exchange or a member thereof or cannot be permitted to continue to have access to services offered by the Exchange or a member thereof with safety to investors, creditors, members, or the Exchange, the Exchange's Regulation Department staff may provide written notice to such member or person limiting or prohibiting access to services offered by the Exchange or a member thereof.

**(b) Service of Notice**

The Exchange's Regulation Department staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Limitation, Prohibition, Suspension, Cancellation or Bar**

The limitation, prohibition, suspension, cancellation or bar referenced in a notice issued under this Rule shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or a member thereof with respect to services to which the member or person does not have access shall be upon service of the notice. A request for a hearing, pursuant to Rule 9559, shall stay the effectiveness of the notice, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by the

Exchange or a member thereof with respect to services to which the member or person does not have access shall not be stayed by a request for a hearing.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made within 14 days after service of the notice. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the limitation, prohibition, suspension, cancellation or bar specified in the notice shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or a member thereof with respect to services to which the member or person does not have access shall be upon service of the notice. The notice shall constitute final Exchange action if the member or person does not request a hearing within 14 days after service of the notice.

**(g) Request for Termination of the Limitation, Prohibition or Suspension**

A member or person subject to a limitation, prohibition or suspension under this Rule may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9556. Failure to Comply with Temporary and Permanent Cease and Desist Orders**

Rule 9556, and related provisions of Rule 8310, IM-8310-3(c)(1), 9120(aa), 9241(c), 9290, 9311(b), 9312(b), 9360 and the Rule 9800 Series, shall expire on June 23, 2009, unless extended or permanently adopted pursuant to SEC approval at or before such date.

**(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to the Exchange's jurisdiction fails to comply with a temporary or permanent cease and desist order issued under the Rule 9200, 9300 or 9800 Series, the Exchange's Regulation Department staff — after receiving written authorization from the Chief Regulatory Officer — may issue a notice to such member or person stating that the failure to comply with the temporary or permanent cease and desist order within seven days of service of

the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

**(b) Service of Notice**

The Exchange's Regulation Department staff shall serve the member or person subject to a notice issued under this Rule by facsimile, overnight courier or personal delivery. Papers served on a member or person by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to the Exchange pursuant to the Exchange's By-Laws, except that, if the Exchange's Regulation Department staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a person by facsimile shall be sent to the person's last known facsimile number and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.

**(c) Contents of Notice**

The notice shall explicitly identify the provision of the permanent or temporary cease and desist order that is alleged to have been violated and shall contain a statement of facts specifying the alleged violation. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective seven days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for a Hearing**

A member served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective seven days after the service of the notice and the notice shall constitute final Exchange action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9557. Procedures for Regulating Activities Under Rules 3130 Regarding a Member Experiencing Financial or Operational Difficulties**

**(a) Notice of Restriction**

The Exchange's Regulation Department staff may issue a notice directing a member to restrict its business activities, either by limiting or ceasing to conduct those activities, if the Exchange's Regulation Department staff has reason to believe that a condition specified in Rule 3130 or exists.

**(b) Service of Notice**

The Exchange's Regulation Department staff shall serve the member subject to a notice issued under this Rule by facsimile, overnight courier or personal delivery. Papers served on a member by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to the Exchange pursuant to the Exchange's By-Laws, except that, if the Exchange's Regulation Department staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.



**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Restriction**

The restrictions referenced in a notice issued and served under this Rule shall become effective seven days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for a Hearing**

A member served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

**(f) Failure to Request Hearing**

If a member does not timely request a hearing, the restrictions specified in the notice shall become effective seven days after service of the notice. The restrictions specified in the notice shall remain in effect until the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, the head of the FINRA department or office that is so designated reduces or removes the restrictions pursuant to paragraph (h) of this Rule.

**(g) Order to Enforce Sanctions**

If the Exchange's Regulation Department staff determines that a member has failed to comply with any restrictions imposed by a decision or an effective notice under this Rule that have not been stayed, the Exchange's Regulation Department staff shall issue an order imposing the sanctions set forth in the decision or notice and specifying the effective date and time of such sanctions. The order shall inform the member that it may apply for relief from the sanctions imposed by the order by filing a written request for a

hearing before the Office of Hearing Officers under Rule 9559. The procedures delineated in this Rule shall be applicable.

**(h) Additional Restrictions or the Reduction or Removal of Restrictions**

(1) Additional Restrictions

If a member continues to experience financial or operational difficulty specified in Rule 3130, notwithstanding an effective notice, order or decision under this Rule, the Exchange's Regulation Department Staff may impose additional restrictions by issuing a notice under paragraph (b) of this Rule. The notice shall inform the member that it may apply for relief from the additional restrictions by filing a written request for a hearing before the Office of Hearing Officers under Rule 9559. The procedures delineated in this Rule shall be applicable to such a notice.

(2) Reduction or Removal of Restrictions

If the Exchange's Regulation Department staff determines that any restrictions previously imposed under this Rule should be reduced or removed, the Exchange's Regulation Department staff shall serve a written notice on the member pursuant to Rule 9134.

**9558. Summary Proceedings for Actions Authorized by Section 6(d)(3) of the Act**

**(a) Notice of Initiation of Summary Proceedings**

The Chief Regulatory Officer of the Exchange may provide written authorization to Association staff to issue on a case-by-case basis a written notice that summarily:

(1) suspends a member, person associated with a member or person subject to the Exchange's jurisdiction who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization;

(2) suspends a member who is in such financial or operating difficulty that Association staff determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the Exchange; or

(3) limits or prohibits any person with respect to access to services offered by the Exchange if paragraphs (1) or (2) of this Rule or the provisions of Section 6(d)(3) of the Act applies to such person or, in the case of a person who is not a member, if the Chief Regulatory Officer of the Exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with

safety to investors, creditors, members, or the Exchange, and so notifies the Commission.

**(b) Service of Notice**

The member or person subject to a notice issued under this Rule shall be served by facsimile, overnight courier or personal delivery. Papers served on a member or person by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to the Exchange pursuant to the Exchange's By-Laws, except that, if the Exchange's Regulation Department staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a person by facsimile shall be sent to the person's last known facsimile number and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Exchange action. The notice shall state when the Exchange action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Limitation, Prohibition or Suspension**

The limitation, prohibition or suspension referenced in a notice issued and served under this Rule is immediately effective. The limitation, prohibition or suspension specified in the notice shall remain in effect unless, after a timely written request for a hearing and written request for a stay, the Chief Hearing Officer or Hearing Officer assigned to the matter finds good cause exists to stay the limitation, prohibition or suspension.

**(e) Request for a Hearing and Stay**

A member or person subject to a notice issued under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made within seven days after service of the notice issued under this Rule. A request for a hearing must set forth with specificity any and all defenses to the Exchange action.

A member or person subject to a notice issued under this Rule may, concurrent with or after filing a request for a hearing, file with the Office of Hearing Officers a written request for a stay of the limitation, prohibition or suspension specified in the notice. A request for a stay must set forth with specificity any and all relevant facts and arguments supporting the request for a stay.

**(f) Failure to Request Hearing**

If a member or person subject to a notice issued under this Rule does not timely request a hearing within the time period specified in paragraph (e) of this Rule, the notice shall constitute final Exchange action.

**(g) Request for Termination of the Limitation, Prohibition or Suspension**

A member or person subject to a limitation, prohibition or suspension under this Rule may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9559. Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series**

**(a) Applicability**

The hearing procedures under this Rule shall apply to a member, person associated with a member, person subject to the Exchange's jurisdiction or other person who is served with a notice issued under the Rule 9550 Series and who timely requests a hearing. For purposes of this Rule, such members or persons shall be referred to as respondents.

**(b) Computation of Time**

Rule 9138 shall govern the computation of time in proceedings brought under the Rule 9550 Series, except that intermediate Saturdays, Sundays and Federal holidays shall be included in the computation in proceedings brought under Rules 9556 through 9558.

**(c) Stays**

Unless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown, a timely request for a hearing shall stay the effectiveness of a notice issued under Rules 9551 through 9557, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by the Exchange or a member thereof under Rule 9555 with respect to services to which the member or person does not have access shall not be stayed by a request for a hearing. A timely request for a hearing shall not stay the effectiveness of a notice issued under Rule 9558, unless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown.

**(d) Appointment and Authority of Hearing Officer and/or Hearing Panel**

(1) For proceedings initiated under Rules 9553 and 9554, the Chief Hearing Officer shall appoint a Hearing Officer to preside over and act as the sole adjudicator for the matter.

(2) For proceedings initiated under Rules 9551, 9552, 9555, 9556, 9557 and 9558, the Chief Hearing Officer shall appoint a Hearing Panel composed of a Hearing Officer and two Panelists. The Hearing Officer shall serve as the chair of the Hearing Panel. The Chief Hearing Officer shall select as Panelists persons who meet the qualifications delineated in Rules 9231 and 9232.

(3) Rules 9231(e), 9233 and 9234 shall govern disqualification, recusal or withdrawal of a Hearing Officer or, if applicable, Hearing Panelist.

(4) A Hearing Officer appointed pursuant to this provision shall have authority to do all things necessary and appropriate to discharge his or her duties as set forth under Rules 9235 and 9280.

(5) Hearings under the Rule 9550 Series shall be held by telephone conference, unless the Hearing Officer orders otherwise for good cause shown.

(6) For good cause shown, or with the consent of all of the parties to a proceeding, the Hearing Officer or, if applicable, the Hearing Panel may extend or shorten any time limits prescribed by this Rule.

**(e) Consolidation or Severance of Proceedings**

Rule 9214 shall govern the consolidation or severance of proceedings, except that, where one of the notices that are the subject of consolidation under this Rule requires that a hearing be held before a Hearing Panel, the hearing of the consolidated matters shall be held before a Hearing Panel. Where two consolidated matters contain different timelines under this Rule, the Chief Hearing Officer or Hearing Officer assigned to the matter has discretion to determine which timeline is appropriate under the facts and circumstances of the case. Where one of the consolidated matters includes an action brought under Rule 9558, the limitation, prohibition or suspension specified in the notice shall not be stayed

pending resolution of the case unless the Chief Hearing Officer or Hearing Officer assigned to the matter orders otherwise for good cause shown. Where one of the consolidated matters includes an action brought under Rule 9555 with respect to services to which the member or person does not have access, the effectiveness of a notice of a limitation or prohibition on access to services offered by the Exchange or a member thereof shall not be stayed pending resolution of the case.

**(f) Time of Hearing**

(1) A hearing shall be held within 14 days after a respondent subject to a notice issued under Rules 9556 through 9558 files a written request for a hearing with the Office of Hearing Officers.

(2) A hearing shall be held within 60 days after a respondent subject to a notice issued under Rules 9551 through 9555 files a written request for a hearing with the Office of Hearing Officers.

(3) The timelines established by paragraphs (f)(1) and (2) confer no substantive rights on the parties.

**(g) Notice of Hearing**

The Hearing Officer shall issue a notice stating the date, time, and place of the hearing as follows:

(1) At least seven days prior to the hearing in the case of an action brought pursuant to Rules 9556 through 9558 and

(2) At least 21 days prior to the hearing in the case of an action brought pursuant to Rules 9551 through 9555.

**(h) Transmission of Documents**

(1) Not less than seven days before the hearing in an action brought under Rules 9556 through 9558 and not less than 40 days before the hearing in an action brought under Rules 9551 through 9555, the Exchange's Regulation Department staff shall provide to the respondent who requested the hearing, by facsimile or overnight courier, all documents that were considered in issuing the notice unless a document meets the criteria of Rule 9251(b)(1)(A), (B) or (C). A document that meets such criteria shall not constitute part of the record, but shall be retained until the date upon which the Exchange's final decision is served or, if applicable, upon the conclusion of any review by the Securities and Exchange Commission or the federal courts.

(2) Not less than three days before the hearing in an action brought under Rules 9556 through 9558 and not less than 14 days before the hearing in an action

brought under Rules 9551 through 9555, the parties shall exchange proposed exhibit and witness lists. The exhibit and witness lists shall be served by facsimile or by overnight courier.

**(i) Evidence**

Formal rules of evidence shall not apply to a hearing under this Rule Series. Rules 9262 and 9263 shall govern testimony and the admissibility of evidence.

**(j) Additional Information**

The Hearing Officer or, if applicable, the Hearing Panel may direct the Parties to submit additional information.

**(k) Record of Hearing**

Rule 9265 shall govern the requirements for the record of the hearing.

**(l) Record of Proceeding**

Rule 9267 shall govern the record of the proceeding.

**(m) Failure to Appear at a Pre-Hearing Conference or Hearing or to Comply with a Hearing Officer Order Requiring the Production of Information**

Failure of any respondent to appear before the Hearing Officer or, if applicable, the Hearing Panel at any status conference, pre-hearing conference or hearing, or to comply with any order of the Hearing Officer or, if applicable, Hearing Panel requiring production of information to support any defense to the notice that respondent has raised, shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing provided by the Rule 9550 Series. In such cases, the notice issued under the Rule 9550 Series shall be deemed to be final the Exchange action. The Hearing Officer or, if applicable, the Hearing Panel may permit the hearing to go forward as to those parties who appear and otherwise comply with this Rule.

**(n) Sanctions, Costs and Remands**

(1) The Hearing Officer or, if applicable, the Hearing Panel may approve, modify or withdraw any and all sanctions or limitations imposed by the notice. The Hearing Officer or, if applicable, the Hearing Panel also may impose any other fitting sanction, pursuant to Rule 8310(a).

(2) The Hearing Officer or, if applicable, the Hearing Panel may impose costs pursuant to Rule 8330.

(3) The Hearing Officer or, if applicable, the Hearing Panel may remand the matter to the department or office that issued the notice for further consideration of specified matters.

**(o) Timing of Decision**

(1) Proceedings initiated under Rules 9553 and 9554

Within 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision and provide it to the Exchange Review Council's Review Subcommittee.

(2) Proceedings initiated under Rules 9556 through 9558

Within 21 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel, as determined by majority vote, and provide it to the Exchange Review Council's Review Subcommittee.

(3) Proceedings initiated under Rules 9551, 9552 and 9555

Within 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel, as determined by majority vote, and provide it to the Exchange Review Council's Review Subcommittee.

(4) If not timely called for review by the Exchange Review Council's Review Subcommittee pursuant to paragraph (q) of this Rule, the Hearing Officer's or, if applicable, the Hearing Panel's written decision shall constitute final the Exchange action. The Office of Hearing Officers shall promptly serve the decision of the Hearing Officer or, if applicable, the Hearing Panel on the Parties and provide a copy to each the Exchange member with which the respondent is associated.

(5) The timelines established by paragraphs (o)(1)–(4) confer no substantive rights on the parties.

**(p) Contents of Decision**

The decision shall include:

(1) a statement describing the investigative or other origin of the notice issued under the Rule 9550 Series;

(2) the specific statutory or rule provisions that were alleged to have been violated;



(3) a statement setting forth the findings of fact with respect to any act or practice the respondent was alleged to have committed or omitted;

(4) the conclusions of the Hearing Officer or, if applicable, Hearing Panel as to whether the respondent violated any provision alleged in the notice;

(5) a statement of the Hearing Officer or, if applicable, Hearing Panel in support of the disposition of the principal issues raised in the proceeding; and

(6) a statement describing any sanction or limitation imposed, the reasons therefore, and the date upon which such sanction or limitation shall become effective.

**(q) Call for Review by the Exchange Review Council**

(1) The Exchange Review Council's Review Subcommittee may call for review a decision issued under the Rule 9550 Series within 21 days after receipt of the decision from the Office of Hearing Officers; provided, however, that a decision under the Rule 9550 Series with respect to an Exchange member that is an affiliate of the Exchange within the meaning of Rule 2140 shall constitute final disciplinary action of the Exchange for purposes of SEC Rule 19d-1(c)(1) and may not be called for review pursuant to Rule 9559. Rule 9313(a) is incorporated by reference.

(2) If the Review Subcommittee calls the proceeding for review within the prescribed time, a Subcommittee of the Exchange Review Council shall meet and conduct a review not later than 40 days after the call for review. The Subcommittee shall be composed pursuant to Rule 9331(a)(1). The Subcommittee may elect to hold a hearing or decide the matter on the basis of the record made before the Hearing Officer or, if applicable, the Hearing Panel. Not later than 60 days after the call for review, the Subcommittee shall make its recommendation to the Exchange Review Council. Not later than 60 days after receipt of the Subcommittee's recommendation, the Exchange Review Council shall serve a final written decision on the parties via overnight courier or facsimile. The Exchange Review Council may affirm, modify or reverse the decision of the Hearing Officer or, if applicable, the Hearing Panel. The Exchange Review Council also may impose any other fitting sanction, pursuant to Rule 8310(a), and may impose costs, pursuant to 8330. In addition, the Exchange Review Council may remand the matter to the Office of Hearing Officers for further consideration of specified matters.

(3) For good cause shown, or with the consent of all of the parties to a proceeding, the Review Subcommittee, the Exchange Review Council Subcommittee or the Exchange Review Council may extend or shorten any time limits prescribed by this Rule.

(4) The Exchange Review Council's written decision shall constitute final the Exchange action.

(5) The Exchange Review Council shall promptly serve the decision on the Parties and provide a copy of the decision to each the Exchange member with which the respondent is associated.

(6) The timelines established by paragraphs (q)(1)–(5) confer no substantive rights on the parties.

**(r) Reserved**

**(s) Application to Commission for Review**

The right to have any action pursuant to this Rule reviewed by the Securities and Exchange Commission is governed by Section 19 of the Securities Exchange Act. The filing of an application for review by the Securities and Exchange Commission shall not stay the effectiveness of final the Exchange action, unless the Securities and Exchange Commission otherwise orders.

**9600. Procedures for Exemptions**

**9610. Application**

**(a) Where to File**

A member seeking exemptive relief as specifically permitted under any Equity Rule referencing the 9600 Series shall file a written application with the appropriate Association department or staff and provide a copy of the application to the Exchange's Regulation Department.

**(b) Content**

An application filed pursuant to this Rule shall contain the member's name and address, the name of a person associated with the member who will serve as the primary contact for the application, the Rule from which the member is seeking an exemption, and a detailed statement of the grounds for granting the exemption. If the member does not want the application or the decision on the application to be publicly available in whole or in part, the member also shall include in its application a detailed statement, including supporting facts, showing good cause for treating the application or decision as confidential in whole or in part.

**(c) Applicant**

A member that files an application under this Rule is referred to as "Applicant" hereinafter in the Rule 9600 Series.

**9620. Decision**

After considering an application, the Exchange's Regulation Department staff shall issue a written decision setting forth its findings and conclusions. The decision shall be served on the Applicant pursuant to Rules 9132 and 9134. After the decision is served on the Applicant, the application and decision shall be publicly available unless the Exchange's Regulation Department staff determines that the Applicant has shown good cause for treating the application or decision as confidential in whole or in part.

**9630. Appeal****(a) Notice**

An Applicant may file a written notice of appeal within 15 calendar days after service of a decision issued under Rule 9620. The notice of appeal shall be filed with the Exchange's Regulation Department, with a copy of the notice also provided to the appropriate the Exchange's Regulation Department staff. The notice of appeal shall contain a brief statement of the findings and conclusions as to which exception is taken. Appeals of decisions issued by the Exchange's Regulation Department staff pursuant to Rule 9620 shall be decided by the Exchange Review Council, except with respect to exemptive relief under Rule 1070 (Qualification Examinations and Waiver of Requirements), which shall be decided by the Waiver Subcommittee of the Exchange Review Council. If the Applicant does not want the decision on the appeal to be publicly available in whole or in part, the Applicant also shall include in its notice of appeal a detailed statement, including supporting facts, showing good cause for treating the decision as confidential in whole or in part. The notice of appeal shall be signed by the Applicant.

**(b) Expedited Review**

Where the failure to promptly review a decision to deny a request for exemption would unduly or unfairly harm the applicant, the Exchange Review Council or the Waiver Subcommittee of the Exchange Review Council, as the case may be, shall provide expedited review.

**(c) Withdrawal of Appeal**

An Applicant may withdraw its notice of appeal at any time by filing a written notice of withdrawal of appeal with the Exchange Review Council.

**(d) Oral Argument**

(1) Subject to paragraph (2) below, following the filing of a notice of appeal, the Exchange Review Council or Review Subcommittee may order oral argument and may designate a Subcommittee to hear such oral argument. The Subcommittee may consider any new evidence if the Applicant can show good

cause for not including it in its application, and the Subcommittee will recommend to the Exchange Review Council a disposition of all matters on appeal.

(2) With respect to exemptive relief requested under Rule 1070, the Waiver Subcommittee of the Exchange Review Council may order oral argument and consider any new evidence if the Applicant can show good cause for not including it in its application.

#### **(e) Decision**

(1) Subject to paragraph (2) below, after considering all matters on appeal, and, as applicable, the Subcommittee's recommendation, the Exchange Review Council shall affirm, modify, or reverse the decision issued under Rule 9620. The Exchange Review Council shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of the Exchange.

(2) With respect to exemptive relief requested under Rule 1070, after considering all matters on appeal, the Waiver Subcommittee of the Exchange Review Council shall affirm, modify, or reverse the decision issued under Rule 9620. The Waiver Subcommittee shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of the Exchange. The Waiver Subcommittee shall retain the discretion to refer the appeal to the Exchange Review Council, in which case the Exchange Review Council shall act on such appeal pursuant to its authority under this 9600 Series.

#### **9700. Reserved**

#### **9800. Temporary Cease and Desist Orders**

The entire Rule 9800 Series, and related provisions of Rules 8310, IM-8310-3(c)(1), 9120(aa), 9241(c), 9290, 9311(b), 9312(b), 9360, and 9556, shall expire on June 23, 2009, unless extended or permanently adopted pursuant to SEC approval at or before such date.

#### **9810. Initiation of Proceeding**

##### **(a) Department of Enforcement or Department of Market Regulation**

With the prior written authorization of FINRA's Chairman and CEO or FINRA's Senior Vice President for Regulatory Policy and Programs, the Department of Enforcement or the Department of Market Regulation may initiate a temporary cease and

desist proceeding with respect to alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder; SEC Rules 15g-1 through 15g-9; Equity Rule 2110 (if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations of Section 17(a) of the Securities Act of 1933); Equity Rule 2120; or Equity Rule 2330 (if the alleged violation is misuse or conversion of customer assets). The Department of Enforcement or the Department of Market Regulation shall initiate the proceeding by serving a notice on a member or associated person (hereinafter "Respondent") and filing a copy thereof with the Office of Hearing Officers. The Department of Enforcement or the Department of Market Regulation shall serve the notice by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Department of Enforcement or the Department of Market Regulation shall send an additional copy of the notice by overnight commercial courier. The notice shall be effective upon service.

### **(b) Contents of Notice**

The notice shall set forth the rule or statutory provision that the Respondent is alleged to have violated and that the Department of Enforcement or the Department of Market Regulation is seeking to have the Respondent ordered to cease violating. The notice also shall state whether the Department of Enforcement or the Department of Market Regulation is requesting the Respondent to be required to take action or to refrain from taking action. The notice shall be accompanied by:

(1) a declaration of facts, signed by a person with knowledge of the facts contained therein, that specifies the acts or omissions that constitute the alleged violation; and

(2) a proposed order that contains the required elements of a temporary cease and desist order (except the date and hour of the order's issuance), which are set forth in Rule 9840(b).

### **(c) Filing of Underlying Complaint**

If the Department of Enforcement or the Department of Market Regulation has not issued a complaint under Rule 9211 against the Respondent relating to the subject matter of the temporary cease and desist proceeding and alleging violations of the rule or statutory provision specified in the notice described in paragraph (b), the Department of Enforcement or the Department of Market Regulation shall serve and file such a complaint with the notice initiating the temporary cease and desist proceeding.

## **9820. Appointment of Hearing Officer and Hearing Panel**

(a) As soon as practicable after the Department of Enforcement or the Department of Market Regulation files a copy of the notice initiating a temporary cease and desist proceeding with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the temporary cease and desist proceeding. The Chief

Hearing Officer shall appoint two Panelists to serve on a Hearing Panel with the Hearing Officer. The Panelists shall be current or former Directors or the Exchange Review Council members, and at least one Panelist shall be an associated person.

(b) If at any time a Hearing Officer or Hearing Panelist determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, or if a Party files a motion to disqualify a Hearing Officer or Hearing Panelist, the recusal and disqualification proceeding shall be conducted in accordance with Rules 9233 and 9234, except that:

(1) a motion seeking disqualification of a Hearing Officer or Hearing Panelist must be filed no later than 5 days after the later of the events described in paragraph (b) of Rules 9233 and 9234; and

(2) the Chief Hearing Officer shall appoint a replacement Panelist using the criteria set forth in paragraph (a) of this Rule.

### **9830. Hearing**

#### **(a) When Held**

The hearing shall be held not later than 15 days after service of the notice and filing initiating the temporary cease and desist proceeding, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. If a Hearing Officer or Hearing Panelist is recused or disqualified, the hearing shall be held not later than five days after a replacement Hearing Officer or Hearing Panelist is appointed.

#### **(b) Service of Notice of Hearing**

The Office of Hearing Officers shall serve a notice of date, time, and place of the hearing on the Department of Enforcement or the Department of Market Regulation and the Respondent not later than seven days before the hearing, unless otherwise ordered by the Hearing Officer. Service shall be made by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the notice by overnight commercial courier. The notice shall be effective upon service.

#### **(c) Authority of Hearing Officer**

The Hearing Officer shall have authority to do all things necessary and appropriate to discharge his or her duties as set forth under Rule 9235.

#### **(d) Witnesses**

A person who is subject to the jurisdiction of the Exchange shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

**(e) Additional Information**

At any time during its consideration, the Hearing Panel may direct a Party to submit additional information. Any additional information submitted shall be provided to all Parties at least one day before the Hearing Panel renders its decision.

**(f) Transcript**

The hearing shall be recorded by a court reporter and a written transcript thereof shall be prepared. A transcript of the hearing shall be available to the Parties for purchase from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Panel within a reasonable time determined by the Hearing Panel. Upon notice to all the Parties to the proceeding, the Hearing Panel may order corrections to the transcript as requested or sua sponte.

**(g) Record and Evidence Not Admitted**

The record shall consist of the notice initiating the proceeding, the declaration, and the proposed order described in Rule 9810(b); the transcript of the hearing; all evidence considered by the Hearing Panel; and any other document or item accepted into the record by the Hearing Officer or the Hearing Panel. The Office of Hearing Officers shall be the custodian of the record. Proffered evidence that is not accepted into the record by the Hearing Panel shall be retained by the custodian of the record until the date when the Exchange's decision becomes final or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

**(h) Failure to Appear at Hearing**

If a Respondent fails to appear at a hearing for which it has notice, the allegations in the notice and accompanying declaration may be deemed admitted, and the Hearing Panel may issue a temporary cease and desist order without further proceedings. If the Department of Enforcement or Department of Market Regulation fails to appear at a hearing for which it has notice, the Hearing Panel may order that the temporary cease and desist proceeding be dismissed.

**9840. Issuance of Temporary Cease and Desist Order by Hearing Panel**

**(a) Basis for Issuance**

The Hearing Panel shall issue a written decision stating whether a temporary cease and desist order shall be imposed. The Hearing Panel shall issue the decision not later than ten days after receipt of the hearing transcript, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. A temporary cease and desist order shall be imposed if the Hearing Panel finds:

(1) by a preponderance of the evidence that the alleged violation specified in the notice has occurred; and

(2) that the violative conduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of the underlying disciplinary proceeding under the Rule 9200 and 9300 Series.

**(b) Content, Scope, and Form of Order**

A temporary cease and desist order shall:

(1) be limited to ordering a Respondent to cease and desist from violating a specific rule or statutory provision, and, where applicable, to ordering a Respondent to cease and desist from dissipating or converting assets or causing other harm to investors;

(2) set forth the alleged violation and the significant dissipation or conversion of assets or other significant harm to investors that is likely to result without the issuance of an order;

(3) describe in reasonable detail the act or acts the Respondent is to take or refrain from taking; and

(4) include the date and hour of its issuance.

**(c) Duration of Order**

A temporary cease and desist order shall remain effective and enforceable until the issuance of a decision under Rule 9268 or Rule 9269.

**(d) Service**

The Office of Hearing Officers shall serve the Hearing Panel's decision and any temporary cease and desist order by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the Hearing Panel's decision and any temporary cease and desist order by overnight commercial courier. The temporary cease and desist order shall be effective upon service.



**9850. Review by Hearing Panel**

At any time after the Office of Hearing Officers serves the Respondent with a temporary cease and desist order, a Party may apply to the Hearing Panel to have the order modified, set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request. The Hearing Panel shall respond to the request in writing within ten days after receipt of the request, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. The Hearing Panel's response shall be served on the Respondent via personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the temporary cease and desist order by overnight commercial courier. The filing of an application under this Rule shall not stay the effectiveness of the temporary cease and desist order.

**9860. Violation of Temporary Cease and Desist Orders**

A Respondent who violates a temporary cease and desist order imposed under this Rule Series may have its association or membership suspended or canceled under Rule 9556. The Chief Regulatory Officer of the Exchange must authorize the initiation of any such proceeding in writing.

**9870. Application to Commission for Review**

Temporary cease and desist orders issued pursuant to this Rule Series constitute final and immediately effective disciplinary sanctions imposed by the Exchange. The right to have any action under this Rule Series reviewed by the Commission is governed by Section 19 of the Exchange Act. The filing of an application for review shall not stay the effectiveness of the temporary cease and desist order, unless the Commission otherwise orders.

**10000. Code of Arbitration Procedure****10001. Regulatory Contract with FINRA**

The Exchange and FINRA are parties to the FINRA Regulatory Contract, pursuant to which FINRA has agreed to perform certain functions described in the Rule 10000 Series on behalf of the Exchange. Exchange Rules that refer to the Exchange's Regulation Department, the Exchange's Regulation Department staff, Exchange staff, and Exchange departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of the Exchange pursuant to the FINRA Regulatory Contract.

Notwithstanding the fact that the Exchange has entered into the FINRA Regulatory Contract with FINRA to perform some of the Exchange's functions, the Exchange shall retain ultimate legal responsibility for, and control of, such functions. In addition, the Exchange has incorporated by reference certain NASD rules. Exchange

members shall comply with these rules and interpretations as if such rules and interpretations were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If an NASD rule that is incorporated by reference in a rule of the Exchange is transferred into the FINRA rulebook, then the Exchange rule shall be construed to require Exchange members to comply with the FINRA rule corresponding to the NASD rule (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

### **10100. Jurisdiction**

Every member or associated person of an Exchange member shall be subject to the NASD Code of Arbitration Procedure for Customer Disputes and the NASD Code of Arbitration Procedure for Industry Disputes as may be in effect from time to time (collectively, the "NASD Code of Arbitration Procedure"), for every claim, dispute, or controversy arising out of or in connection with matters eligible for submission under Equity Rule 10101. For the purposes of this Rule, each member or associated person of an Exchange member shall be subject to and shall abide by the NASD Code of Arbitration Procedure as if such member or associated person were a "member" or "associated person" of FINRA.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of the NASD Code of Arbitration Procedure are transferred into the FINRA rulebook, then Equity Rule 10100 shall be construed to require Exchange members to comply with the FINRA rules corresponding to the NASD Code of Arbitration Procedure (regardless of whether such rules are renumbered or amended) as if such rules were part of the Rules of the Exchange.

### **IM-10100. Failure to Act Under Provisions of NASD Code of Arbitration Procedure**

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to:

(a) fail to submit a dispute for arbitration under the NASD Code of Arbitration Procedure as required by that Code;

(b) fail to comply with any injunctive order issued pursuant to the NASD Code of Arbitration Procedure;

(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure;

(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the procedures specified by FINRA, Nasdaq, the New York, American, National,

Chicago, or Philadelphia Stock Exchanges, NYSE Arca, the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of disputes before the American Arbitration Association or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law; or

(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by FINRA.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award. Action by members requiring associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure shall constitute conduct that is inconsistent with just and equitable principles of trade and a violation of Rule 2110.

#### **10101. Matters Eligible for Submission**

This Code of Arbitration Procedure is prescribed and adopted for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any the Exchange member, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

- (a) between or among members;
- (b) between or among members and associated persons;
- (c) between or among members or associated persons and public customers, or others; and
- (d) between or among members, registered clearing agencies with which the Exchange has entered into an agreement to utilize the Exchange's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

#### **10102. Non-Waiver of the Exchange's Objects and Purposes**

The submission of any matter to arbitration under the NASD Code of Arbitration Procedure shall in no way limit or preclude any right, action or determination by the Exchange which it would otherwise be authorized to adopt, administer or enforce. If any

matter comes to the attention of an arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Rules of the Exchange or the federal securities laws, the arbitrator may initiate a referral of the matter to the Exchange for disciplinary investigation; provided, however, that any such referral should only be initiated by an arbitrator after the matter before him has been settled or otherwise disposed of, or after an award finally disposing of the matter has been rendered pursuant to the NASD Code of Arbitration Procedure.

### **11000. Uniform Practice Code**

#### **11100. Scope of Uniform Practice Code**

(a) Transactions executed through the facilities of the NASDAQ OMX BX Equities Market, including the rights and liabilities of the members participating in the transaction, and those operational procedures that affect the day-to-day business of members shall be subject to the provisions of this Code. However, the provisions of this Code shall not apply to transactions between members that are compared, cleared or settled through the facilities of a registered clearing agency (except to the extent that the rules of the clearing agency provide that rules of other organizations shall apply). Accordingly, because Equity Rule 4618 contemplates that NASDAQ OMX BX Equities Market transactions will be settled through the facilities of a registered clearing agency using a continuous net settlement system, the provisions of the Code relating to clearance and settlement will apply to NASDAQ OMX BX Equities Market transactions only in unusual circumstances in which trades are settled "ex-clearing".

(b) The scope of coverage contained in paragraph (a) above may be expanded or limited in any Rule of this Code if specifically provided therein.

(c) With respect to transactions executed on the Exchange, failure to deliver the securities sold, or failure to pay for securities as delivered, on or after the settlement date, does not effect a cancellation of the contract. The remedy for the buyer or seller is provided for by Rules 11810 and 11820 respectively unless the parties mutually consent to cancel the trade. In every such case of nondelivery of securities, the party in default shall be liable for any damages which may accrue thereby. All claims for such damages shall be made promptly.

(d) The CUSIP number must be used on the Uniform Transfer Instruction Form, Uniform Delivery Ticket and the Uniform Comparison or Confirmation.

#### **11110. The Exchange's Regulation Department**

The Exchange's Regulation Department shall have the power to issue interpretations or rulings with respect to the applicability of this Code to situations in which there is no substantial disagreement as to the facts involved in order to make

custom, practice, usage, and trading technique in the investment banking and securities business uniform, to simplify and facilitate day-to-day business of members and to remove causes for business disputes and misunderstandings which arise from uncertainty and lack of uniformity, including rulings in connection with "when, as and if issued" trading and "when, as and if distributed" trading, and whether a security tendered is a good delivery in settlement of such contracts.

### **IM-11110. Refusal to Abide by Rulings of the Exchange's Regulation Department Saff**

It shall be considered conduct inconsistent with just and equitable principles of trade for any member to refuse to abide by an official ruling of the Exchange's Regulation Department, acting within its appropriate sphere, with respect to any transaction which was consummated within the provisions and purview of the Uniform Practice Code.

### **11120. Definitions**

#### **(a) The Exchange's Regulation Department**

The term "the Exchange's Regulation Department" as used in this Code, unless the context otherwise requires, shall mean the Department of the Exchange that administers this Code.

#### **(b) Delivery Date**

The term "delivery date" as used in this Code shall be used interchangeably with "settlement date" and shall mean the date designated for the delivery of securities.

#### **(c) Ex-Date**

The term "ex-date" as used in this Code shall mean the date on and after which the security is traded without a specific dividend or distribution.

#### **(d) Immediate Return Receipt**

The term "immediate return receipt" as used in this Code, shall mean the acknowledgement by the receiving member of a written notice and which shall be issued, upon receipt, via the media in which such notice is received.

#### **(e) Record Date**

The term "record date" as used in this Code means the date fixed by the trustee, registrar, paying agent or issuer for the purpose of determining the holders of equity securities, bonds, similar evidences of indebtedness or unit investment trust securities entitled to receive dividends, interest or principal payments or any other distributions.

**(f) Reserved****(g) Written Notices**

The term "written notice," as used in this Code, shall include a notice delivered by hand, by letter, teletype, telegraph, TWX, facsimile ("FAX") transmission or other comparable media.

**11130. When, As and If Issued/Distributed Contracts****(a) Confirmations or Comparisons**

(1) Each party to the transaction shall send a written "when, as and if issued" or "when as and if distributed" confirmation or comparison in the same form as set forth in the Sample Form appearing after this Rule 11130 and pursuant to the requirements of Rules 11210(a), 11220, and 11860.

(2) Each confirmation or comparison covering a contract in a "when, as and if issued" or "when, as and if distributed" security shall, at a minimum, contain:

(A) an adequate description of the security and the plan, if any, under which the security is proposed to be issued or distributed;

(B) designation of the Exchange as the authority which shall rule upon the performance of the contract; and

(C) provision for marking the contract to the market.

(3) the Exchange's Regulation Department will furnish, upon written request therefor, an adequate description of any particular issue of securities and of the plan under which the securities are proposed to be issued for the purpose of inclusion in all contracts or confirmations covering transactions on a "when, as and if issued" or "when, as and if distributed" basis in the particular securities.

**(b) Accrued Interest**

(1) Unless the parties agree otherwise, "when, as and if issued" or "when, as and if distributed" transactions between members in fixed obligations of new or reorganized companies shall be "and accrued interest" to date of settlement. Interest shall be computed on the basis of the expired portion of the coupon current at the time of settlement, and all due and past due coupons shall be detached.

(2) "When, as and if issued" or "when, as and if distributed" transactions between members in income or contingent interest securities of such companies

shall be traded "flat" and shall carry all payments that may be made or declared in connection with such new securities from the effective date of the plan; except that, if any payment is made or declared directly or indirectly in connection with such securities, prior to the settlement date, transactions made on and after the "ex" date for such payment shall carry only payments made or declared in connection with such securities from such "ex" date.

(3) Securities of such companies which bear a fixed rate of interest, plus contingent additional payment, are to be traded "and accrued interest" at the rate of the fixed interest, and traded "flat" in respect to the contingent payments.

### **(c) Marks to the Market**

In case of "when, as and if issued" or "when, as and if distributed" contracts, the time of issuance or distribution of the securities is indefinite and may be long delayed. Therefore, such contracts should be marked to the market pursuant to the provisions of Rule 11740 of the Code.

### **(d) Contracts on Margin**

All "when, as and if issued" or "when, as and if distributed" contracts shall be in compliance with Sections 220.4 and 220.5 of Regulation T of the Board of Governors of the Federal Reserve System.

### **(e) Request for Deposits**

A member may require a customer to deposit cash or collateral to secure a "when, as and if issued" or "when, as and if distributed" contract even though Section 220.8(b)(1) of Regulation T of the Board of Governors of the Federal Reserve System may not require such deposit.

### **(f) Segregation of Funds**

(1) Deposits against "when, as and if issued" or "when, as and if distributed" transactions should be segregated on the books of the firm in order to present a true picture of the firm's position and its commitment in transactions of this kind. It may be appropriate to segregate such deposits from the firm's general cash balances by depositing them in a bank other than those containing the general deposits, loans or other obligations of the firm. Whether or not such physical segregation is made, no member should permit any part of deposits against "when, as and if issued" or "when, as and if distributed" contracts to be used for any purpose whatsoever other than to secure such contracts.

(2) As a minimum, every member doing business in "when, as and if issued" or "when, as and if distributed" securities shall ensure that the sum of the cash balances and any deposits with banks, clearing houses, or other brokers

against "when, as and if issued" or "when, as and if distributed" contracts always exceeds the aggregates of all free credits and deposits against "when, as and if issued" or "when, as and if distributed" contracts by an amount fully ample to conduct his business without employing any part of such deposits.

**(g) Settlement of Contracts**

(1) A date for the settlement of "when, as and if issued" and "when, as and if distributed" contracts shall be determined by the Exchange's Regulation Department when a sufficient percentage of the issue is outstanding.

(2) In connection with a transaction in a security "when, as and if issued," delivery shall be made at the office of the purchaser on the date declared by the Exchange's Regulation Department; except that if no delivery date shall be declared by the Exchange's Regulation Department:

(A) delivery may be made by the seller on the business day following the day upon which the seller has delivered at the office of the purchaser written notice of intention to deliver, and

(B) open market "when, as and if issued" contracts in securities currently being publicly offered through a syndicate or selling group shall be settled on the date such syndicate or selling group contracts are settled; provided, however, delivery of securities in accordance with this paragraph shall be made during the normal delivery hours in the community where the buyer is located.

(3) In connection with a transaction in a security "when, as and if distributed," delivery shall be made at the office of the purchaser on the date declared by the Exchange's Regulation Department; except that if no delivery date shall be declared by the Exchange's Regulation Department, delivery may be made by the seller on the business day following the day upon which the seller has delivered at the office of the purchaser written notice of intention to deliver.

**(h) Cancellation of Contracts**

(1) Pursuant to Rule 11110, the Exchange's Regulation Department may cancel or terminate "when, as and if issued" and "when, as and if distributed" contracts as necessary to resolve conflicts over the settlement of such contracts.

(2) Contracts will be canceled if the securities are not to be issued or distributed.

(3) Contracts will generally be canceled if the securities which are to be issued or distributed are not substantially the same as those contemplated in the contract. Material changes which will generally result in cancellation include, but



are not limited to, changes to the redemption schedule, dividend payments, interest rates, maturity, yield, and exercise price.

(4) Notwithstanding paragraph (h)(3), contracts will not generally be canceled as a result of changes that do not constitute material changes to the terms of the security called for under the contract. Changes which will not generally result in cancellation include, but are not limited to:

(A) changes in the dollar value of securities to be issued or distributed;

(B) restructuring of financing arrangements previously announced by the issuer of the securities; or

(C) settlement of any legal action or the occurrence of any other event which has or will have a material effect on the financial condition of the issuer of the securities.

**IM-11130. Standard Forms of "When, As and If Issued" or "When, As and If Distributed" Contract**

**(a) For use by dealers and brokers in confirming transactions with other dealers and brokers**

"When, as and if Issued" or "When, as and if Distributed" Contract

.....

.

(Firm Name)

Date.....

Sold to — Quantity.etc. Table Here

If this contract was made on a national securities exchange other than the Exchange, the contract shall be subject to and governed by the requirements of such other exchange, its constitution, rules, practices and interpretations thereof, relating to contracts between members of such exchange, as the same may be amended or modified from time to time.

If this contract was made elsewhere than on a national securities exchange, it shall be subject to and governed by the requirements of [the NASD]FINRA, its By-Laws, Rules, Uniform Practice Code and interpretations thereof as the same may be amended or modified from time to time.

This contract shall be settled and payment therefor made at such time and place, in such manner, and by the delivery of such securities and/or other property as the exchange or

association to whose requirements this contract is subject in its sole discretion may determine, or shall be canceled and thereafter shall be null and void if such exchange or association determines in its sole discretion that the securities which are to be issued or distributed are not substantially the same as those contemplated in the contract. During the pendency of this contract either party shall have the right to call for a mark to the market, and upon failure of the other party to comply therewith the party not in default may close this contract in accordance with the requirements of the exchange or association to whose requirements this contract is subject.

**(b) For use by a dealer (principal) and his customer covering transactions on a principal basis**

.....

Date

"When, as and if Issued" or "When, as and if Distributed"  
Contract

TO .....

I/we have sold to you/purchased from you  
..... shares/par value  
..... at ..... These  
securities shall be payable and deliverable "when, as and if  
issued" or "when, as and if distributed," or this contract  
shall be cancelable in accordance with the requirements of  
the Rules of the NASDAQ OMX BX, Uniform Practice  
Code and interpretations thereof.

I/we shall have the right to demand deposits according to  
such requirements. On your failure to comply therewith, we  
may close the contract in accordance with such  
requirements.

.....

(Firm Signature)

Accepted:

.....

(Signature of Customer)

**11140. Transactions in Securities "Ex-Dividend," "Ex-Rights" or "Ex-Warrants"**

**(a) Designation of Ex-Date**

All transactions in securities, except "cash" transactions, shall be "ex-dividend," "ex-rights" or "ex-warrants": (1) on the day specifically designated by the Exchange's Regulation Department after definitive information concerning the declaration and payment of a dividend or the issuance of rights or warrants has been received at the office of the Exchange's Regulation Department; or (2) on the day specified as such by the appropriate national securities exchange which has received definitive information in accordance with the provisions of SEC Rule 10b-17 concerning the declaration and payment of a dividend or the issuance of rights or warrants.

**(b) Normal Ex-Dividend, Ex-Warrants Dates**

(1) In respect to cash dividends or distributions, or stock dividends, and the issuance or distribution of warrants, which are less than 25% of the value of the subject security, if the definitive information is received sufficiently in advance of the record date, the date designated as the "ex-dividend date" shall be the second business day preceding the record date if the record date falls on a business day, or the third business day preceding the record date if the record date falls on a day designated by the Exchange's Regulation Department as a non-delivery date.

(2) In respect to cash dividends or distributions, stock dividends and/or splits, and the distribution of warrants, which are 25% or greater of the value of the subject security, the ex-dividend date shall be the first business day following the payable date.

(3) In respect to stock dividends and/or splits relating to American Depository Receipts (ADRs) and foreign securities, the ex-dividend or ex-warrants date shall be designated by the Exchange's Regulation Department.

**(c) Late Information Re: Ex-Dividend, Ex-Warrants Dates**

If definitive information is not received sufficiently in advance of the record date to permit designation of an ex-dividend or ex-warrants date in accordance with paragraph (b)(1) hereof, the date designated shall be the first business day which, in the opinion of the Exchange's Regulation Department, shall be practical having regard to the circumstances pertaining.

**(d) Normal Ex-Rights Dates**

In respect to transferable rights subscription offerings, if definitive information is received sufficiently in advance of the effective date of the registration statement, the date designated as the ex-rights date shall be the first business day after the effective date of the registration statement.

**(e) Late Information Re: Ex-Rights**

If definitive information is not received sufficiently in advance of the effective date of the registration statement to permit designation of an ex-rights date in accordance with the paragraph (d) hereof, the date designated shall be the first business day which in the opinion of the Exchange's Regulation Department shall be practical having regard to the circumstances pertaining.

### **11150. Transactions "Ex-Interest" in Bonds Which Are Dealt in "Flat"**

#### **(a) Normal Ex-Interest Dates**

All transactions, except "cash" transactions, in bonds or similar evidences of indebtedness which are traded "flat" shall be "ex-interest" as prescribed by the following provisions:

(1) On the second business day preceding the record date if the record date falls on a business day.

(2) On the third business day preceding the record date if the record date falls on a day other than a business day.

(3) On the third business day preceding the date on which an interest payment is to be made if no record date has been fixed.

#### **(b) Late Information Re: Ex-Interest Dates**

If notice of payment of interest is not made public sufficiently in advance of the record date or the payment date, as the case may be, to permit the security to be dealt in "ex-interest" in accordance with paragraph (a) hereof such security shall be dealt in "ex-interest" on the first business day which, in the opinion of the Exchange's Regulation Department, shall be practical having regard to the circumstances pertaining.

### **11160. "Ex" Liquidating Payments**

All transactions except "cash" transactions in stocks, bonds or similar evidences of indebtedness shall be "ex" liquidating payments or payments on account of principal in accordance with the formula set forth in Rules 11140 and 11150.

### **11170. Transactions in "Part-Redeemed" Bonds**

In transactions in bonds which have been redeemed or paid in part, such bonds shall be designated as "part-redeemed" bonds. The settlement price of contracts in "part-redeemed" bonds shall be determined by multiplying the contract price by the original principal amount thereof and contracts shall be made on the same basis.

### **11180. Reserved**

**11190. Reconfirmation and Pricing Service Participants**

(a) Each member or its agent that is a participant in a registered clearing agency, for purposes of clearing transactions executed on the Exchange, shall participate in fail reconfirmation and pricing services when offered.

(b) (1) A contract submitted to a reconfirmation and repricing service ("service") which has been DK'd ("Don't Know") by the contra-party or is otherwise deemed a DK under the rules of the service may be closed-out by the party who submitted the contract to the service without notice during normal trading hours promptly after the completion of the reconfirmation and pricing cycle of the service for the account and liability of the non-confirming member.

(2) Notice of any execution pursuant to this paragraph (b), shall be made as promptly as possible on the day of execution, as provided in Rules 11810(g) and 11820(b).

**11200. Comparisons or Confirmations and "Don't Know Notices"****11210. Sent by Each Party****(a) Comparisons or Confirmations**

(1) Each party to a transaction, other than a cash transaction, shall send a Uniform Comparison or Confirmation of same on or before the first business day following the date of the transaction.

(2) Comparisons or confirmations of cash transactions shall be exchanged on the day of the trade.

(3) Comparisons or confirmations shall be compared upon receipt to ascertain whether any discrepancies exist. If discrepancies do exist, a corrected Uniform Comparison or Confirmation shall be sent by the party in error.

(4) This Rule shall not be applicable to transactions which clear through the National Securities Clearing Corporation or other clearing organizations registered under the Act.

**(b) Uniform Comparison or Confirmation**

A properly executed Uniform Comparison or Confirmation must be used for each transaction.<sup>1</sup>

**(c) "DK" Procedures Using "Don't Know Notices" (NASD Form No. 101)**

When a party to a transaction sends a comparison or confirmation of a trade, but does not receive a comparison or confirmation or a signed DK, from the contra-member by the close of four business days following the trade date of the transaction, the following procedure may be utilized.

(1) The confirming member shall send by certified mail, return receipt requested, or messenger, a "Don't Know Notice" on the form prescribed by NASD Rule 11210 to the contra-member in accordance with the directions contained thereon. If the notice is sent by certified mail the returned, signed receipt therefor must be retained by the confirming member and attached to the fourth copy of the "Don't Know Notice." If delivered by messenger, the fourth copy must immediately be dated and manually receipted by, and imprinted with the firm stamp of, the contra-member pursuant to the provisions of paragraph (c)(4) of this Rule, returned to the messenger and thereafter be retained by the confirming member.

(2) (A) After receipt of the "Don't Know Notice" as specified in paragraph (c)(1) of this Rule, the contra-member shall have four business days after the notice is received to either confirm or DK the transaction in accordance with the provisions of subparagraphs (B) or (C) below.

(B) If the contra-member desires to respond by mail, the second copy of the "Don't Know Notice" previously received shall be executed in accordance with the provisions of paragraph (c)(4) of this Rule and sent to the confirming broker by certified mail, return receipt requested. The notice so returned shall indicate clearly whether the contra-member desires to confirm or DK the transaction. The returned, signed receipt must thereafter be retained by the contra-member.

(C) If the contra-member desires to respond by messenger, it shall return to the confirming member the second and third copies of the notice which shall indicate clearly whether the contra-member desires to confirm or DK the transaction. The third copy shall be dated and manually receipted by the confirming broker pursuant to the provisions of paragraph (c)(4) of this Rule and immediately be returned to the messenger and thereafter be retained by the contra-member.

(3) If the confirming member does not receive a response from the contra-member by the close of four business days after receipt by the confirming member of the fourth copy of the "Don't Know Notice" if delivered by messenger, or the post office receipt if delivered by mail, as specified in paragraph (c)(1) of this Rule, such shall constitute a DK and the confirming member shall have no further liability for the trade.

(4) All "Don't Know Notices" sent by any party pursuant to the provisions of this paragraph (c) must be manually signed by a person authorized to pursue

further discussions in respect to the transaction on behalf of the signing member. In addition to the manual signature receipt on the third and fourth copies, as required by paragraphs (c)(1) and (c)(2)(C) hereof, if delivered by hand, the firm stamp of the contra-member must be imprinted thereon to signify receipt.

(5) The "Don't Know Notice" form to be used for purposes of complying with this section, may be ordered through any office of [NASD|FINRA. If the official form is not used, the form which is used must conform in every respect to the official form.

**(d) "DK" Procedure Using Other Forms of Notice**

When a party to a transaction sends comparison or confirmation of a trade, but does not receive a comparison or confirmation or a signed DK, from the contra-member by the close of four business days following the date of the transaction, the following procedure may be utilized in place of that provided in the preceding paragraph (c).

(1) The confirming member shall provide notice to the contra-member identifying the trade in question by providing the information described in Rule 11220. The notice shall, in addition, contain a request for the contra-member to confirm or "DK" the trade and the name of the individual issuing the notice.

(2) The confirming member shall record and retain verification of delivery to the contra-member of each notice issued in accordance with paragraph (d)(1) of this Rule.

(3) The contra-member, on receipt of the notice from the confirming member, shall research the trade in question.

(4) The contra-member shall then send notice to the confirming member to either confirm or "DK" the trade and shall include the name of the individual issuing the notice.

(5) If the confirming member does not receive a response in the form of a notice from the contra-member by the close of four business days after receipt of the confirming member's notice, such shall constitute a DK and the confirming member shall have no further liability.

(6) Both the confirming member and the contra-member shall record and retain verification of the delivery and receipt of each notice issued pursuant to paragraph (d)(4) of this Rule.

(7) If the trade in question is confirmed by the contra-member pursuant to paragraph (d)(4) of this Rule, settlement shall be completed in the normal manner.

(8) Notices under this paragraph (d) may be delivered through any communications medium which provides verification of delivery and receipt as required under paragraphs (d)(2) and (d)(6).

<sup>1</sup> Specifications for use of the Uniform Comparison are contained in the Final Report of the Banking and Securities Industry Committee entitled "Four Uniform Forms," dated December 22, 1971.

### **IM-11210. Uniform Comparison Form**

<u>NO. COMPARISON</u>		<u>Firm Name</u>	<u>TELEPHONE</u>	
-		<u>CODES</u>	-	
<u>ORIGINATOR</u>	<u>TRANS.</u>	<u>TR</u>	<u>CAP</u>	<u>SETT</u>
<u>NO.</u>	<u>NO</u>		<u>TRADE DATE</u>	<u>SETTLEMENT</u>
-				<u>DATE</u>
<u>IDENTIFICATION</u>	<u>CONTRA</u>	<u>C.H.</u>	<u>SPECIAL DELIVERY</u>	
<u>NO.</u>	<u>PARTY</u>	<u>NUMBER</u>	<u>INSTRUCTIONS</u>	
<u>WE</u>	<u>QUANTITY</u>	<u>CUSIP</u>	<u>SECURITY</u>	<u>NET AMOUNT</u>
		<u>NUMBER</u>	<u>DESCRIPTION</u>	
-				
<u>PRICE</u>	-			

RESERVED FOR USER'S MONEY DETAIL

### **11220. Description of Securities**

Confirmations or comparisons shall include, in addition to an adequate description of the security (which shall include payment options on a unit investment trust series), the price at which the transaction was made and any other information deemed necessary to insure that the buyer and seller agree as to details of the transaction.



Such "other information" should include, if applicable, but need not be limited to, such phrases as "ex-warrants," "ex-stock," "registered," "flat," "part-redeemed," "Canadian funds," "with proxy," etc.

### **11300. Delivery of Securities**

#### **11310. Book-Entry Settlement**

(a) A member shall use the facilities of a securities depository for the book-entry settlement of all transactions in depository eligible securities with another member or a member of a national securities exchange or a registered securities association.

(b) A member shall not effect a delivery-versus-payment or receipt-versus payment transaction in a depository eligible security with a customer unless the transaction is settled by book-entry using the facilities of a securities depository.

(c) For purposes of this Rule, the term "securities depository" shall mean a securities depository registered as a clearing agency under Section 17A of the Act.

(d) (1) The term "depository eligible securities" shall mean securities that (A) are part of an issue of securities that is eligible for deposit at a securities depository and (B) with respect to a particular transaction, are eligible for book-entry transfer at the depository at the time of settlement of the transaction.

(2) A determination under Rule 4310(c)(23) or under the corresponding rule of another national securities exchange that a security depository has included a CUSIP number identifying a security in its file of eligible issues does not render the security "depository eligible" under this Rule until:

(A) in the case of any new issue distributed by an underwriting syndicate on or after the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available, the date of the commencement of trading in such security on the Exchange; or

(B) in the case of any new issue distributed by an underwriting syndicate prior to the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available where the managing underwriter elects not to deposit the securities on the date of the commencement of trading in such security on the Exchange, such later date designated by the managing underwriter in a notification submitted to the securities depository; but in no event more than three (3) months after the commencement of trading in such security on the Exchange.

(e) This Rule shall not apply to transactions settled outside of the United States.

(f) The requirements of this Rule shall supersede any inconsistent requirements under other Rules in the Code.

(g) This Rule shall not apply to any transactions where the securities to be delivered in settlement of the transaction are not on deposit at a securities depository and:

(1) if the transaction is for same-day settlement, the deliverer is unable to deposit the securities in a securities depository prior to the cut-off time established by the depository for same-day crediting of deposited securities, or

(2) the deliverer is unable to deposit the securities in a depository prior to the cut-off date established by the depository for that issue of securities.

### **11320. Dates of Delivery**

#### **(a) For "Cash"**

In connection with a transaction for "cash," delivery shall be made at the office of the purchaser on the day of the transaction.

#### **(b) "Regular Way"**

In connection with a transaction "regular way," delivery shall be made at the office of the purchaser on, but not before, the third business day following the date of the transaction.

#### **(c) "Seller's Option"**

In connection with a transaction "seller's option," delivery shall be made at the office of the purchaser on the date on which the option expires; except that delivery may be made by the seller on any business day after the third business day following the date of transaction and prior to the expiration of the option, provided the seller delivers at the office of purchaser, on a business day preceding the day of delivery, written notice of intention to deliver.

#### **(d) "Buyer's Option"**

In connection with a transaction "buyer's option," delivery shall be made at the office of the purchaser on the date on which the option expires.

#### **(e) Contracts Due on Holidays or Saturdays**

Contracts due on a day other than a business day shall mature on the next business day.

#### **(f) "Delayed-Delivery"**

In connection with a transaction made for "delayed-delivery," delivery shall be at the office of the purchaser on the date agreed upon at the time for the transaction.

**(g) Prior to Delivery Date**

If in contracts executed pursuant to paragraphs (b), (d) and (h) of this Rule, the seller tenders delivery before the stated time, acceptance shall be at the election of the purchaser, and rejection of such delivery by the purchaser shall be without prejudice to his rights.

**(h) Time and Place of Delivery**

Delivery shall be made at the office of the purchaser between the hours established by rule or practice in the community where such office is located. If the purchaser maintains more than one office, delivery shall be made at the office with which the transaction was effected, unless delivery instructions are provided at the time of the transaction.

**11330. Payment**

The party making delivery shall have the right to require the purchase money to be paid upon delivery by certified check, cashier's check, bank draft or cash.

**11340. Stamp Taxes**

(a) Members shall, as required by the rules and regulations of jurisdictions imposing taxes on sales, purchases or other transfers of securities, furnish tax stamps or pay the tax through securities clearing organizations.

(b) In the event that taxes are due pursuant to state stock transfer taxes, the seller shall furnish to the buyer at the time of delivery a sale memorandum ticket to which shall be affixed and canceled sufficient state transfer stamps as are required by the state in which the sale occurs, or the tax may be paid by the seller through securities clearing organizations.

(c) Additional stamps. If any stamps in addition to those required by paragraph (a) hereof are desired by the buyer, the furnishing of such additional stamps by the seller may be made a part of the transaction.

(d) Seller's failure to furnish stamps. If the buyer has requested the additional state stamps provided by paragraph (c) and at the time of delivery of the security the seller does not furnish or has not made adequate provision for such stamps, the buyer may furnish and cancel such additional state transfer stamps and deduct the cost thereof from the purchase price.

**11350. Part Delivery**

The purchaser shall be required to accept a part delivery on any contract due provided the portion remaining undelivered is not an amount which includes an odd-lot which was not a part of the original transaction.

**11360. Units of Delivery**

**IM-11360. Uniform Delivery Ticket Form**

<u>NO. DELIVERY TICKET</u>	<u>Firm Name</u>	<u>TELEPHONE</u>			
<u>THE ATTACHED SECURITIES ARE DELIVERED AGAINST PAYMENT</u>					
<u>CODES</u>					
<u>ORIGINATOR</u> <u>NO.</u>	<u>TRANS.</u> <u>NO.</u>	<u>SETT</u> <u>DATE</u>	<u>TRADE</u> <u>DATE</u>	<u>SETTLEMENT</u> <u>DATE</u>	<u>DELIVERY</u> <u>DATE</u>
560	-	-	-	-	-
<u>IDENTIFICATION</u> <u>NO.</u>	<u>ACCOUNT</u> <u>NAME</u>	<u>C.H. NUMBER</u>	<u>SPECIAL DELIVERY</u> <u>INSTRUCTIONS</u>		
<u>QUANTITY</u>	<u>CUSIP</u> <u>NUMBER</u>	<u>SECURITY</u> <u>DESCRIPTION</u>	<u>NET AMOUNT</u>		

**11361. Units of Delivery — Stocks**

**(a) Stock certificates delivered in settlement of contracts:**

(1) in which the transaction is for 100 shares may be in one certificate for the exact number of shares or certificates totaling 100 shares.

(2) in which the transaction is greater than 100 shares and a multiple of 100 shall be in the exact amount of the contract, or in multiples of 100 shares, or in amounts from which units of 100 shares can be made, or a combination thereof equaling the amount of the contract.

(3) in which the transaction is for more than 100 shares but not in a multiple of 100 shall be in multiples of 100 shares, or in amounts from which units of 100 shares can be made, or a combination thereof, plus either the exact amount for the odd lot or smaller amounts equaling the odd lot.

(4) in which the transaction is for less than 100 shares shall be in the exact amount of the contract or for smaller units aggregating the amount of the contract.

**(b) Uniform Delivery Ticket**

A properly executed Uniform Delivery Ticket must accompany the delivery of securities.<sup>1</sup>

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<sup>1</sup> Specifications for use of the Uniform Delivery Ticket are contained in the Final Report of the Banking and Securities Industry Committee entitled "Four Uniform Forms" dated December 22, 1971.

**11362. Units of Delivery — Bonds**

**(a) Coupon Bonds**

Each delivery of bonds or similar evidences of indebtedness in coupon bearer form shall be made in denominations of \$1,000 or in denominations of \$100 or multiples thereof aggregating \$1,000.

**(b) Registered Bonds**

Each delivery of bonds or similar evidences of indebtedness in fully registered bond issues shall be made in denominations of \$1,000 or multiples thereof or in amounts of \$100 or multiples aggregating \$1,000 but in no event in denominations larger than \$100,000.

**(c) Bonds Issued in Both Coupon and Registered Form**

Unless otherwise specified at the time of execution, contracts in bonds that are issuable in either coupon or registered form, shall be settled by delivery of bonds in either form pursuant to the denominations in paragraphs (a) and (b) above, notwithstanding that there may be a charge for interchanging one form with the other.

**(d) Units of Delivery by Agreement**

When a contract relating to paragraphs (a), (b) and (c) above is for a principal amount which is not a multiple of \$100, the parties shall agree, at the time of entering into the contract, as to the proper units of delivery.

**11363. Units of Delivery — Unit Investment Trust Securities**

The minimum unit of delivery for Unit Investment Trust Securities shall be a single unit of the trust.

**11364. Units of Delivery — Certificates of Deposit for Bonds**

The units of delivery for certificates of deposit for bonds, shall be the same as prescribed for bonds in Rule 11362.

**IM-11364. Trading Securities As "Units" or Bonds "With Stock"**

Where securities are physically separate instruments, transferable independently of one another, and not subject to any legal or technical condition which requires that they be kept together, good practice requires that they be quoted and dealt in separately and not as units.

Where, for some special reason, members enter into a contract calling for a group of securities, they are cautioned to make adequate specification both at the time of trade and in their confirmation or comparison, so that uncertainty or misunderstanding in the settlement of the contract may be eliminated.

**11400. Delivery of Securities with Draft Attached****11410. Acceptance of Draft****(a) Time of Presentation**

Drafts accompanying the shipment of securities need be accepted only on a business day between the hours established by rule or practice in the community where the draft is presented. Acceptance of a draft at other times shall be at the option of the drawee, and the drawee shall not be liable for any expense arising out of his refusal of the draft when presented on a Saturday or half-holiday.

**Note:** For his own protection, the seller should instruct his bank or collecting agent that if the draft is received on a Saturday or half-holiday, it need not be presented to the drawee until the following business day.

**(b) Prior to Settlement Date**

The acceptance of a draft prior to the settlement date shall be at the option of the drawee.

**(c) With Irregularities**

The acceptance of a draft which contains irregularities shall be at the option of the drawee.

**(d) Expense Due to Shipment**

Expenses of shipment, including insurance, postage, draft, and collection charges, shall be paid by the seller.

**(e) Expenses Due to Delay**

Failure to accept a draft in which no irregularities exist, when duly presented on a business day, shall make the drawee liable for the payment of interest to the date the draft is paid and for other incidental expenses incurred because of the delay, including protest fees, if any, and wire charges.

**(f) Claims for Irregularities**

Claims with respect to such items as price, interest, protest fees or wire charges and items of similar nature, arising from the acceptance of draft shipments in which irregularities exist, shall be presented not later than ten days after payment. This limitation shall not apply to matters covered hereinafter under "Reclamations," in Rules 11710 to 11730.

**11500. Delivery of Securities with Restrictions**

**11510. Delivery of Temporary Certificates**

A temporary certificate shall not be a good delivery when permanent certificates are available.

**11520. Delivery of Mutilated Securities**

(a) A mutilated security shall not be a good delivery until appropriately authenticated by the trustee, registrar, transfer agent, or issuer.

(b) The delivery of a bond which bears a coupon which has been mutilated as to the bond number or signature or which bears a coupon which has been canceled in error shall not be good delivery unless an appropriate endorsement by an official authorized by paragraph (c) hereof shall have been placed on the reverse of the coupon.

(c) The endorsement shall be signed on behalf of the obligor by an officer thereof or, under authorization from the obligor, on behalf of the corporate trustee or paying agent by a duly authorized officer thereof or other person authorized to sign on behalf thereof.

**11530. Delivery of Securities Called for Redemption or Which Are Deemed Worthless**

**(a) Securities Called for Redemption**

A certificate of stock or a bond shall cease to be a good delivery upon publication of notice of call for redemption, except when an entire issue is called for redemption and except against transactions in "called stock" or "called bonds" dealt in specifically as such.

**(b) Securities Deemed Worthless**

(1) In contracts for securities where a public announcement or publication of general circulation discloses that the securities have been deemed worthless, deliveries shall consist of (A) the worthless securities or (B) a Letter of Indemnity which shall grant the purchaser any rights and privileges which might accrue to the holders of the physical securities.

(2) Deliveries effected pursuant to paragraph (b)(1) shall operate to close-out the contract and must be accompanied by documentation evidencing that the security was deemed worthless after the original execution date of the contracts. Such contracts shall be settled at the existing contract price.

(3) For purposes of this paragraph (b), securities deemed worthless shall be those instruments which have no known market value.

**11540. Delivery Under Government Regulations**

**(a) Documents Required**

When the laws, regulations, rulings, instructions or orders of any government, government instrumentality or agency, or official thereof having jurisdiction, require a license, clearance certificate, affidavit of ownership or any similar document in connection with the acquisition, disposition, transfer or redemption of, or other dealing in or with respect to, any security, such security shall not be a good delivery unless accompanied by the document or documents so required.

**(b) Certificate Subject to Stoppage**

If a specific certificate tendered in settlement of a contract in foreign securities is on a black list, blocked list, or subject to similar stoppage, from which an innocent holder in due course cannot have it removed by simple request, such certificate is not a good delivery, and reclamation may be made without limit of time.

**11550. Assignments and Powers of Substitution; Delivery of Registered Securities**

**(a) General Requirements**

Any registered security to be a good delivery must be accompanied by an assignment and a power of substitution (when such power of substitution is required under paragraph (g) of this Rule) conforming to the requirements set forth in Rule 11550



to 11574, inclusive. Any expense incurred through failure of a seller to meet these requirements shall be paid by the seller.

**(b) Assignment**

An assignment shall be executed on the certificate itself or on a separate paper, in which latter case there shall be a separate assignment for each certificate.

**(c) Signature Requirements**

The signature to an assignment or power of substitution shall be technically correct; i.e., it shall correspond with the name as written upon the certificate in every particular without alteration or enlargement, or any change whatever, except that "and" or "&" "Company" or "Co." may be written either way.

**(d) Detached Assignment Requirements**

A separate (detached) assignment shall contain provision for the irrevocable appointment of an attorney, with power of substitution, and a full description of the security, including name of issuer, issue, certificate number, and amount (expressed in words and numerals).

**(e) Two or More Names**

A certificate registered in the names of two or more individuals or firms shall be a good delivery only if signed by all the registered owners.

**(f) Alteration or Correction**

Any alteration or correction in an assignment or power of substitution shall be accompanied by an explanation on the original instrument signed by the person or firm executing the same.

**(g) Power of Substitution**

When the name of an individual or firm has been inserted in an assignment, as attorney, a power of substitution shall be executed in blank by such individual or firm. When the name of an individual or firm has been inserted in a power of substitution as substitute attorney, a new power of substitution shall be executed in blank by such substitute attorney.

**(h) Guarantee**

Each assignment, endorsement, alteration and erasure shall bear a guarantee acceptable to the transfer agent or registrar. It is not the intent of this paragraph that a

"New York," national securities exchange member or other specific guarantee is required; rather, it is the intent only that the guarantee be acceptable to the transfer agent.

**(i) Foreign Internal Securities**

Except for Canadian Securities, American Depositary Receipts, American Shares, New York Shares and similar securities, the provisions of paragraphs (b) through (g), inclusive, and Rule 11572 shall not apply to Foreign Internal Securities in registered form. In default of specific Rules in this Code, the usual conditions of delivery and transfer of Foreign Internal Securities in registered form in the foreign market where principally traded shall apply.

**(j) Uniform Transfer Instruction Form**

A properly executed Uniform Transfer Instruction Form must accompany securities presented for transfer.<sup>1</sup>

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<sup>1</sup>Specifications for use of the Uniform Transfer Instruction Form are contained in the Final Report of the Banking and Securities Industry Committee entitled "Four Uniform Forms" dated December 22, 1971.

**IM-11550. Uniform Transfer Instructions Form**

TO TRANSFER AGENT:

Firm Name  
I.D. #

PLEASE TRANSFER THE ATTACHED  
SECURITIES AS SHOWN BELOW

SECURITY DESCRIPTION

CERTIFICATION PRESENTED TO  
TRANSFER

<u>QUANTITY</u>	<u>DENOMINATIONS</u>	<u>TAX</u>	<u>CUSIP</u>	<u>CONTROL</u>	<u>PRESENTOR</u>	<u>DATE</u>
		<u>PAYER</u>	<u>NUMBER</u>			
		<u>NO.</u>				

TO BE REGISTERED IN THE NAME OF

**11560. Certificate of Company Whose Transfer Books Are Closed**

**General Requirements**

A certificate of a company whose transfer books are closed indefinitely for any reason shall be good delivery only if the required ownership transfer indemnification is affixed to or recorded upon the certificate. The indemnification acknowledges the assignor(s)' ultimate responsibility for the ownership of the certificate as of the date of the indemnification and shall be affixed or recorded only once during the lifetime of the certificate. Certificates delivered pursuant to this Rule must conform with all the applicable delivery requirements set forth in Rule 11550 of this Code.

**IM-11560. Sample Ownership Transfer Indemnification Stamp**

Date:

The undersigned owner of this certificate (number) representing ..... Shares of ..... hereby certifies the transfer of all ownership therewith to the bearer hereby. We acknowledge that the transfer books of the herein named corporation are closed and agree to accept responsibility in accordance with the provisions of Rule 11560 of NASDAQ OMX BX's Uniform Practice Code.

\_\_\_\_\_ **NAME OF MEMBER**  
 \_\_\_\_\_ **AUTHORIZED SIGNATURE**

**11570. Certificates in Various Names**

**11571. Certificate in Name of Corporation**

**(a) Transfer Books Open**

A certificate in the name of a corporation or an institution, or in a name with official designation shall be a good delivery only if the statement "Proper papers for transfer filed by assignor" is placed on the assignment and signed by the transfer agent.

**(b) Transfer Books Closed**

Where a certificate, an assignment or a power of attorney is in the name of a corporation and the transfer books of the issuing company are closed indefinitely for any reason, the certificate shall be a good delivery if the assignment or other instrument effecting transfer on the corporation's behalf is executed by an officer of such corporation, other than the secretary, and is accompanied by (1) a guarantee of such officer's signature executed by a person with the authority to make such a guarantee; (2) a copy of a corporate resolution and a completed and executed certificate of incumbency;

and (3) the ownership transfer indemnification, as provided in Rule 11560, affixed to or recorded on the certificate.

**(c) Foreign Internal Securities**

The foregoing requirements shall not apply to foreign internal securities when the requirements do not correspond to the laws or customs of the country concerned; but instead such laws and customs shall govern such securities.

**IM-11571. Sample Certificate and Authorizing Resolution/Certificate of Incumbency**

I hereby certify that a meeting of the Board of Directors of ....., a corporation organized under the laws of the State of ....., held the ..... day of ....., 19....., at which a quorum was present and acting throughout, the following resolution was duly adopted and is now in full force and effect:

**RESOLVED**, that any one of the following officers of this Corporation, viz: the President, Vice President, Treasurer or Secretary, be and is hereby fully authorized and empowered to sell, assign, transfer and deliver any and all shares of stock, bonds, debentures, notes, evidences of indebtedness, or other securities now or hereafter standing in the name of or owned by this Corporation, and to make, execute, and deliver, any and all written instruments necessary or proper to effectuate the authority hereby conferred.

I further certify that the authority thereby conferred is not inconsistent with the Charter or By-Laws of this Corporation, and that the following is a true and correct list of the officers of this Corporation authorized to act.

Signing Officers:

In witness, whereof, I have hereunto set my hand and the seal of said Corporation this .....day of ....., 19.....

(Affix Corporate Seal)

\_\_\_\_\_

Secretary

(The foregoing certification and the assignment of the securities should be executed by different officers.)

**11572. Certificate in Name of Firm**

Unless the endorsement specifies otherwise, there shall be a presumption that stock registered in a firm or business name is registered in the name of a partnership and not a corporation.

**11573. Certificate in Name of Dissolved Firm Succeeded by New Firm**

A certificate with an assignment or a power of substitution executed in the name of a firm that has since dissolved and is succeeded by a firm or firms having as general partners one or more of the general partners of the dissolved firm shall be a good delivery only if the new firm or one of the new firms shall have signed the statement "Execution Guaranteed" under a date subsequent to the formation of the new firm so signing.

**11574. Certificate in Name of Deceased Person, Trustee, Etc.**

(a) A certificate shall not be a good delivery with an assignment or power of substitution executed by a: (1) person since deceased; (2) trustee or trustees, except as provided in paragraph (b) below, or except for trustees acting in the capacity of a board of directors of a corporation or association, in which case Rule 11561(a) shall apply; (3) guardian, except as provided in paragraph (b) below; (4) infant; (5) executor, except as provided in paragraph (b) below; (6) administrator, except as provided in paragraph (b) below; (7) receiver in bankruptcy; (8) agent; (9) attorney; (10) or with a qualification, restriction or special designation.

(b) A certificate shall be a good delivery with an assignment or a power of substitution executed by a: (1) domestic individual executor(s) or administrator(s); (2) domestic individual trustee(s) under an inter vivos or testamentary trust; or (3) domestic guardian(s) including committees, conservators and curators. These exceptions to paragraph (a) above are to cover transfers that will be effected by transfer agents without additional documentation. This paragraph (b) shall apply only to securities of a domestic issuer (organized under the laws of any state in the United States or District of Columbia) which are registered in the name(s) of (1), (2) or (3) of this paragraph (b). Certificates delivered pursuant to this paragraph (b) must be properly assigned, and the signature(s) to the assignment be guaranteed pursuant to Rule 11550(h).

(c) This Rule does not apply to certificates registered under a Statutory Gifts to Minors Act.

**IM-11574. Sample Limited Partnership Change of Trustee Form****Limited Partnership Change of Trustee Form**

FBO (Investor's Name)      Partnership Name

Assignor (Present Trustee's Name)      Assignor's Address

Customer's A/C Number with Assignor      This hereby constitutes and appoints the said Partnership to transfer the said interests on the books of the Partnership with full power of substitution in the premises.

The Assignor hereby assigns to the Assignee 100% of the Assignor's right, title and interest in the Limited Partnership(s) described herein.

ASSIGNOR'S

RELEASE: (DATE)

Authorized Signature X

Designee (New  
Trustee's Name) (Assignee's Address)

(Customer's A/C  
Number with Assignee) (Assignee's Tax ID Number)

New Trustee's (Assignee's) Instructions:

Partnership Information:

ASSIGNEE'S

ACCEPTANCE (DATE)

Authorized Signature X

Assignee: Upon receipt, forward this form and the original certificate (if available) to the General Partner for re-registration.

General  
Partner: -

### **11600. Delivery of Bonds and Other Evidences of Indebtedness**

#### **11610. Liability for Expenses**

Failure of the seller to meet the requirements of good delivery relating to bonds and similar evidences of indebtedness, as set forth in paragraphs (a) through (h) of this Rule inclusive, shall make the seller liable for any expense incurred as a result of such failure.

##### **(a) Coupon Bonds**

A coupon bond shall have securely attached in the correct place proper coupons, warrants, etc., of the same serial number as the bond. Acceptance of cash or check in lieu of missing coupons shall be at the option of the purchaser.

**(b) Endorsed Bonds**

A coupon bond bearing an endorsement of a definite name of a person, firm, corporation, association, etc., in conjunction with words of condition, qualification, direction, or restriction, not properly pertaining thereto as a security, shall not be a good delivery unless sold specifically as an "endorsed bond." This shall also apply to bonds with coupons bearing such endorsements.

**(c) Interest in Default**

A bond upon which interest is in default shall carry all unpaid coupons.

**(d) Registerable as to Principal**

A coupon bond registerable as to principal shall be a good delivery only if registered to bearer.

**(e) Endorsements for Banking or Insurance Requirements**

A coupon bond bearing an endorsement indicating that the bond was deposited in accordance with a governmental requirement pertaining to banking institutions or insurance companies shall not be a good delivery. If released, with such release acknowledged before an officer authorized to take acknowledgments, it shall be a good delivery if sold specifically as a "released endorsed bond."

**(f) Coupon Detached Prior to Delivery**

(1) A bond dealt in "and interest," for delivery on or after the date on which interest is due and payable, shall be delivered without the coupon payable on such date.

(2) Late delivery. In the settlement of contracts in bonds dealt in "and interest" where delivery is due prior to the interest payment date but is made on or after the interest payment date, bonds may be delivered without coupons payable on such date, and the seller may present such detached, unpaid coupons to the buyer for payment, the buyer bearing the risk of non-payment.

**(g) Stamped Bonds**

(1) If a plan of reorganization which has been declared operative, or an amendment or supplement to an indenture provides that the bonds covered thereby shall be stamped to reflect the adoption of such plan or the amendment or supplement to the indenture, bonds so stamped shall be a good delivery and bonds not so stamped shall not be a good delivery.

(2) The fact that a bond has been stamped "Tax Paid" by any authority vested with the power to tax, if the stamp does not indicate ownership, shall not prevent such bond from being a good delivery.

**(h) Certificates of Deposit**

Certificates of deposit issued by committees or depositaries other than those specified at time of trade shall not be a good delivery.

**11620. Computation of Interest**

**(a) Interest To Be Added to the Dollar Price**

In the settlement of contracts in interest-paying securities other than for "cash," there shall be added to the dollar price interest at the rate specified in the security, which shall be computed up to but not including the third business day following the date of the transaction. In transactions for "cash," interest shall be added to the dollar price at the rate specified in the security up to but not including the date of transaction.

**(b) Basis of Interest**

Interest shall be computed on the basis of a 360-day year, i.e., every calendar month shall be considered to be 1/12 of 360 days; every period from a date in one month to the same date in the following month shall be considered to be 30 days.

Note: The number of elapsed days should be computed in accordance with the examples given in the following table:

From 1st to 30th of the same month to be figured as 29 days;

From 1st to 31st of the same month to be figured as 30 days;

From 1st to 1st of the following month to be figured as 30 days;

From 1st to 28th of February to be figured as 27 days;

From the 23rd of February to the 3rd of March is to be figured as 10 days;

From the 15th of May to the 6th of June is to be figured as 21 days.

Where interest is payable on 30th or 31st of the month:

From 30th or 31st to 1st of the following month to be figured as 1 day;

From 30th or 31st to 30th of the following month to be figured as 30 days;

From 30th or 31st to 31st of the following month to be figured as 30 days;

From 30th or 31st to 1st of second following month to be



*figured as 1 month, 1 day.*

**(c) Securities Traded "and interest"**

When delivery of a security traded "and interest" is made between the record date fixed for the purpose of determining the holder entitled to receive interest and the interest payment date, a deduction equivalent to the full amount of the interest to be paid shall be made on settlement.

**(d) Securities Traded "flat"**

When delivery of a security traded "flat" is made after the record date fixed for the purpose of determining the holder entitled to receive interest, in the settlement of a contract made prior to the date on which the security was traded "ex-interest," a due-bill check for the full amount of the interest to be paid shall accompany the delivery.

**(e) Income Bonds**

Income bonds shall be dealt in "flat" even though such bonds are paying interest, except that where a certain fixed rate is guaranteed in the indenture and provision is made for additional contingent payment, they shall be dealt in "and interest" at the fixed rate guaranteed in the indenture (so long as interest payments at such fixed rate are not in default and no announcement of intention to default has been made).

**(f) Fractions of a Cent**

In all transactions involving the payment of interest, fractions of a cent equaling or exceeding five mills shall be regarded as one cent; fractions of a cent less than five mills shall be disregarded.

**11630. Due-Bills and Due-Bill Checks**

**(a) Definition of Due-Bills**

The term "due-bill" as used in this Rule means an instrument employed for the purpose of evidencing the transfer of title to any security or rights pertaining to any security contracted for or evidencing the obligation of a seller to deliver such to a subsequent purchaser. A due-bill shall not be transferable or assignable by the purchaser.

**(b) Definition of Due-Bill Checks**

The term "due-bill checks" as used in this Rule means a due-bill in the form of a check payable on the date of payment of a cash dividend, interest on registered bonds or interest on unit investment trust securities, which prior to such date shall be considered as a due-bill, as defined in paragraph (a) above, for the amount of such dividend or interest.

**(c) Due-bills for Stock Dividends and Rights**

A security sold before it trades "ex-dividend" (for stock and scrip dividends) or "ex-rights" and delivered too late for transfer on or before the record date, shall be accompanied by a due-bill for the distribution to be made. When a due-bill accompanying a delivery evidences the obligation of the seller to deliver stock, the purchaser shall prorate the value of the contract, and shall make payment of the balance upon redemption of the due-bill. The requirement to pro-rate the value of the contract as described above shall not apply to stock dividends less than ten percent (10%) or to "spinoffs" or rights.

**(d) Due-bill Checks for Cash Distribution and Interest**

Due-bill checks for a cash distribution, interest on registered bonds or interest on unit investment trust securities shall accompany securities delivered too late for transfer on or before the record date.

**(e) Redemption of Due-Bills**

Due-bills for any security or rights pertaining to any security shall be redeemable on the date on which the security or rights are issued by the corporation or as soon thereafter as the signer or guarantor of the due-bill can obtain transfer of the security or rights into denominations necessary to effect the redemption of the due-bills.

**(f) Default Upon Redemption of Due-Bills**

A due-bill for any security or rights pertaining to any security issued pursuant to paragraph (c) of this Rule and presented for redemption pursuant to the terms of paragraph (e), and not honored by the seller may, at the option of the buyer, be treated as a "fail to receive" from the seller, and the distribution evidenced by such due-bill may be bought-in for the account and risk of the seller pursuant to the terms of Rule 11810. However, buy-ins executed in accordance with this paragraph must be executed after the payable date of such securities as determined by the issuing corporation.

**IM-11630. Sample Due-Bill Forms****(a) Due-Bill for Stock Dividend or Stock Distribution**

For value received, the undersigned hereby assigns, transfers and sets over to.....the stock distribution of.....( ) shares of.....stock of.....to be issued on.....to the registered holder of.....( ) shares of.....stock of.....represented by certificate number....., to which the undersigned is entitled as a stock dividend, and hereby irrevocably constitutes and appoints.....attorney to transfer the shares

representing said stock dividend on the books of said corporation, with full power of substitution in the premises.

Dated.....

.....

(Official Signature)

\_\_\_\_\_

**(b) Due-Bill for Rights**

For value received, the undersigned hereby assigns, transfers, and sets over to.....the warrant and/or fractional warrant to which the undersigned is entitled, evidencing the rights to subscribe for.....which warrant and/or fractional warrant is to be issued to the holder of record at the close of business.....of.....() shares of.....stock of.....represented by certificate No.....

Dated.....

.....

(Official Signature)

\_\_\_\_\_

**(c) Due-Bill for Interest on When Issued Contract**

This is to certify that, upon issuance of.....in accordance with the plan approved by....., the undersigned will pay to.....\$ representing (contingent)(income) interest for.....on \$ principal amount of said bonds sold to him when, as, and if issued on.....19....

This due-bill shall become null and void if the contract for sale of said bonds cannot be completed in accordance with the plan approved by....., on.....

Dated.....

.....

(Official Signature)

\_\_\_\_\_

**(d) Due-Bill for Dividend on When Issued Contract**

This is to certify that, upon issuance of.....in accordance with the plan approved by ....., the undersigned will pay to.....\$, representing the dividend of \$.....per share declared for the period ending.....19...., on.....shares of.....stock of.....sold to him when, as, and if issued on.....19....

This due-bill shall become null and void if the contract for sale of said stock cannot be completed in accordance with the plan approved by....., on.....

Dated.....

.....

(Official Signature)

\_\_\_\_\_

**(e) Due-Bill Check**

Consider this check as due-bill until payable date as shown below

NEW YORK....., 19...No. 1999

XYZ BANK

Pay To The Order Of

\$.....

.....

DOLLARS

.....

In Payment of Dividend or Interest

Dividend  
Account

On.....

Interest Account

NOT PAYABLE BEFORE.....

Record Date.....

**11640. Claims for Dividends, Rights, Interest, etc.**

**(a) Dividends or Rights**

A buyer of stock who has the certificate in his possession in time to enable him to effect transfer prior to the closing of the books or to the record date shall have no claim

upon the seller (unless the seller is the registered holder) for the dividend or rights pertaining to such certificate, but the seller, upon request of the buyer, shall use his best efforts to collect the same for the buyer.

**(b) Substantiating Claims**

When a buyer of stock who has failed to have said stock transferred in time requests the seller to collect the dividends or rights pertaining thereto, the seller may require from the buyer the presentation of the certificate or a letter from the transfer agent substantiating the claim, or the buyer's written statement that he or his customer was the holder on the record date, and a guarantee of indemnity for liability arising out of any further demand for said dividend or rights.

**(c) Interest or Rights**

The provisions of paragraphs (a) and (b) of this Rule shall be equally applicable to interest or rights pertaining to registered bonds and unit investment trust securities.

**11650. Transfer Fees**

The party at whose instance a transfer of securities is made shall pay all service charges of the transfer agent.

**11700. Reclamations and Rejections**

**11710. General Provisions**

**(a) Definition**

The term "reclamation" as used in this Code shall mean a claim for the right to return or the right to demand the return of a security which has been previously accepted. Securities which have been presented for delivery on a transaction and which for a valid reason have been refused shall within the meaning of Rules 11710 and 11720, inclusive, be deemed a rejection for the purposes of these Rules.

**(b) Uniform Reclamation Form**

**(1) Form Must Accompany Securities**

A properly executed Uniform Reclamation Form must accompany securities on reclamation or return.<sup>1</sup>

**(2) Absence of Form Permits Sell-Out**

Any security reclaimed or returned on a transaction without a properly executed Uniform Reclamation Form as prescribed within this Rule may, at the

option of the receiving broker, be "sold-out" pursuant to Rule 11820 of this Code, however, in no event later than three business days after receipt of the receiving broker or his agent.

**(c) Time for Delivery of Reclamation and Manner of Settlement**

(1) A security with an irregularity having been delivered may be returned or reclaimed between the hours established by rule or practice in the community where the delivery or reclamation is to be made.

(2) When a security is returned or reclaimed, the party who originally delivered it shall immediately give the party returning it either the security in proper form for delivery in exchange for the security originally delivered, or the money amount of the contract. In the latter case, unless otherwise agreed, the party to whom the security is returned shall be deemed to be failing to deliver the security until such time as a proper delivery is made.

**(d) Minor Irregularities**

Reclamation for an irregularity which affects only the currency of the security in the market shall be made within fifteen days from the day of original delivery, except that, if the security is issued under the jurisdiction of a foreign country, the period for reclamation under this section shall be forty-five days from the day of original delivery.

**(e) Wrong Form of Certificate**

Reclamation, by reason of the fact that a form of certificate was delivered which was not a good delivery, but which is exchangeable without charge for a certificate which is a good delivery, shall be made within fifteen days from the day of original delivery.

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<sup>1</sup> Specifications for use of the Uniform Reclamation Form are contained in the Final Report of the Banking and Securities Industry Committee entitled "Four Uniform Forms" dated December 22, 1971.

**IM-11710. Uniform Reclamation Form**

<u>To Accompany Reclamations Subject to Rules &amp; Regulations of</u>	<u>NASD — Uniform Practice Code</u> <u>NASDAQ OMX BX — Uniform Practice Code</u>
--	---

<u>RECLAIMED TO</u>	<u>Rec No.</u>	<u>Name of Receiver</u>	<u>Date Securities</u>
---------------------	----------------	-------------------------	------------------------

			<u>Below Received</u>
<u>RECLAIMED BY</u>	<u>Del. No.</u>	<u>Name of Deliverer</u>	<u>Date of Return</u>
<u>Quantity</u>	<u>Security Description</u> <u>(certificate's can be</u> <u>applied to reverse</u> <u>side of copy #1</u>		<u>Amount</u>
-	<u>Wrong Security</u>	-	<u>Wrong Money</u> <u>Our</u>
-	<u>Should Be</u>	-	<u>Money</u>
-	<u>Carries Due Bill</u>	-	<u>Duplicates Delivery</u> <u>You</u> <u>Delivered On</u>
-	<u>Needs Signature</u> <u>Guarantee</u>	-	<u>Wrong Settlement Date</u> <u>Our S/D</u>
-	<u>Needs Tax</u> <u>Stamp</u>	-	<u>No Instructions</u>
-	<u>Release Power</u> <u>of Attorney</u>	-	<u>Needs Legal Opinion</u>
-	<u>Coupon Missing</u>	-	<u>Needs Better Account</u> <u>Date</u>
-	<u>Other — Explanation</u>	-	
-		-	
<hr/>			<hr/>
<u>Name of Person</u> <u>making Reclamation</u> <u>(Print )</u>	<u>Telephone Number</u>		<u>Extension</u>

ATTACH COPIES 1 & 2 TO CERTIFICATE — COPIES 3 & 4 ARE RETAINED BY DELIVERER

**11720. Irregular Delivery — Transfer Refused — Lost or Stolen Securities**

**(a) Irregular Delivery**

Reclamation, by reason of the fact of an irregularity in the delivery of a security, shall be within 30 months after the settlement date of the contract. For purposes of this paragraph, the term "irregular delivery" shall include, among other things, wrong, duplicate, misdirected or over-deliveries and delivery of unit investment trust securities having the incorrect payment option.

**(b) Transfer Refused**

Reclamation, by reason of the fact that a specific certificate tendered in settlement of a contract has been presented for transfer and transfer thereof has been refused by the transfer agent, shall be within 30 months after the settlement date of the contract.

**(c) Lost or Stolen or Confiscated Securities**

Reclamation, by reason of the fact that a security is lost or stolen or confiscated shall be within 30 months after the settlement date of the contract.

**(d) Running of 30 Month Period**

The running of the 30-month period described in this Rule shall not be deemed to foreclose a member's rights to pursue its claim via other open avenues, including but not limited to arbitration.

**IM-11720. Obligations of Members Who Discover Securities in Their Possession to Which They Are Not Entitled**

Any member who discovers securities in its possession to which it is not entitled is required to make reasonable attempts to ascertain and to promptly notify the true owner of such securities and to take affirmative steps to correct the situation. Failure to abide by this requirement may result in a violation of Rule 2110.

**11730. Called Securities**

Reclamation by reason of the fact that a security was delivered after publication of notice of call for its redemption, may be made without limit of time and such security may be returned to the party who held it at the time of such publication; except that this Rule shall not apply when an entire issue is called for redemption or when the security involved was dealt in specifically as a "called" security.

**11740. Marking to the Market**

**(a) Demand for Deposit**

The party who is partially unsecured by reason of a change in the market value of the subject of a contract in securities may demand from the other party a deposit equal to the difference between the contract price and the market price, without being required to make a mutual deposit. Such deposit shall be made either with the member demanding same or with a mutually agreed-on depository or, on failure to agree on a depository, with any member of the Federal Reserve System with an office in the financial district of the city where the unsecured party maintains its office.

**(b) Assignment of Contract**



Either party to a contract in securities may assign the contract, either at the time the transaction is effected or at the time a request is made for funds to "mark to the market," provided the other party to the contract assents to the assignment.

**(c) Refund of Deposit**

If the market value of the subject of the contract changes so as to permit a total or partial refund of any deposits which have been made in accordance with paragraph (a) of this Rule, such refunds shall be made on demand.

**(d) Delivery of Demand for Deposit or Refund**

All demands for deposits or refunds shall be in writing and shall be delivered at the office of the party upon whom the demand is made during the business hours of member banks of the Federal Reserve System located in the community where such party maintains his office, and such demands shall be complied with immediately.

**(e) Failure to Comply with Demand**

Failure of a party to comply with a demand for a deposit or refund made in accordance with paragraphs (a), (c) and (d) of this Rule shall entitle the party making the demand to close the contract without notice, by making offsetting purchase or sale contracts in the best available market for the account and liability of the party failing to comply with said demand.

**(f) Contract Closure**

No contract shall be closed pursuant to paragraph (e) of this Rule prior to the expiration of regular delivery time in the community where the party making the demand maintains his office, on the next business day following the day when notice of such demand was received by the other party.

**(g) Notice of Offsetting Purchase or Sale**

The party making such offsetting purchase or sale contracts shall as promptly as possible on the day on which they are made (1) notify the other party via telegram, TWX, or other comparable written media, and (2) mail or deliver formal confirmation of same to the other party and a copy of said confirmation to the Exchange's Regulation Department.

**11800. Close-Out Procedures**

**11810. Buying-In**

A contract which has not been completed by the seller according to its terms may be closed by the buyer not sooner than the third business day following the date delivery was due, in accordance with the following procedure:

**(a) Notice of "Buy-In"**

(1) Written notice of "buy-in" shall be delivered to the seller at his office not later than 12:00 noon, his time, two business days preceding the execution of the proposed "buy-in."

(2) For purposes of this Rule written notice shall include an electronic notice through a medium that provides for an immediate return receipt capability. Such electronic media shall include but not be limited to facsimile transmission, a computerized network facility, etc.

**(b) Information Contained in "Buy-in" Notice**

(1) Every notice of "buy-in" shall state the date of the contract to be closed, the quantity and contract price of the securities covered by said contract, the settlement date of said contract and any other information deemed necessary to properly identify the contract to be closed. Such notice shall state further that unless delivery is effected at or before a certain specified time, which may not be prior to 11:30 a.m. local time in the community where the buyer maintains his office, the security may be "bought-in" on the date specified for the account of the seller. If the originator of a "buy-in" in a depository eligible security is a participant in a registered securities depository, the specified delivery time may not be prior to 3:00 p.m. Eastern Time and the "buy-in" may not be executed prior to 3:00 p.m., Eastern Time. Each "buy-in" notice shall also state the name and telephone number of the individual authorized to pursue further discussions concerning the buy-in.

(2) Notice may be redelivered immediately to another broker/dealer from whom the securities involved are due in the form of a re-transmitted notice (re-transmit). A re-transmitted notice of buy-in must be delivered to subsequent broker/dealers not later than 12 noon, recipient's local time, on the business day preceding the time and date of execution of the proposed buy-in, and the time specified for delivery may not be prior to the time specified in the original notice.

**IM-11810. Sample Buy-In Forms**

*(a) Notice of Buy-In*

.....

(Member's Name)

.....

(Locality and Date)

TO.....

RE:.....

(Quantity and description of Security)

which is due from you to the undersigned on a contract made on.....at.....for settlement

(Date of Contract) (Contract Price)

.....

(Settlement Date)

\*\*\*

We hereby notify you that unless you make delivery of the foregoing security at or before..... (Time and Date) the security will be bought in for your account and risk pursuant to Rule 11810 in the Uniform Practice Code.

**Note:** If some or all of the foregoing securities are due you by another member of the NASDAQ OMX BX, Rule 11810(b) permits the use of the re-transmitted buy- in.

Buy-In Dept.

By:

Phone:

*(b) Notice of Re-transmitted Buy-In*

.....

(Member's Name)

.....

(Locality and Date)

TO.....

RE:.....

(Quantity and Description of Security)

which is due from you to the undersigned on a contract made on ..... at ..... settlement on

(Date of Contract) (Contract Price)

.....

(Settlement Date)

\*\*\*

We hereby inform you that a notice of buy-in has been issued with respect to the aforesaid securities and stated that unless delivery was made at or before .....(Time and date on original buy-in) the securities may be bought in pursuant to Rule 11810 in the Uniform Practice Code.

**Note:** If some or all of the foregoing securities are due you by another member of the NASDAQ OMX BX, Rule 11810(b) permits the use of the re-transmitted buy-in.

Buy-In Dept.

By:

Phone:

**(c) Seller's Failure to Deliver After Receipt of Notice**

(1) (A) On failure of the seller to effect delivery in accordance with the "buy-in" notice, or to obtain a stay as hereinafter provided, the buyer may close the contract by purchasing all or part of the securities necessary to satisfy the amount requested in the "buy-in" notice. Securities delivered subsequent to the receipt of the "buy-in" notice should be considered as delivered pursuant to the "buy-in" notice. Delivery of the requisite number of shares, as stated in the "buy-in" notice, or execution will also operate to close-out all contracts covered under re-transmitted notices of buy-ins issued pursuant to the original notice of buy-in. A "buy-in" may be executed by a member from its long position and/or from customers' accounts maintained with such member.

(B) For transactions where the buyer is a customer (other than another member), upon failure of a clearing corporation to effect delivery in accordance with a buy-in notice, the contract must be closed by purchasing for "cash" in the best available market, or at the option of the buyer for guaranteed delivery, for the account and liability of the party in default all or any part of the securities necessary to complete the contract.

(C) As provided in paragraph (c)(1)(A) and (B) hereof, members must be prepared to defend the price at which the "buy-in" is executed relative to the current market at the time of the "buy-in."

(2) Buy-in for unit investment trust securities. Buy-in execution options, in addition to those contained in paragraph (c)(1), may be available when the purchaser wishes to buy-in contracts made for unit investment trust securities. The purchaser may:

(A) by mutual agreement, accept from the seller in lieu of the seller's obligation under the original contract (which shall be concurrently canceled) the delivery of unit investment trust securities which are

comparable to those originally bought in quantity, quality, yield or price and maturity, with any additional expenses or any additional cost of acquiring such substituted securities being borne by the seller;

(B) if the purchaser's options in paragraph (c)(1) are not available and the purchaser and seller cannot agree upon option (A), above, require the seller, for the account and liability of the seller, to repurchase the unit investment trust securities on terms which provide that the seller pay an amount which requires the seller to bear the burden of any change in the market price from the original contract price, with accrued interest. Bearing the burden of any change in the market price from the original contract price means that if the current market price is higher than the original contract price, the purchaser may require the seller to repurchase the unit investment trust securities at the current market price and conversely means that if the current market price is lower than the original contract price, the purchaser may require the seller to repurchase the unit investment trust securities at the original contract price, with accrued interest.

**(d) "Buy-in" Not Completed**

(1) In the event that a "buy-in" is not completed pursuant to the provisions of paragraph (b) hereof on the day specified in the notice of "buy-in," or as such date may be extended pursuant to the provisions of paragraph (f) or (g) hereof, said notice shall expire at the close of business on the day specified in the notice of buy-in.

(2) When a "buy-in" notice is pending during a reconfirmation and pricing period and one or more members are participating in a reconfirmation and pricing service, such "buy-in" notice shall be canceled. Written notice of cancellation must be received by the non-participating member prior to the original or extended date of execution. Failure to provide such notification may result in an execution. New notice of "buy-in" may be issued no earlier than the first business day following the final reconfirmation and pricing settlement date.

**(e) Partial Delivery by Seller**

Prior to the closing of a contract on which a "buy-in" notice has been given, the buyer shall accept any portion of the securities called for by the contract, provided the portion remaining undelivered at the time the buyer proposes to execute the "buy-in" is not an amount which includes an odd-lot which was not part of the original transaction.

**(f) Securities in Transit**

If prior to the closing of a contract on which a "buy-in" notice has been given, the buyer receives from the seller written or comparable electronic notice stating that the

securities are (1) in transfer; (2) in transit; (3) are being shipped that day; or (4) are due from a depository and giving the certificate numbers, except for those securities due from a depository, then the buyer must extend the execution date of the "buy-in" for a period of seven (7) calendar days from the date delivery was due under the "buy-in." Upon request of the seller, an additional extension of seven (7) calendar days may be granted by the Exchange's Regulation Department due to the circumstances involved.

**(g) Notice of Executed "Buy-In"**

The party executing the "buy-in" shall immediately upon execution, but no later than the close of business, local time, where the seller maintains his office, notify the broker/dealer for whose account the securities were bought as to the quantity purchased and the price paid. Such notification should be in written or electronic form having immediate receipt capabilities. If this written media is not available the telephone shall be used for the purpose of same day notification, and written or similar electronic notification having next day receipt capabilities must also be sent out simultaneously. In either case formal confirmation of purchase along with a billing or payment, (depending upon which is applicable), should be forwarded as promptly as possible after the execution of the "buy-in." Notification of the execution of a "buy-in" shall be given to succeeding broker/dealers to whom a re-transmitted notice was issued pursuant to paragraph (b) using the same procedures stated herein. If a re-transmitted "buy-in" is executed, it will operate to close out all contracts covered under the re-transmitted notice.

**(h) "Close-Out" Under the Exchange's Regulation Department, Securities Association or Other Exchange Rulings**

(1) When a national securities association or another exchange makes a ruling that all open contracts with a particular member, who is also a member of the Exchange, should be closed-out immediately (or any similar ruling), members may close-out contracts as directed by the securities association or exchange.

(2) Whenever the Exchange's Regulation Department ascertains that a court has appointed a receiver for any member because of its insolvency or failure to meet its obligations, or whenever the Exchange's Regulation Department ascertains, based upon evidence before it, that a member cannot meet its obligations as they become due and that such action will be in the public interest, the Exchange's Regulation Department may, in its discretion, issue notification that all open contracts with the member in question may be closed-out immediately.

(3) Within the meaning of this paragraph (b), to close-out immediately shall mean that (A) "buy-ins" may be executed without prior notice of intent to "buy-in" and (B) "sell-outs" may be executed without making prior delivery of the securities called for.

(4) All close-outs executed pursuant to the provisions of this paragraph shall be executed for the account and liability of the member in question. Notification of all close-outs shall immediately be sent to such member pursuant to the confirmation provisions of the Rule 11200 Series.

**(i) Failure to Deliver and Liability Notice Procedures**

(1) (A) If a contract is for warrants, rights, convertible securities or other securities which (i) have been called for redemption; (ii) are due to expire by their terms; (iii) are the subject of a tender or exchange offer; or (iv) are subject to other expiring events such as a record date for the underlying security and the last day on which the securities must be delivered or surrendered (the expiration date) is the settlement date of the contract or later the receiving member may deliver a Liability Notice to the delivering member as an alternative to the close-out procedures set forth in paragraphs (a) through (g). When the parties to a contract are both participants in a registered clearing agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, the transmission of the liability notice must be accomplished through the use of said automated notification service. When the parties to a contract are not both participants in a registered clearing agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, such notice must be issued using written or comparable electronic media having immediate receipt capabilities no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by this Rule.

(B) If the contract is for a deliverable instrument with an exercise provision and the exercise may be accomplished on a daily basis, and the settlement date of the contract to purchase the instrument is on or before the requested exercise date, the receiving member may deliver a Liability Notice to the delivering member no later than 11:00 a.m. on the day the exercise is to be effected. Notice may be redelivered immediately to another member but no later than noon on the same day. When the parties to a contract are both participants in a registered clearing agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, the transmission of the liability notice must be accomplished through the use of said automated notification service. When the parties to a contract are not both participants in a registered clearing agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, such notice must be issued using written or comparable electronic media having immediate receipt capabilities. If the contract remains undelivered at expiration, and has not been canceled by mutual consent, the receiving

member shall notify the defaulting member of the exact amount of the liability on the next business day.

(C) In all cases, members must be prepared to document requests for which a Liability Notice is initiated.

(2) If the delivering member fails to deliver the securities on the expiration date, the delivering member shall be liable for any damages which may accrue thereby. A Liability Notice delivered in accordance with the provisions of this Rule shall serve as notification by the receiving member of the existence of a claim for damages. All claims for such damages shall be made promptly.

(3) For the purposes of this Rule, the term "expiration date" shall be defined as the latest time and date on which securities must be delivered or surrendered, up to and including the last day of the protect period, if any.

(4) If the above procedures are not utilized as provided under this Rule, contracts may be "bought-in" without prior notice, after normal delivery hours established in the community where the buyer maintains his office, on the expiration date. Such buy-in execution shall be for the account and risk of the defaulting member.

#### **(j) Contracts Made for Cash**

Contracts made for "cash," or made for or amended to include guaranteed delivery on a specified date may be "bought-in" without notice during the normal trading hours on the day following the date delivery is due on the contract; otherwise, the procedures set forth in paragraphs (a) through (f) of this Rule shall apply. In all cases, notification of executed "buy-in" must be provided pursuant to paragraph (g) of this Rule. "Buy-ins" executed in accordance with this paragraph shall be for the account and risk of the defaulting broker/dealer.

#### **(k) Information on Notices**

Notices of "buy-in" and "re-transmitted buy-in" shall include all information contained in the sample forms prescribed by the Exchange.

#### **(l) "Buy-In" Desk Required**

Members shall have a "buy-in" section or desk adequately staffed to process and research all "buy-ins" during normal business hours.

#### **(m) Buy-In of Accrued Securities**

Securities in the form of stock, rights or warrants which accrue to a purchaser shall be deemed due and deliverable to the purchaser on the payable date. Any such



securities remaining undelivered at that time shall be subject to the "buy-in" procedures as provided under this Rule.

### **11820. Selling-Out**

#### **(a) Conditions Permitting "Sell-Out"**

Upon failure of the buyer to accept delivery in accordance with the terms of the contract, and lacking a properly executed Uniform Reclamation Form or the equivalent depository generated advice for depository eligible securities meeting the requirements prescribed in Rule 11710(b), the seller may, without notice, "sell-out" in the best available market and for the account and liability of the party in default all or any part of the securities due or deliverable under the contract.

#### **(b) Notice of "Sell-Out"**

The party executing a "sell-out" as prescribed above shall, as promptly as possible on the day of execution, but no later than the close of business, local time, where the buyer maintains his office, notify the broker/dealer for whose account and risk such securities were sold of the quantity sold and the price received. Such notification should be in written or electronic form having immediate receipt capabilities. A formal confirmation of such sale should be forwarded as promptly as possible after the execution of the "sell-out."

### **11830. Reserved**

### **11840. Rights and Warrants**

#### **(a) Definition — "Rights"**

The term "rights" or "rights to subscribe," as used in this Rule is the privilege offered to holders of record of issued securities to subscribe (usually on a pro rata basis) for additional securities of the same class, of a different class, or of a different issuer as the case may be.

#### **(b) Definition — "Warrants"**

The term "warrants" or "stock purchase warrants" as used in this Rule is an instrument issued separately or accompanying other securities, but not necessarily issued to stockholders of record as of a specific date; i.e., warrants issued with or attached to bonds, common stock, preferred stocks, etc. The instrument represents the privilege to purchase securities at a stipulated price or prices and is usually valid for several years.

#### **(c) Basis and Unit of Trading — Rights**

Except as otherwise designated by the Exchange's Regulation Department, transactions in rights to subscribe shall be on the basis of one right accruing to each share of issued stock and the unit of trading in rights shall be 100 rights (unless otherwise specified).

**(d) Basis and Unit of Trading — Warrants**

Except as otherwise agreed or designated by the Exchange's Regulation Department, transactions in stock purchase warrants shall be on the basis of one warrant representing the right of the purchaser to receive one warrant in settlement of such transaction and the unit of trading shall be 100 warrants. Members must ascertain how many warrants they have to sell, what each warrant entitles the holder to purchase, the purchase price, and the current price of the warrant relative to the price of the underlying security which may be purchased. Trades in warrants should be properly described on comparisons and confirmations.

**(e) Securities Which Have Expired by Their Terms**

(1) In contracts for warrants, rights or other securities which have expired by their terms, deliveries effected more than thirty (30) days after expiration shall consist of (A) the expired securities; or (B) a Letter of Indemnity in lieu of the expired instrument.

(2) In the case of units or other securities of which one or more of the integral parts of the instrument has expired by its terms, after expiration, the instrument shall cease to be a unit as originally contemplated in the contract. Deliveries effected after expiration shall consist of the unexpired security and (A) the expired instrument; or (B) a Letter of Indemnity in lieu of the expired instrument.

(3) Deliveries effected pursuant to paragraphs (e)(1) and (2) of this Rule shall be settled at the existing contract price.

**IM-11840. Sample Letter of Indemnity**

DATE \_\_\_\_\_

TO: \_\_\_\_\_

RE: \_\_\_\_\_

(Quantity and Description)

CUSIP # \_\_\_\_\_

For value received the undersigned hereby assigns, transfers and sets over to you all rights and privileges which may accrue on the above contract made on (Date of Contract) ----- at (Contract Price)----- for settlement (Settlement

Date).

Upon acceptance of this delivery in lieu of physical certificates, we agree, for ourselves, our successors, assigns, heirs, executors and administrators, to at all times indemnify and hold harmless from and against any and all claims, liabilities, damages, taxes, charges and expense sustained or incurred by reason of this action. Acceptance of this delivery shall operate to close- out the above stated contract in accordance with the provisions of NASDAQ OMX BX's Uniform Practice Code.

.....  
(Member Firm)

.....  
(Official Signature)

If any questions, please contact ..... at (telephone Number) .....

**11850. Reserved**

**11860. Acceptance and Settlement of COD Orders**

(a) Exchange members shall comply with NASD Rule 11860 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 11860 are transferred into the FINRA rulebook, then Equity Rule 11860 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 11860 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) The Exchange and FINRA are parties to the FINRA Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 11860 by complying with NASD Rule 11860 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 11860 are being performed by FINRA on behalf of the Exchange.

**11870. Customer Account Transfer Contracts**

(a) Exchange members shall comply with NASD Rule 11870 as if such Rule were part of the Rules of the Exchange.

FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook. If the provisions of NASD Rule 11870 are transferred into the FINRA rulebook, then Equity Rule 11870 shall be construed to require Exchange members to comply with the FINRA rule corresponding to NASD Rule 11870 (regardless of whether such rule is renumbered or amended) as if such rule were part of the Rules of the Exchange.

(b) The Exchange and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of the Exchange. Therefore, Exchange members are complying with Equity Rule 11870 by complying with NASD Rule 11870 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Equity Rule 11870 are being performed by FINRA on behalf of the Exchange.

(c) Pursuant to the Rule 9600 Series, the Exchange may exempt from the provisions of this Rule, either unconditionally or on specified terms and conditions, (A) any member, or (B) any type of account, security or financial instrument.

**IM-11870. Sample Transfer Instruction Forms**

**(a) Customer Account Transfer**

**CUSTOMER SECURITIES ACCOUNT TRANSFER  
INSTRUCTION**

-	.....
	(Date)
-	-
<u>RECEIVING FIRM</u>	<u>CARRYING FIRM</u>
.....	.....
<u>RECEIVING FIRM</u>	<u>CARRYING FIRM</u>
<u>ACCOUNT NUMBER</u>	<u>ACCOUNT NUMBER</u>
.....	.....
<u>ACCOUNT TITLE</u>	-
.....	
.....	

ACCOUNT TYPE

(C = CASH, M = MARGIN)

.....

TAX ID OR SS NUMBER

-

.....

TO

-

.....

(Receiving Firm Name and Address)

Please receive my entire securities account from the below indicated carrying firm and remit to it the debit balance or accept from it the credit balance in my securities account.

TO

.....

(Carrying Firm Name and Address)

Please transfer my entire securities account to the above indicated receiving firm, which has been authorized by me to make payment to you of the debit balance or to receive payment of the credit balance in my securities account. I understand that to the extent any assets or instruments in my securities account are not readily transferable, with or without penalties, such assets or instruments may not be transferred within the time frames required by Rule 11870 of NASDAQ OMX BX's Uniform Practice Code.

I understand that you will contact me with respect to the disposition of any assets in my securities account that are nontransferable. If certificates or other instruments in my securities account are in your physical possession, I instruct you to transfer them in good deliverable form, including affixing any necessary tax waivers, to enable such receiving firm to transfer them in its name for the purpose of sale, when and as directed by me. I further instruct you to cancel all open orders for my securities account on your books.

I affirm that I have destroyed or returned to you any credit/debit cards and/or unused checks issued to me in connection with my securities account.

.....

.....

(Customer's Signature)

(Date)

.....

.....

(Customer's Signature if Joint Account)

(Date)

[It is suggested that a copy of the customer's most recent account statement be attached.]

Receiving Firm Contact:

Name

Phone Number

.....

.....

For Broker Use Only:

Mutual Fund Registration Instructions:

Registration Name

.....

Address

.....

Tax ID #

.....

Dividend and Capital Gains Options:

Reinvest ( )

Dividend Cash/Capital Gains Reinvest ( )

All Cash ( )

Deposit to New Plan ( )

Issue Certificate ( )

Deposit to Existing Plan ..... ( )

Broker Instructions (if broker agreement exists):

Name

.....

Address

.....

RR Name/Number/Branch

**(b) Customer Retirement Account Transfer**

**CUSTOMER RETIREMENT PLAN SECURITIES ACCOUNT  
TRANSFER INSTRUCTION**

RECEIVING FIRM

CARRYING FIRM

.....

.....

RECEIVING FIRM ACCOUNT  
NUMBER

CARRYING FIRM  
ACCOUNT NUMBER

.....

.....

ACCOUNT TITLE

.....

.....

ACCOUNT TYPE

(I = IRA, Q = QUALIFIED)

.....

TAX ID OR SS NUMBER

.....

TO

.....

(Prior Custodian/Trustee Name, Address and Tax ID Number)

You are the custodian/trustee for my  
retirement plan securities account with

.....

(Carrying Firm Name and Address)

as my broker. Please be advised that I have amended my retirement  
plan and have adopted a new retirement plan with the below indicated  
as successor custodian/trustee and

.....as broker

(Receiving Firm Name and Address)

Pursuant to said amendment, please transfer all assets in my securities account to such successor custodian/trustee. I understand that to the extent any assets in my account are not readily transferable, with or without penalties, such assets may not be transferred within the time frames required by Rule 11870 of NASDAQ OMX BX's Uniform Practice Code.

I understand that the above indicated carrying firm will contact me with respect to the disposition of any assets in my account that are nontransferable. I authorize you to deduct any outstanding fees due you from the credit balance in my account. If my account does not contain a credit balance, or if the credit balance in the account is insufficient to satisfy any outstanding fees due you, I authorize you to liquidate the assets in my account to the extent necessary to satisfy any outstanding fees due you. If certificates or other instruments in my account are in your physical possession, I instruct you to transfer them in good deliverable form, including affixing any necessary tax waivers, to enable the successor custodian/trustee to transfer them in its name for the purpose of sale, when and as directed by me. Upon receiving a copy of this transfer instruction, the carrying firm will cancel all open orders for my account on its books.

.....  
(Customer's Signature) (Date)

Please be advised that

.....  
(Successor Custodian/Trustee Name, Address and Tax ID Number)  
will accept the above captioned account as successor custodian/trustee.

Please send all checks to  
..... and non-DTC eligible items  
to

.....  
.....  
(Successor Custodian/Trustee (Date)  
Authorized Signature)

.....  
(Tax ID Number) (Date of Trust)

[It is suggested that a copy of the customer's most recent account statement be attached.]



Receiving Firm Contact:

Name .....

Phone Number

.....

For Broker Use Only:

Mutual Fund Registration Instructions:

Registration Name

.....

Address .....

Tax ID # .....

Dividend and Capital Gains Options:

Reinvest ( )

Dividend Cash/Capital Gains

Reinvest ( )

All Cash ( )

Deposit to New Plan ( )

Issue Certificate ( )

Deposit to Existing Plan .....

( )

Broker Instructions (if broker agreement exists):

Name .....

Address .....

RR Name/Number/Branch .....

**(c) Mutual Fund Re-Registration**

**MUTUAL FUND RE-REGISTRATION INSTRUCTIONS USED FOR  
BROKER-TO-BROKER TRANSFERS**

TO:

(1) .....

Date: .....

.....

Transfer Agent: .....

Address: .....

Name of Fund:

(2) Present Account Information

.....

..

Fund A/C #:

.....

.....

Certificate # (if in physical form)  
[Certificate attached must be in negotiable form.]

Account Registration:  
.....

(3)(A) Broker Identification  
)

Old Firm Name and In-house A/C#  
.....

(3)(B) -  
)

New Firm Name and In-house A/C#  
.....

Registration Instructions

Please transfer ..... shares from the above-referenced account and register as follows:

Name .....

Address .....

(4) Tax ID # .....

Dividend and Capital Gains Option:

Reinvest ( )

Dividend Cash/Capital Gains Reinvest ( )

All Cash ( )

Deposit to New Plan ( )

Issue Certificate ( )

Deposit to Existing Plan ..... ( )

If a Broker/Dealer Agreement exists:

Name

(5) Broker/Dealer Instructions

.....

Address

.....

RR Name/Number/Branch

.....

(6) Release

In consideration for your complying with the above request, we hereby agree to indemnify the:

.....  
(fund)

and

.....  
(agent)

against any and all losses  
incurred hereof.

Thank you in advance for your  
cooperation in this matter.

Sincerely,

(Signature Guarantee Stamp)

.....  
Authorized Signature

If there are any questions call:

.....  
.....

(Signature of Delivering Broker) (Phone Number)

.....  
.....

(Signature of Receiving Broker) (Phone Number)

Items 1, 2, 3a are completed by the delivering broker.

Items 3b, 4 and 5 are completed by the receiving broker.

**11880. Settlement of Syndicate Accounts**

**(a) Definitions**

(1) "Selling syndicate" means any syndicate formed in connection with a public offering to distribute all or part of an issue of corporate securities by sales made directly to the public by or through participants in such syndicate.

(2) "Syndicate account" means an account formed by members of the selling syndicate for the purpose of purchasing and distributing the corporate securities of a public offering.

(3) "Syndicate manager" means the member of the selling syndicate that is responsible for maintenance of syndicate account records.

(4) "Syndicate settlement date" means the date upon which corporate securities of a public offering are delivered by the issuer to or for the account of the syndicate members.

(b) Final settlement of syndicate accounts shall be effected by the syndicate manager within 90 days following the syndicate settlement date.

(c) No later than the date of final settlement of the syndicate account, the syndicate manager shall provide to each member of the selling syndicate an itemized statement of syndicate expenses that shall include, where applicable, the following categories of expenses: legal fees; advertising; travel and entertainment; closing expenses; loss on oversales; telephone; postage; communications; co-manager's expenses; computer, data processing charges; interest expense; and miscellaneous. The amount under "miscellaneous" should not be disproportionately large in relation to other items and should include only minor items that cannot be easily categorized elsewhere in the statement. Any other major items not included in the above categories shall be itemized separately.

#### **(d) Settlement of Underwritten Public Offerings**

The syndicate manager of a public offering underwritten on a "firm-commitment" basis shall, immediately, but in no event later than the scheduled closing date, notify the Exchange's Uniform Practice Department of any anticipated delay in the closing of such offering beyond the closing date in the offering document or any subsequent delays in the closing date previously reported pursuant to this Rule.

### **11890. Clearly Erroneous Transactions**

#### **(a) Authority to Review Transactions Pursuant to Complaint of Market Participant**

##### **(1) Scope of Authority**

(A) Subject to the limitations described in paragraph (a)(2)(D) below, officials of the Exchange designated by its President shall, pursuant to the procedures set forth in paragraph (a)(2) below, have the authority to review any transaction arising out of the use or operation of any execution or communication system owned or operated by the Exchange and approved by the Commission; provided, however, that the parties to the transaction must be readily identifiable by the Exchange through its systems. An Exchange official shall review transactions with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Based upon this review, the official shall decline to act upon a disputed transaction if the official believes that the transaction under dispute is not clearly erroneous. If the official determines the transaction in dispute is clearly erroneous, however, he or she shall declare that the transaction is null and void or modify one or more terms of the transaction. When adjusting the terms of a transaction, the Exchange official shall seek to adjust the price and/or size of the transaction to achieve an equitable rectification of the error that would

place the parties to a transaction in the same position, or as close as possible to the same position, as they would have been in had the error not occurred. For the purposes of this Rule, the terms of a transaction are clearly erroneous if the transaction is eligible for review under the Rule and if there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.

## **(2) Procedures for Reviewing Transactions**

(A) Except as provided in paragraph (a)(2)(B), any member or person associated with a member that seeks to have a transaction reviewed pursuant to paragraph (a)(1) hereof shall submit a written complaint to the Exchange's MarketWatch Department in accordance with the following time parameters:

(i) for transactions occurring at or after 9:30 a.m. but prior to 10:00 a.m., complaints must be received by the Exchange by 10:30 a.m.; and

(ii) for transactions occurring at any other time, complaints must be received by the Exchange within thirty minutes of execution time.

(B) In the case of an Outlier Transaction, a member or person associated with a member that seeks to have a transaction reviewed pursuant to paragraph (a)(1) hereof shall submit a written complaint to the Exchange's MarketWatch Department in accordance with the following time parameters:

(i) for transactions occurring at or after 9:30 a.m. but prior to 10:00 a.m., complaints must be received by the Exchange by 11:30 a.m.;

(ii) for transactions occurring prior to 9:30 a.m. or between 10:00 a.m. and the close of the Regular Session, complaints must be received by the Exchange within ninety minutes of execution time;

(iii) for transactions occurring after the close of the Regular Session, complaints must be received by the Exchange prior to 9:30 a.m. the next trading day.

(C) Once a complaint has been received in accord with paragraph (a)(2)(A) or (B) above, the complainant shall have up to thirty (30) minutes, or such longer period as specified by the Exchange staff, to

submit any supporting written information concerning the complaint necessary for a determination under paragraph (a)(1). Such supporting information must include the approximate time of transaction(s), security symbol, number of shares, price(s), contra broker(s) if the transactions are not anonymous, the Exchange system used to execute the transactions, and the factual basis for believing that the trade is clearly erroneous. If the Exchange receives a complaint that does not contain all of the required supporting information, the Exchange shall immediately notify the filer that the complaint is deficient.

(D) Following the expiration of the period for submission of supporting material, an Exchange official shall determine whether the complaint is eligible for review. A complaint shall not be eligible for review under paragraph (a) unless:

(i) the complainant has provided all of the supporting information required under paragraph (a)(2)(C), and

(ii) For trades in Nasdaq Securities or Exchange Securities executed during the Regular Session, or trades in other securities executed during the Regular Session after the Primary Market for the security first posts an executable two-side quote, the price of a transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Inside Price by an amount that equals or exceeds the minimum threshold set forth below:

#### **Inside Price Minimum Threshold**

<u>\$0–\$0.99</u>	<u><math>\\$0.02 + (0.10 \times \text{Inside Price})</math></u>
<u>\$1.00–\$4.99</u>	<u><math>\\$0.12 + (0.07 \times (\text{Inside Price} - \\$1.00))</math></u>
<u>\$5.00–\$14.99</u>	<u><math>\\$0.40 + (0.06 \times (\text{Inside Price} - \\$5.00))</math></u>
<u>\$15 or more</u>	<u>\$1.00</u>

(E) If a complaint is determined to be eligible for review, the counterparty to the trade shall be notified of the complaint via telephone or other method permitted by paragraph (d) by Exchange staff and shall have up to thirty (30) minutes, or such longer period as specified by the Exchange staff, to submit any supporting written information concerning the complaint necessary for a determination under paragraph (a)(1). Either party to a disputed trade may request the written information provided by the other party pursuant to paragraph (a)(2).

(E) Notwithstanding paragraphs (a)(2)(C) and (E) above, once a party to a disputed trade communicates that it does not intend to submit any further information concerning a complaint, the party may not thereafter provide additional information unless requested to do so by the

Exchange staff. If both parties to a disputed trade indicate that they have no further information to provide concerning the complaint before their respective thirty-minute information submission period has elapsed, then the matter may be immediately presented to an Exchange official for a determination pursuant to paragraph (a)(1) above.

(G) Each member or person associated with a member involved in the transaction shall provide the Exchange with any information that it requests in order to resolve the matter on a timely basis notwithstanding the time parameters set forth in paragraphs (a)(2)(C) and (E) above.

(H) Once a party has applied to the Exchange for review and the transaction has been determined to be eligible for review, the transaction shall be reviewed and a determination rendered, unless (i) both parties to the transaction agree to withdraw the application for review prior to the time a decision is rendered pursuant to paragraph (a)(1), or (ii) the complainant withdraws its application for review prior to the notification of counterparties pursuant to paragraph (a)(2)(E).

#### **(b) Procedures for Reviewing Transactions on the Exchange's Own Motion**

In the event of (i) a disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by the Exchange and approved by the Commission, or (ii) extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest, the President of the Exchange or any Executive Vice President designated by the President may, on his or her own motion, review any transaction arising out of or reported through any such quotation, execution, communication, or trade reporting system. An Exchange officer acting pursuant to this subsection may declare any such transaction null and void or modify the terms of any such transaction if the officer determines that (i) the transaction is clearly erroneous, or (ii) such actions are necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest; provided, however, that the officer shall take action pursuant to this subsection as soon as possible after detection of the transaction except in the event of extraordinary circumstances, in which event the officer must take action by 9:30 a.m. on the next trading day following the date of the transaction at issue.

#### **(c) Review by the Market Operations Review Committee ("MORC")**

(1) Subject to the limitations described in paragraph (c)(2), a member or person associated with a member may appeal a determination made under paragraph (a) to the MORC. A member or person associated with a member may appeal a determination made under paragraph (b) to the MORC unless the officer making the determination also determines that the number of the affected transactions is such that immediate finality is necessary to maintain a fair and

orderly market and to protect investors and the public interest. An appeal must be made in writing, and must be received by the Exchange within thirty (30) minutes after the person making the appeal is given the notification of the determination being appealed, except that if the Exchange notifies the parties of action taken pursuant to paragraph (b) after 4:00 p.m., the appeal must be received by the Exchange by 9:30 a.m. the next trading day. Once a written appeal has been received, the counterparty to the trade that is the subject of the appeal will be notified of the appeal and both parties shall be able to submit any additional supporting written information up until the time the appeal is considered by the MORC. Either party to a disputed trade may request the written information provided by the other party during the appeal process. An appeal to the MORC shall not operate as a stay of the determination being appealed, and the scope of the appeal shall be limited to trades which the person making the appeal is a party. Subject to the limitations described in paragraph (c)(2), once a party has appealed a determination to the MORC, the determination shall be reviewed and a decision rendered, unless (i) both parties to the transaction agree to withdraw the appeal prior to the time a decision is rendered by the MORC, or (ii) the party filing the appeal withdraws its appeal prior to the notification of counterparties under this paragraph (c)(1). Upon consideration of the record, and after such hearings as it may in its discretion order, the MORC, pursuant to the standards set forth in this rule, shall affirm, modify, reverse, or remand the determination.

(2) If an Exchange official determines under paragraph (a)(2)(D) that a transaction is not eligible for review, a party appealing such determination must allege in its appeal a mistake of material fact upon which it believes the official's determination was based. If the MORC concludes that an appeal of such a determination does not allege a mistake of material fact, the determination shall become final and binding. If the MORC concludes that an appeal of such a determination alleges a mistake of material fact, the Exchange shall notify the counterparty to the transaction and the determination shall be reviewed by the MORC as provided under paragraph (c)(1). If the MORC then finds that the determination was based on a mistake of material fact, the MORC shall remand the matter for adjudication under paragraph (a); otherwise, the determination shall become final and binding.

(3) The decision of the MORC pursuant to an appeal, or a determination by an Exchange official that is not appealed, shall be final and binding upon all parties and shall constitute final Exchange action on the matter in issue. Any determination by an Exchange official pursuant to paragraph (a) or (b) or any decision by the MORC pursuant to paragraph (c) shall be rendered without prejudice as to the rights of the parties to the transaction to submit their dispute to arbitration.

#### **(d) Communications**



(1) All materials submitted to the Exchange or the MORC pursuant to this Rule shall be submitted in writing within the time parameters specified herein via the online complaint form available on the Exchange's website, facsimile, or such other telecommunications procedures as the Exchange may announce from time to time in a Notice to Members or Head Trader Alert. Materials shall be deemed received at the time indicated by the telecommunications equipment (e.g., facsimile machine or computer) receiving the materials. The Exchange, in its sole and absolute discretion, reserves the right to reject or accept any material that is not received within the time parameters specified herein. All times stated in this rule and related Interpretive Material are Eastern Time.

(2) The Exchange shall provide affected parties with prompt notice of determinations under this Rule via facsimile machine, electronic mail, or telephone (including voicemail); provided, however, that if an officer nullifies or modifies a large number of transactions pursuant to paragraph (b), the Exchange may instead provide notice to parties via Exchange telecommunications protocols, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

#### **(e) Fees**

##### **(1) Filing Fees**

No fee shall be assessed to a member for filing two or fewer unsuccessful clearly erroneous complaints pursuant to paragraph (a)(2) during a calendar month. A member shall be assessed a fee of \$250.00 for each additional unsuccessful complaint filed thereafter during the calendar month. An unsuccessful complaint is one in which the Exchange does not break any of the trades included in the complaint. Each security filed on is considered a separate complaint. In cases where the member files on multiple securities at the same time, the Exchange calculates the fee separately for each security depending upon whether the Exchange breaks any trades filed on by the member in that security. Adjustments or voluntary breaks negotiated by the Exchange to trades executed at prices that meet the percentage thresholds in IM-11890-4 count as breaks by the Exchange for purposes of this paragraph. A member for purposes of this paragraph (e)(1) is defined by each unique broker Web CRD Number. All MPIDs associated with that Web CRD Number shall be included when calculating the number of unsuccessful clearly erroneous complaints for that member during the calendar month. No fee pursuant to this paragraph (e)(1) shall be assessed for a complaint that is (A) successful, where the final decision by the Exchange (including after appeal, if any) is to break at least one of the trades filed on by the member, (B) not timely filed under the parameters in paragraph (a)(2)(A), (C) withdrawn by the complainant within five (5) minutes of filing and before the Exchange has performed any substantial work on the complaint, or (D) adjudicated by the Exchange on its own motion under Rule 11890(b).

(2) Appeal Fees

The party initiating an appeal shall be assessed a \$500.00 fee if the MORC upholds the decision of the Exchange official.

(3) Fees Charged By Another Market Center

In instances where the Exchange, on behalf of a member, requests a determination by another market center that a transaction is clearly erroneous, the Exchange will pass any resulting charges through to the relevant member.

**(f) Definitions**

For purposes of this Rule and related Interpretive Material:

(1) "Inside Price" means:

(A) for a transaction to buy (sell) a Nasdaq Security, the best offer (best bid) in Nasdaq at the time that the first share of an order or the first share of a series of orders that resulted in disputed transactions was executed;

(B) for a transaction to buy (sell) an Exchange Security, the best offer (best bid) in the Exchange at the time that the first share of an order or the first share of a series of orders that resulted in disputed transactions was executed; and

(C) for a transaction to buy (sell) an Other Security, the national best offer (best bid) at the time that the first share of an order or the first share of a series of orders that resulted in the disputed transactions was executed.

(2) "Nasdaq Security" means a security for which transaction reports are disseminated under the Nasdaq UTP Plan.

(3) "Exchange Security" means a security listed on the Exchange for which transaction reports are disseminated under the Consolidated Tape Association Plan.

(4) "Other Security" means a security that is not listed on the Exchange for which transaction reports are disseminated under the Consolidated Tape Association Plan.

(5) "Outlier Transaction" means a transaction that:

(A) is executed at a price that meets the following parameters:

(i) in the case of a transaction for a Nasdaq Security or an Exchange Security that is executed during the Regular Session, the price is 50% or more away from the Inside Price;

(ii) in the case of a transaction for an Other Security executed during the Regular Session after the Primary Market has posted its first two-sided quote, the price is 50% or more away from the Inside Price;

(iii) in the case of a transaction for any security that is executed outside of the Regular Session, or an Other Security executed during the Regular Session before the Primary Market has posted its first two-sided quote, the price is 50% or more away from the closing price of the security in the most recent Regular Session; and

(B) the loss value of all transactions at issue in the complaint exceeds \$10,000. The loss value is measured by multiplying the number of shares by the difference between the execution price and price with which the execution price is compared under paragraph (e)(4)(A).

(6) "Primary Market" means:

(A) for a Nasdaq Security, the Nasdaq Market Center

(B) for an Exchange Security, the NASDAQ OMX BX Equities Market,  
and

(C) for an Other Security, the market designated as the primary market under the Consolidated Tape Association Plan.

(7) "Regular Session" means the primary trading session for a particular security on its Primary Market, which is generally 9:30 a.m. through 4:00 or 4:15 p.m.

### **IM-11890-1. Refusal to Abide by Rulings of a the Exchange Official or the MORC**

It shall be considered conduct inconsistent with just and equitable principles of trade for any member to refuse to take any action that is necessary to effectuate a final decision of an Exchange official or the MORC under Rule 11890.

### **IM-11890-2. Review by Panels of the MORC**

For purposes of Rule 11890 and other Equity Rules that permit review of the Exchange decisions by the MORC, a decision of the MORC may be rendered by a panel of the MORC. In the case of a review of a determination by an Exchange official under Rule 11890(a)(2)(D) that a transaction is not eligible for review (including a review of the sufficiency of allegations contained in an appeal regarding such a determination), the panel may consist of one or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member whose revenues from market making activity exceed ten percent of its total revenues. In all other cases, the panel shall consist of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are

directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues.

### **IM-11890-3. Application of Rule 11890(a)(2)(C)**

The following example is intended to assist market participants in understanding the minimum price deviation thresholds in paragraph (a)(2)(D) and their effect on the eligibility of transactions for review under Rule 11890.

ABCD, an Exchange Security, has an Inside Price of (bid) \$12.00 – \$12.05 (ask). Market Maker A (MMA) enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order 'sweeps' the Exchange Market Center order file, which reflects 1,000 shares of liquidity offered at each of ten prices ranging from \$12.05 to \$12.95. Executions occur, moving through the depth of file, as follows:

Trade #1 — 1000 shares @ \$12.05 (9000 remaining)

Trade #2 — 1000 shares @ \$12.10 (8000 remaining)

Trade #3 — 1000 shares @ \$12.15 (7000 remaining)

Trade #4 — 1000 shares @ \$12.25 (6000 remaining)

Trade #5 — 1000 shares @ \$12.35 (5000 remaining)

Trade #6 — 1000 shares @ \$12.45 (4000 remaining)

Trade #7 — 1000 shares @ \$12.55 (3000 remaining)

Trade #8 — 1000 shares @ \$12.65 (2000 remaining)

Trade #9 — 1000 shares @ \$12.90 (1000 remaining)

Trade #10 — 1000 shares @ \$12.95 (complete)

The inside offer at the time the first share of the order was executed is \$12.05, so the minimum price deviation threshold is determined using the following formula:  $\$0.40 + (0.06 \times (\text{Inside Price} - \$5.00)) = \$0.40 + (0.06 \times (\$12.05 - \$5.00)) = \$0.82$ . Thus, to be eligible for review, a transaction must be at a price that is at least \$0.82 higher than the original best offer price (i.e.,  $\$12.05 + \$0.82 = \$12.87$ ). MMA could petition for review of trades #9 and #10, priced at \$12.90 and \$12.95 respectively, but trades #1 through #8 would not be eligible for review. The sole basis for an appeal to the MORC of the determination that trades #1 through #8 are not eligible for review would be an assertion of a mistake of material fact. For example, an appeal could be based upon an assertion that the Exchange official had made an arithmetical error in determining the minimum price deviation threshold, or had erred in determining the applicable inside price.

### **IM-11890-4 Clearly Erroneous Transaction Guidance for Filings under Rule 11890(a) and Single Stock Events under Rule 11890 (b)**

The Exchange is providing the following guidance on how it considers:

- all complaints filed by market participants under Rule 11890(a); and
- most events involving a single security considered on the Exchange's own motion pursuant to Rule 11890(b).

The Exchange generally considers a transaction to be clearly erroneous when the print is substantially inconsistent with the market price that existed at the time of execution of the first share of one or a series of orders that resulted in disputed transactions. The Exchange would not consider a trade clearly erroneous, and therefore would not break or modify it, if it was priced within a range of the preceding market price, as described in detail below. In making such a determination, the Exchange takes into account the circumstances at the time of the transaction, the maintenance of a fair and orderly market, and the protection of investors and the public interest. Participants in the Exchange are responsible for ensuring that the appropriate price and type of order are entered into the Exchange's systems. Simple assertion by a firm that it made a mistake in entering an order or a quote, or that it failed to pay attention or to update a quote, may not be sufficient to establish that a transaction was clearly erroneous.

#### **Numerical factors for review**

The Exchange primarily considers the execution price of a trade in determining whether it is clearly erroneous, and breaks trades that are more than a specified percentage away from a Reference Price that is indicative of prior market conditions. The range away from a Reference Price beyond which trades may be broken is referred to as the Numerical Threshold. As a corollary to this policy, the Exchange does not break trades that are at the Numerical Threshold or between the Reference Price and the Numerical Threshold, as set forth in the chart below.

<b><u>Execution Price</u></b>	<b><u>Numerical Threshold – Regular Session</u></b>	<b><u>Numerical Threshold – Outside Regular Session</u></b>
<u>\$0.20 and under</u>	<u>The minimum threshold required for adjudication under Rule 11890(a)(2)(D)(ii)</u>	<u>The minimum threshold that would be required for adjudication under Rule 11890(a)(2)(D)(ii) if it were applicable outside of the Regular Session</u>
<u>Over \$0.20 and up to \$1.75</u>	<u>The minimum threshold required for adjudication under Rule 11890(a)(2)(D)(ii)</u>	<u>20%</u>
<u>Over \$1.75 and up to \$25</u>	<u>10%</u>	<u>20%</u>
<u>Over \$25 and up to \$50</u>	<u>5%</u>	<u>10%</u>
<u>Over \$50</u>	<u>3%</u>	<u>6%</u>

Nasdaq uses Reference Prices based on the time of the trade and the listing venue of the security in order to establish an appropriate comparison point. These Reference Prices are detailed below.

<u>Time of Trade and Listing Venue</u>	<u>Reference Price</u>
<u>Nasdaq Securities and Exchange Securities during Regular Session</u>	<u>Inside Price</u>
<u>Other Securities for trades executed during Regular Session and after Primary Market has posted first two-sided quote</u>	<u>Inside Price</u>
<u>Other Securities for trades executed during Regular Session and before Primary Market has posted first two-sided quote</u>	<u>Inside Price. If the Inside Price does not appear substantially related to the market, the Exchange may consider other Reference Prices including the opening trade, indication of interest and first two-sided quote in the Primary Market (which may occur after the execution) and the closing price for the prior Regular Session.</u>
<u>Any securities outside of Regular Session</u>	<u>Closing price of security for the last Regular Session on the security's Primary Market. If the closing price does not appear substantially related to the market, the Exchange may consider other Reference Prices, including the prices of other trades in the trading session or the Inside Price.</u>

In unusual circumstances, the Exchange may use a different Reference Price in determining which trades to break. For example, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the best bid (best offer) ("BBO") at relevant times may be used rather than a Reference Price based solely on the Inside Price.

It may also be necessary to use a higher Numerical Threshold if, after market participants have been alerted to the existence of erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. The Exchange also may use different Numerical Thresholds in events that involve other markets in an effort to coordinate a Numerical Threshold that is consistent across markets.

Finally, the Exchange could break or adjust all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering would all be broken.

### **Additional Factors**

In occasional circumstances, the Exchange may consider additional factors in determining whether a transaction is clearly erroneous (provided the applicable Numerical Threshold is exceeded). These include:

- Material news released for the security
- Suspicious trading activity
- System malfunctions or disruptions
- Locked or crossed markets
- Trading in the security was recently halted/resumed
- The security is an initial public offering
- Volume and volatility for the security
- Stock-split, reorganization or other corporate action
- Validity of consolidated tape trades and quotes and Exchange BBO or Nasdaq BBO comparison to national BBO
- General volatility of market conditions
- Reason for the error

### **Additional Information Concerning Rule 11890(b)**

The Exchange may on its own motion review transactions in any security in the event of:

- A disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by the Exchange and approved by the SEC;
- Extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.

Consequently, Rule 11890(b) is focused on systemic problems that involve large numbers of parties or trades, or market conditions where it would not be in the best interests of the market to proceed under the processes set forth in Rule 11890(a). Sometimes events involving a single security will meet the standards of Rule 11890(b). However, market participants should not assume that Rule 11890(b) will be available where, for example, they failed to file a complaint within the time periods specified in Rule 11890(a). The rule could be available, however, in cases where a trade not eligible for adjudication under Rule 11890(a) nevertheless could present systemic risks if permitted to stand. The guidance set forth in IM-11890-4 applies to many events involving a single security adjudicated pursuant to Rule 11890(b). However, the Exchange may apply the guidance set forth in IM-11890-5 to some events involving a single security, such as some situations where trading activity occurs in multiple market centers and Nasdaq is acting in consultation with other markets.

### **IM-11890-5 Clearly Erroneous Transaction Guidance for Multi-Stock Events**

Nasdaq is providing the following guidance on how it considers multi-stock events adjudicated on Nasdaq's own motion pursuant to Rule 11890(b).

Nasdaq generally considers a transaction to be clearly erroneous when the print is substantially inconsistent with the market price that existed at the time of execution of the first share of one or a series of orders that resulted in disputed transactions. The Exchange would not consider a trade clearly erroneous, and therefore would not break or modify it, if it was priced within a range of the preceding market price, as described in detail below. In making such a determination, the Exchange takes into account the circumstances at the time of the transaction, the maintenance of a fair and orderly market, and the protection of investors and the public interest. Participants in the Exchange are responsible for ensuring that the appropriate price and type of order are entered into the Exchange's systems. Simple assertion by a firm that it made a mistake in entering an order or a quote, or that it failed to pay attention or to update a quote, may not be sufficient to establish that a transaction was clearly erroneous.

The Exchange may on its own motion review transactions in any security in the event of:

- A disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by the Exchange and approved by the SEC; or
- Extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.

Consequently, Rule 11890(b) is focused on systemic problems that involve large numbers of parties or trades, or market conditions where it would not be in the best interests of the market to proceed under the processes set forth in Rule 11890(a). Even in cases involving multiple securities, however, market participants should not assume that Rule 11890(b) will be available where, for example, they failed to file a complaint within the time periods specified in Rule 11890(a). The rule could be available, however, in cases where a trade not eligible for adjudication under Rule 11890(a) nevertheless could present systemic risks if permitted to stand. The determination of whether to adjudicate an event under Rule 11890(b) is made by the Exchange in its sole discretion pursuant to the terms of the rule.

### **Numerical factors for review**

The Exchange primarily considers the execution prices of the trades in question in determining whether trades should be nullified in a multi-stock event pursuant to Rule 11890(b). The range away from a Reference Price beyond which trades may be broken is referred to as the Numerical Threshold, and is 10% (except in the circumstances described below). As a corollary to this policy, the Exchange does not break trades that are at the Numerical Threshold or between the Reference Price and the Numerical Threshold.



The Exchange uses Reference Prices based on time of the trade in order to establish an appropriate comparison point. These Reference Prices are detailed below.

<u>Time of Trade</u>	<u>Reference Price</u>
<u>All trades executed during the Regular Session after the market opening process</u>	<u>Inside Price</u>
<u>All securities for trades executed:</u> <ul style="list-style-type: none"> <li>▪ <u>outside of the Regular Session</u></li> <li>▪ <u>during the market opening process</u></li> </ul>	<u>The closing price of the security for the Regular Session on the security's Primary Market. If the closing price does not appear substantially related to the market, the Exchange may consider other References Prices, including the prices of other trades in the trading session or the Inside Price.</u>

In unusual circumstances, however, the Exchange may use a different Reference Price in determining which trades to break. For example, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the best bid (best offer) ("BBO") at relevant times may be used rather than a Reference Price based solely on the Inside Price.

It may also be necessary to use a higher Numerical Threshold if, after market participants have been alerted to the existence of erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. The Exchange also may use different Numerical Thresholds in events that involve other markets in order to coordinate a Numerical Threshold that is consistent across markets.

Finally, the Exchange could break or adjust all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering would all be broken.

In occasional circumstances, the Exchange may consider additional factors in determining whether the transactions are clearly erroneous (provided the applicable Numerical Threshold is exceeded). These include:

- Material news released for individual securities
- Suspicious trading activity

The Exchange may also apply the guidance set forth in IM 11890-5 to some events involving a single security, such as some situations where trading activity occurs in multiple market centers and the Exchange is acting in consultation with other markets.

**EXHIBIT 5B**

The text of proposed changes to the Certificate of Incorporation and By-Laws of the Exchange is below. Proposed new language is underlined; proposed deletions are in brackets.

**Restated Certificate of Incorporation of [Boston Stock Exchange,  
Incorporated]NASDAQ OMX BX, Inc.**

**Article First**

The name of the corporation is [Boston Stock Exchange, Incorporated]NASDAQ OMX BX, Inc. (the “Corporation”).

**Article Second – Article Tenth** No change.

\* \* \* \* \*

**By-Laws of [Boston Stock Exchange, Incorporated]NASDAQ OMX BX, Inc.**

**Article I Definitions**

When used in these By-Laws, unless the context otherwise requires, the terms set forth below shall have the following meanings:

(a) – (k) No change.

(l) “Corporation” means [Boston Stock Exchange, Incorporated] NASDAQ OMX BX, Inc.

(m) - (ll) No change.

**Article II – Article XII** No change.

**EXHIBIT 5C**

The text of proposed changes to the Operating Agreement of BSX Group LLC is below. Proposed new language is underlined; proposed deletions are in brackets.

**[BSX GROUP LLC] NASDAQ OMX BX EQUITIES LLC****[FOURTH] FIFTH AMENDED AND RESTATED OPERATING AGREEMENT**

This [FOURTH] FIFTH AMENDED AND RESTATED OPERATING AGREEMENT of NASDAQ OMX BX Equities LLC (the “Company”) is made as of [\_\_\_\_\_] \_\_\_\_\_, 2008 (the “Effective Date”), by and among The NASDAQ OMX Group, Inc., a Delaware corporation (“NASDAQ OMX”)[, the Boston Stock Exchange, Incorporated] and NASDAQ OMX BX, Inc., a Delaware corporation (“BX”) and wholly-owned subsidiary of NASDAQ OMX [(“BSE”), and all other Persons who become a party hereto] as the sole Members [of BSX Group LLC (the “Company”) in accordance with the terms hereof]of the Company, for the purpose of recording their agreement regarding the affairs of the Company and the conduct of its business.

**R E C I T A L S**

WHEREAS, [on June 4, 2004 the BSE caused] the Certificate of Formation (as amended, the “Certificate”), attached as [of] Exhibit 1 hereto[, to be] has been filed with the Office of the Secretary of State of the State of Delaware for the purpose of commencing the existence of the Company pursuant to the Act (as defined below) on June 4, 2005, and has been thereafter amended, including to change the name of the Company from “BSX Group LLC” to “NASDAQ OMX BX Equities LLC” and registered agent and office of the Company (each such filing being herein ratified and confirmed);

[WHEREAS, BSE and other Persons formerly Members of the Company formed the Company for the purpose of developing and operating an electronic market as a facility (as defined in Section 3(a)(2) of the Exchange Act) of the BSE for trading U.S. Equities (as defined below), the Boston Equities Exchange (“BeX”);]

[WHEREAS, this Operating Agreement was originally executed on August 15, 2005, an Amended and Restated Operating Agreement was executed on May 26, 2006, a second Amended and Restated Operating Agreement was executed on June 6, 2006, and a third Amended and Restated Operating Agreement was executed on March 13, 2007;]

[WHEREAS, subsequent to the execution of this Agreement, the Company and the BSE executed a Facility Services Agreement dated August 18, 2006, pursuant to the principal terms and conditions set forth in Schedule 4 (the “BSE Facility Services Agreement”), whereby the Company has operated the business of BSE related to the trading of U.S. Equities (the “BSE Equities Business”);]

[WHEREAS, the operations of BeX were discontinued on September 5, 2007, and]

[WHEREAS, BSE entered into an Agreement and Plan of Merger, dated as of October 1, 2007, as amended November 12, 2007 and January 18, 2008, by and among BSE, NASDAQ OMX and Yellow Merger Corporation, a Delaware corporation and wholly-owned subsidiary of NASDAQ OMX (the “Transitory Subsidiary”), pursuant to which the Transitory Subsidiary merged with and into BSE with BSE surviving the merger as a wholly-owned subsidiary of NASDAQ OMX;]

[WHEREAS, Citigroup Financial Strategies Inc., Credit Suisse First Boston Next Fund Inc., LB 1 Group, Inc., Fidelity Global Brokerage Group, Inc., Merrill Lynch L.P. Holdings Inc. and certain individuals (the “Prior Members”) entered into a Purchase and Sale Agreement, dated as of October 1, 2007, as amended November 12, 2007 and January 18, 2008, by and among the Prior Members and NASDAQ OMX (the “Purchase Agreement”), pursuant to which NASDAQ OMX purchased the Prior Members’ equity interests in the Company; and]

[WHEREAS, BSE and NASDAQ OMX desire to amend this Agreement to reflect the admission of NASDAQ OMX as a Member hereof and the withdrawal of the Prior Members pursuant to the Purchase Agreement; and]

[WHEREAS, as a result of the Purchase Agreement and such amendments to this Agreement, BSE and NASDAQ OMX are the sole Members of the Company;]

NOW, THEREFORE, in order to carry out their intent as expressed above and in consideration of the mutual agreements hereinafter contained, the parties hereby agree as follows:

## **Article 1**

### **Definitions**

1.1 Certain Defined Terms: As used in this Agreement, the following capitalized terms have the following meanings:

“Act” means the Delaware Limited Liability Company Act, 6 Del. C. § 18-101, et. seq., as amended and in effect from time to time, and any successor statute.

“Additional Capital Contribution” means any Capital Contribution effected after completion of the Initial Capital Contributions pursuant to Section 7.3 hereof.

“Advisors” means, with respect to any Person, any of such Person’s attorneys, accountants or consultants.

“Affiliate” means, with respect to any Person, any other Person controlling, controlled by or under common control with, such Person. As used in this definition, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise with respect to such Person. A Person is presumed to control any other Person, if that Person: (i) is a director, general partner, or

officer exercising executive responsibility (or having similar status or performing similar functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the Person; or (iii) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the partnership.

“Agreement” means this [~~Fourth~~ Fifth] Amended and Restated Operating Agreement, including all exhibits and schedules hereto, as amended, restated or supplemented from time to time.

“Bankruptcy” has the meaning ascribed thereto in Section 18-304 of the Act.

[“Board” has the meaning set forth in Section 4.1 hereof.]

“[~~BSE~~]BX” has the meaning set forth in the preamble.

“[~~BSE~~]BX Contribution Schedule” shall mean the Contribution Schedule of [~~the BSE~~]BX set forth in Schedule 3.

[“BSE Facility Services Agreement” has the meaning set forth in the recitals hereto.]

[“BeX” has the meaning set forth in the recitals hereto.]

“Capital Account” means a separate account maintained for each Member in the manner described in this paragraph, which is intended to comply and be interpreted and applied consistent with the Treasury Regulations under §704(b) of the Code. There shall be credited to each Member’s Capital Account (i) its Capital Contributions; (ii) the share of income and gain of the Company allocated to the Member pursuant to Section 10.1 hereof (including the Member’s share of any income and gains of the Company exempt from U.S. federal income tax); (iii) the amount of any liabilities of the Company that are assumed by such Member or that are secured by any property distributed to such Member by the Company; and (iv) any other items required by Treasury Regulations §1.704-1(b)(2)(iv). There shall be charged against each Member’s Capital Account (i) the amount of cash and the fair market value of property distributed to it from the Company; (ii) the share of losses and deductions of the Company allocated to the Member pursuant to Section 10 hereof (including the Member’s share of any expenditures of the Company not deductible or properly chargeable to capital accounts for U.S. federal income tax purposes); (iii) the amount of any liabilities of such Member that are assumed by the Company or that are secured by any property contributed by such Member to the Company; and (iv) any other items required by Treasury Regulations § 1.704-1 (b)(2)(iv). In connection with the maintenance of Capital Accounts for the Members, [~~the Board~~]NASDAQ OMX may make adjustments consistent with Treasury Regulations §1.704-1(b)(2)(iv)(f) upon the occurrence of any event described in subparagraph (5) of such Regulations. The Members’ Capital Accounts shall be further adjusted in accordance with Treasury Regulations § 1.704-1 (b)(2)(iv)(g) in the event of a

reevaluation of the Company property pursuant to Treasury Regulations § 1.704-1 (b)(2)(iv)(f), or if required by Treasury Regulations § 1.704-1 (b)(2)(iv)(d)(3).

“Capital Contribution” means the amount of cash and the fair market value of all property (net of any liability secured by such property that the Company is considered to assume, or take subject to Section 752 of the Code) and/or services contributed to the Company by a Member in its capacity as such at any point in time, including any Additional Capital Contributions. All such amounts contributed shall be reflected on the books and records of the Company.

“Certificate” has the meaning set forth in the recitals hereto.

“Code” means the United States Internal Revenue Code of 1986, as amended and in effect from time to time.

“Company” has the meaning set forth in the preamble.

“Company Minimum Gain” means partnership minimum gain with respect to the Company, as determined under Treasury Regulations § 1.704-2(d).

“Confidential Information” means any confidential or proprietary information of the Company[, including any confidential or proprietary information conveyed to the Company pursuant to this Agreement or any Related Agreements].

[“DGCL” has the meaning set forth in Section 4.2(b) hereof.]

[“Directors” has the meaning set forth in Section 4.1(a) hereof. Each Director shall be a “manager” within the meaning of the Act.]

[“Disclosing Member” has the meaning set forth in Section 16.3 hereof.]

“Distributable Cash” has the meaning set forth in Section 9.1 hereof.

“Effective Date” means the date hereof.

[“Excess Units” means the Units owned by a Person, either alone or with its Affiliates, in excess of 20% of all Units then issued and outstanding.]

“Exchange Act” shall mean the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder.

“Facility” shall have the meaning set forth in Section 3(a)(2) of the Exchange Act.

“Fiscal Year” has the meaning set forth in Section 12.3 hereof.

“Funding Date” shall mean any date on which a Member provides a Capital Contribution or Additional Capital Contribution [including the Initial Funding Date].

“Government Authority” means any federal, national, state, municipal, local, foreign, territorial, provincial or other governmental department, commission, board, bureau, agency, regulatory authority, instrumentality, judicial or administrative body, domestic or foreign.

“Indemnitees” has the meaning set forth in Section 14.1 hereof.

“Initial Capital Contributions” has the meaning set forth in Section 7.1.

[“Initial Funding Date” shall mean the date which is thirty (30) days following August 18, 2005.]

“Liquidator” has the meaning set forth in Section 11.1(b) hereof.

“Member” means NASDAQ OMX and BX [each Person admitted and named as a Member on Schedule 2 hereto, and any Person admitted to the Company as an additional or substitute member of the Company as provided by this Agreement], in each such Person’s capacity as a member of the Company. [For the avoidance of doubt, a transferee or an assignee (including, without limitation, the personal representatives (as defined in the Act) of a Member) of a limited liability company interest in the Company shall not be a member of the Company, and no transferee or assignee, except as otherwise specifically provided in this Agreement with respect to BSE, other than a duly admitted member of the Company, shall have any right whatsoever to vote or consent to any action with respect to the Company, and shall not be entitled to exercise any rights of Members held by such Members by virtue of their admission to the Company as members of the Company, whether any such rights arise under this Agreement, the Act or other applicable law, unless and until such transferee or assignee is admitted to the Company as a member of the Company in accordance with the provisions of this Agreement.]

[“Member Entities” has the meaning set forth in Section 5.7 hereof.]

[“Member Information” has the meaning set forth in Section 16.3 hereof.]

“Member Nonrecourse Deductions” means partner nonrecourse deductions with respect to a Member, as determined under Treasury Regulations § 1.704-2(i)(2).

“Member Nonrecourse Debt Minimum Gain” means partner nonrecourse debt minimum gain with respect to a Member, within the meaning of Treasury Regulations § 1.704-2(i)(2).

“Nonrecourse Debt” means a liability of the Company as to which no Member bears the economic risk of loss as determined under Treasury Regulations § 1.752-2 (including a liability of an entity owned by the Company to the extent such liability is treated as a liability of the Company for U.S. federal income tax purposes and no other owner of such entity bears the economic risk of loss as determined under Treasury Regulations § 1.752-2).

“Nonrecourse Deductions” shall have the meaning as set forth in Treasury Regulations §1.704-2(b)(1) and the amount for the partnership year shall be determined in accordance with the rules of Treasury Regulations § 1.704-2(c).

[“Ownership Concentration Limit” has the meaning set forth in Section 8.3(a) hereof.]

“Officers” has the meaning set forth in Section 5.1 hereof.

“Percentage Interest” with respect to a Member or Person means the ratio of the number of Units held by the Member or Person to the total of all of the issued Units, expressed as a percentage and determined with respect to each class of Units, whenever applicable.

“Person” shall mean an individual, corporation, association, general or limited partnership, organization, business, firm, limited liability company, joint venture, trust, estate, or other entity, association or organization, whether constituting a legal entity or not.

[“Regulatory Services Provider” shall mean the BSE.]

[“Related Agreements” means the BSE Facility Services Agreement and any other agreement among or between any of the Members and the Company, or to which the Members or the Company are otherwise parties, in all cases necessary for the conduct of the business of the Company.]

“Regulatory Funds” means fees, fines, or penalties derived from the regulatory operations of the Company. “Regulatory Funds” shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the Company, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Company.

“SEC” means the United States Securities and Exchange Commission.

[“Self-Regulatory Organization” shall have the meaning set forth in the Exchange Act.]

[“Senior Executive” has the meaning set forth in Section 4.7 hereof.]

“Tax Amount” of a Member for a fiscal year or other period shall mean the product of (a) the Member’s Tax Rate for such fiscal year or other period, and (b) the Member’s Tax Amount Base for such fiscal year or other period, and shall be reduced by (c) any United States federal, state or local income tax credits allocated to the Member by the Company for such fiscal year or other period, all as estimated in good faith by [the Board] NASDAQ OMX.

“Tax Amount Base” of a Member for a fiscal year or other period shall mean the taxable income (for U.S. federal income tax purposes) allocated to the Member by the



Company for such fiscal year or other period; provided that such taxable income shall be computed (i) without regard to the application of §704 (c) of the Code with respect to any variation between the fair market value and tax basis of any assets at the time such assets were contributed to the Company and (ii) without regard to any taxable income or loss recognized by a Member (other than through its distributive share of income or gain of the Company) in connection with the dissolution, initial public offering, sale of substantially all equity or assets of the Company or any similar event.

“Tax Rate” of a Member for a fiscal year or other period shall mean the highest effective marginal combined United States federal, state and local income tax rate applicable during such fiscal year to business entities of the same type as the Member that do business exclusively in the Commonwealth of Massachusetts, giving proper effect to the federal deduction for state and local income taxes and taking into account any special tax rates (such as special capital gains tax rates) applicable to any portion or portions of the Member’s Tax Amount Base.

[“Total Votes” has the meaning set forth in Section 5.8 hereof.]

[“Transfer” has the meaning set forth in Section 8.1(a) hereof.]

[“Transferee” means a third party or another Member to which a Transferring Member proposes to transfer Units.]

[“Transferring Member” means a Member that desires to, directly or indirectly, whether voluntarily, by operation of law, or otherwise, Transfer all or any portion of the Units owned, directly or indirectly, by such Member.]

“Treasury Regulations” means the regulations promulgated under the Code, as amended and in effect from time to time.

“Units” shall mean equal units of limited liability company interest in the Company, including an interest in the ownership and profits and losses of the Company and the right to receive distributions from the Company as set forth in this Agreement. For the avoidance of doubt, the ownership or possession of Units shall not in and of itself entitle the owner or holder thereof to vote or consent to any action with respect to the Company (which rights, except as otherwise specifically provided in this Agreement with respect to [BSE]BX, shall be vested in only duly admitted members of the Company), or to exercise any right of a member of the Company under this Agreement, the Act or other applicable law.

“Unpermitted Deficit” has the meaning set forth in Section 10.3 hereof.

“U.S. Equities” means equity securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan, and NASD’s Over-The-Counter Bulletin Board equity securities.

## 1.2 Other Definitions

The words “include,” “includes,” and “including” where used in this agreement are deemed to be followed by the words “without limitation.”

Any reference to “Dollars” or “\$” in this Agreement refers to U.S. Dollars.

Except as otherwise provided in this Agreement or unless the context otherwise clearly requires, (a) terms used in this Agreement that are defined in the Act will have the meaning set forth in the Act; (b) all references in this Agreement to one gender also include, where appropriate, the other gender; (c) the singular includes the plural and the plural includes the singular; and (d) references in this Agreement to the preamble, Sections, Schedules, and Exhibits shall be deemed to mean the preamble and sections of, and schedules and exhibits to, this Agreement.

## Article 2

### Organization

2.1 Formation and Continuation of Company. Each of the parties hereto hereby (a) ratifies the formation of the Company as a limited liability company under the Act, the execution of the Certificate (and each amendment thereto as of the date hereof) and the filing of the Certificate (and each amendment thereto as of the date hereof) in the Office of the Secretary of State of the State of Delaware and (b) agrees that the rights, duties and liabilities of the Members shall be as provided in the Act, except as otherwise provided herein. The name of the Company shall be [BSX Group]NASDAQ OMX BX Equities LLC.

2.2 Principal Office; Registered Agent and Office. The principal place of business of the Company shall be at One Liberty Plaza, New York, New York 10006 or such location as shall be determined from time to time by BX. [located at 100 Franklin Street, Boston, MA 02110. The Board] BX may, at any time, change the name or the principal place of business of the Company and shall give notice thereof to the Members. The registered agent for service of process on the Company in the State of Delaware required to be maintained by § 18-104 of the Act shall be The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801 and the registered office of Company in the State of Delaware shall be c/o The Corporation Trust Company at the same address. [The Board] BX may at any time change the registered agent of the Company or the location of such registered office and shall give notice thereof to the Members.

2.3 Term. The legal existence of the Company shall be perpetual, unless the Company is sooner dissolved as a result of an event specified in the Act or pursuant to a provision of this Agreement.

2.4 Interest of Members; Property of Company. Units held by a Member shall be personal property for all purposes. All real and other property owned by the Company shall be deemed the Company’s property owned by the Company as an entity, and no Member, individually, shall own any such property. The name and mailing address of

each Member and the number and class of Units held by each and the Percentage Interest represented thereby shall be as listed on Schedule 2 attached hereto. [The Board] BX shall be required to update said Schedule 2 from time to time as necessary to accurately reflect the information contained therein upon (i) a Member ceasing to be a member of the Company, (ii) the admission of a new Member or (iii) any change in the number or class of Units owned by a Member, in each case pursuant to the terms and conditions specified in this Agreement.

## 2.5 The Units.

(a) Except as otherwise provided in this Agreement, all Units are identical to each other and accord the holders thereof the same obligations, rights and privileges as are accorded to each other holder thereof. Except as otherwise provided in this Agreement, the Company will not subdivide or combine any Units, or make or pay any distribution on any Units, or accord any other payment, benefit or preference to any Units, except by extending such subdivision, combination, distribution, payment, benefit or preference equally to all Units.

(b) Units have no par value. To the extent that any Units must be cancelled or any Units shall be issued, the amount of such Units shall be rounded to the nearest whole number, to the extent feasible, as determined by [the Board] BX.

2.6 Intent. It is the intent of the Members that the Company (a) shall always be operated in a manner consistent with its treatment as a partnership for United States federal income tax purposes (and, to the extent possible, for state income tax purposes within the United States), and (b) to the extent not inconsistent with the foregoing clause (a), shall not be operated or treated as a partnership for purposes of §303 of the Federal Bankruptcy Code (11 U.S.C. §303). Neither the Company nor any Member shall take any action inconsistent with the express intent of the parties hereto as set forth in the immediately preceding sentence.

2.7 Article 8 Opt-In. Each limited liability company interest in the Company (including the Units) shall constitute a “security” within the meaning of (i) Article 8 of the Uniform Commercial Code (including Section 8-102(a)(15) thereof) as in effect from time to time in the State of Delaware (the “Delaware UCC”) and (ii) the Uniform Commercial Code of any other applicable jurisdiction that now or thereafter substantially includes the 1994 revisions to Article 8 thereof as adopted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on February 14, 1995 (each, an “Other State UCC”). For all purposes of Article 8 of the Delaware UCC and any Other State UCC, Delaware law shall constitute the local law of the Company’s jurisdiction in the Company’s capacity as the issuer of Units.

## 2.8 Certificates.

(a) All Units shall be represented by one or more certificates (a “Unit Certificate”) issued to the registered owner of such Units by the Company. Each such

Unit Certificate shall be denominated in terms of the number and class of Units in the Company evidenced by such Unit Certificate and shall be signed by at least one officer of the Company on behalf of the Company. Within fourteen (14) days of a Funding Date, the Company shall issue to each Person one or more Unit Certificates in the name of such Person to represent the Units owned by such Person as of the date hereof.

(b) Upon the issuance of additional Units in the Company to any Person in accordance with the provisions of this Agreement, the Company shall issue to such Person one or more Unit Certificates in the name of such Person. Each such Unit Certificate shall be denominated in terms of the class and number of Units in the Company evidenced by such Unit Certificate and shall be signed by at least one officer of the Company on behalf of the Company.

(c) The Company shall issue a new Unit Certificate in place of any Unit Certificate previously issued if the registered owner of the Units represented by such Unit Certificate, as reflected on the books and records of the Company:

(i) makes proof by affidavit, in form and substance satisfactory to [the Board]BX in its sole discretion, that such previously issued Unit Certificate has been lost, stolen or destroyed;

(ii) requests the issuance of a new Unit Certificate before the Company has notice that such previously issued Unit Certificate has been acquired by a protected purchaser;

(iii) if requested by [the Board]BX in its sole discretion, delivers to the Company a bond, in form and substance satisfactory to [the Board]BX in its sole discretion, with such surety or sureties as the Board in its sole discretion may direct, to indemnify the Company against any claim that may be made on account of the alleged loss, destruction or theft of the previously issued Unit Certificate; and

(iv) satisfies any other reasonable requirements imposed by [the Board]BX.

(d) Upon the Transfer in accordance with the provisions of this Agreement by any Person of any or all of its Units represented by a Unit Certificate, such Person shall deliver such Unit Certificate to the Company for cancellation (endorsed thereon or endorsed on a separate document), and any officer of the Company shall thereupon cause to be issued a new Unit Certificate to such Person's permitted transferee or such Person, as applicable, for the class and number of Units being transferred or converted and, if applicable, cause to be issued to such Person a new Unit Certificate for that class and number of Units that were represented by the canceled Unit Certificate and that are not being transferred or converted; provided, however, the Company shall have no duty to register the Transfer unless the requirements of Section 8-401 of the Delaware UCC are satisfied.

(e) Legends.

(i) Each Unit Certificate issued by the Company shall include the following legend:

“THE RIGHTS, POWERS, PREFERENCES, RESTRICTIONS (INCLUDING TRANSFER RESTRICTIONS) AND LIMITATIONS OF THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED BY THIS CERTIFICATE ARE SET FORTH IN, AND THIS CERTIFICATE AND THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED HEREBY ARE ISSUED AND SHALL IN ALL RESPECTS BE SUBJECT TO, THE TERMS AND PROVISIONS OF, THE [FOURTH]FIFTH AMENDED AND RESTATED OPERATING AGREEMENT OF [BSX GROUP]NASDAQ OMX BX EQUITIES LLC (THE “COMPANY”), DATED AS OF [\_\_\_\_\_] \_\_\_\_\_, 2008, AS THE SAME MAY BE AMENDED AND/OR RESTATED FROM TIME TO TIME (THE “AGREEMENT”). THE TRANSFER, SALE, ALIENATION, ASSIGNMENT, EXCHANGE, PARTICIPATION, SUBPARTICIPATION, ENCUMBRANCE, OR DISPOSITION IN ANY MANNER, WHETHER DIRECT OR INDIRECT, VOLUNTARY OR INVOLUNTARY, BY OPERATION OF LAW OR OTHERWISE, OF THIS CERTIFICATE AND THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED HEREBY ARE RESTRICTED AS DESCRIBED IN THE AGREEMENT. THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED BY THIS CERTIFICATE MAY NOT BE SOLD, ASSIGNED OR TRANSFERRED BY THE HOLDER HEREOF UNLESS SUCH SALE, ASSIGNMENT, OR TRANSFER HAS BEEN FILED WITH AND APPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION UNDER SECTION 19 OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, AND THE RULES PROMULGATED THEREUNDER.”

EACH LIMITED LIABILITY COMPANY INTEREST REPRESENTED HEREBY SHALL CONSTITUTE A “SECURITY” WITHIN THE MEANING OF (I) ARTICLE 8 OF THE UNIFORM COMMERCIAL CODE (INCLUDING SECTION 8-102(A)(15) THEREOF) AS IN EFFECT FROM TIME TO TIME IN THE STATE OF DELAWARE (THE “DELAWARE UCC”) AND (II) THE UNIFORM COMMERCIAL CODE OF ANY OTHER APPLICABLE JURISDICTION THAT NOW OR HEREAFTER SUBSTANTIALLY INCLUDES THE 1994 REVISIONS TO ARTICLE 8 THEREOF AS ADOPTED BY THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND APPROVED BY THE AMERICAN BAR ASSOCIATION ON FEBRUARY 14, 1995 (EACH, AN “OTHER STATE UCC”). FOR ALL PURPOSES OF ARTICLE 8 OF THE DELAWARE UCC AND ANY OTHER STATE UCC, DELAWARE SHALL CONSTITUTE THE LOCAL LAW OF THE COMPANY’S JURISDICTION IN THE COMPANY’S CAPACITY AS THE ISSUER OF THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED HEREBY.”

(ii) In addition, unless counsel to the Company has advised Company that such legend is no longer needed, each Unit Certificate shall bear a legend in substantially the following form:

“THE LIMITED LIABILITY COMPANY INTERESTS REPRESENTED HEREBY HAVE NOT BEEN REGISTERED PURSUANT TO THE SECURITIES ACT OF 1933, AS AMENDED (THE “ACT”), OR ANY STATE SECURITIES LAWS, AND SUCH SECURITIES MAY NOT BE SOLD, TRANSFERRED OR OTHERWISE DISPOSED OF UNLESS THE SAME ARE REGISTERED AND QUALIFIED IN ACCORDANCE WITH THE ACT AND ANY APPLICABLE STATE SECURITIES LAWS, OR IN THE OPINION OF COUNSEL REASONABLY SATISFACTORY TO THE COMPANY SUCH REGISTRATION AND QUALIFICATION ARE NOT REQUIRED.”

### Article 3

#### **Purposes and Powers**

3.1 Purposes. [The purpose of the Company is to develop, own and operate the BSE Equities Business and to engage in any and all activities necessary, convenient, desirable or incidental to the foregoing, including, without limitation, acquiring, holding, managing, operating and disposing real and personal property. The Company shall not engage in any other business or activity except as approved in accordance with Section 4.4(b)(ix) hereof.] The Company is formed for the object and purpose of, and the nature of the business to be conducted and promoted by the Company is, engaging in any lawful act or activity for which limited liability companies may be formed under the Act and engaging in any and all activities necessary or incidental to the foregoing. Without limiting the generality of the foregoing, the nature of the business or purposes to be conducted and promoted shall include (i) supporting the operation, regulation, and surveillance of a cash equities market operated by the Company, (ii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removing impediments to and perfecting the mechanisms of a free and open market and a national market system, and, in general, protecting investors and the public interest, (iii) supporting the various elements of the national market system pursuant to Section 11A of the Exchange Act and the rules thereunder, (iv) fulfilling the self-regulatory responsibilities of the Company and the Members as set forth in the Exchange Act, and (v) supporting such other initiatives as the Members may deem appropriate.

3.2 [Role of BSE. Pursuant to the BSE Facility Services Agreement and the BSE Contribution Schedule, BSE will provide SEC approved Self-Regulatory Organization services and status as the regulatory framework for the Company and the BSE Equities Business. As the Regulatory Services Provider, BSE will have the sole regulatory responsibility for the activities of the Company and the BSE Equities Business. BSE will also provide certain administrative services as agreed by the Company and BSE.] Powers. The Company, and BX and the Officers of the Company

on behalf of the Company, (i) shall have and exercise all powers necessary, convenient or incidental to accomplish its purposes as set forth in Section 3.1 and (ii) shall have and exercise all of the powers and rights conferred upon limited liability companies formed pursuant to the Act.

## Article 4

### ~~[Governance]~~Management

4.1 [Board of Directors.] Management by BX. In accordance with Section 18-402 of the Act, management of the Company shall be vested in BX. BX shall have the power to do any and all acts necessary, convenient or incidental to or for the furtherance of the purposes described herein, including all powers, statutory or otherwise, possessed by members of a limited liability company under the laws of the State of Delaware. BX has the authority to bind the Company. BX may delegate any of its powers as permitted by the Act. Notwithstanding any other provision of this Agreement (but subject to Section 4.2), BX is authorized to execute and deliver any document on behalf of the Company without any vote or consent of any other Person.

[(a) The Members shall establish a Board of Directors of the Company (the “Board” or “Directors”) to implement this Agreement. The Board shall be comprised of from five (5) to fifteen (15) Directors, and shall initially consist of five (5) Directors. Except as otherwise specifically provided in this Agreement, the Board will manage the development, operations, business and affairs of the Company, without the need for any approval of any Member or other Person.]

[(b) BSE shall be entitled to designate all of the Directors. Each Director shall serve at the pleasure of BSE and may from time to time be replaced by BSE. The Board shall terminate a Director: (i) in the event such Director has violated any provision of this Agreement or any federal or state securities law; or (ii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors. If a Director is terminated pursuant to this subsection (b), BSE shall have the right to appoint a replacement.]

[(c) In the event that a Director has not been designated or is unable to attend or participate in any meeting of the Board or any committee thereof, the Member that designated or has the right to designate such Director may appoint an individual to attend such meetings and to participate in the deliberations of such meetings. Such individual will not be permitted to vote on behalf of the Member, nor will such individual be considered an attendee of any meetings for the purposes of constituting a quorum.]

4.2 [Authority and Duties of Board; Committees.] Member Conduct. The Company, and to the extent that they relate to the Company, the Members, shall comply with the federal securities laws and the rules and regulations thereunder; shall cooperate with the SEC and BX pursuant to its regulatory authority and the provisions of this

Agreement; and shall engage in conduct that fosters and does not interfere with the Company's ability: 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.

[(a) Authority and Conduct. The Board shall have the specific authority delegated to it pursuant to this Agreement. Each Director agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the SEC and the BSE pursuant to their regulatory authority and the provisions of this Agreement. Furthermore, each Director shall take into consideration whether his or her actions as a Director would cause BSX to engage in conduct that fosters and does not interfere with the Company's ability to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.]

[(b) Duties of Board. Without limiting the general duties and authority of the Board as set forth in this Article 4, except as otherwise provided in this Agreement, the Board shall have all of the powers of the Board of Directors of a corporation organized under the General Corporation Law of the State of Delaware, as from time to time in effect (the "DGCL"), including the power and responsibility to manage the business of the Company, select and evaluate the performance of the Senior Executive, and establish and monitor capital and operating budgets.]

[(c) Executive Committee. There may be an executive committee of the Board consisting of at least one or more Directors, such executive committee to be formed by resolution passed by the Board. The act of a majority of the members of such committee shall be the act of the committee. Said committee may meet at stated times or on notice to all members of such committee, and shall have and may exercise all powers of the Board in the management of the business affairs of the Company. Vacancies in the membership of the committee shall be filled by the Board in accordance with this Section 4.2(c) at a regular meeting or at a special meeting of the Board called for that purpose.]

[(d) Other Committees. The Board may also designate one or more committees in addition to the executive committee, by resolution or resolutions passed by a majority of the whole Board.]

[(e) Substitute Committee Member; Minutes. In the absence or on the disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint, in accordance with the provisions of this Section 4.2, another individual to act at the meeting in the place of such absent or disqualified



member. All committees shall keep regular minutes of its proceedings and report the same to the Board as may be required by the Board.]

[4.3 (a) Meetings. The Board will meet as often as the members thereof deem necessary, but not less frequently than every three (3) months. Meetings may be conducted in person or by telephone or in any other manner agreed to by the Board. Any Director may call a meeting of the Board upon fourteen (14)-calendar days prior written notice. In any case where the convening of a meeting of Directors is a matter of urgency, notice of such meeting may be given not less than forty-eight (48) hours before such meeting is to be held. No notice of a meeting shall be necessary when all members of the Board are present. A majority of the Board shall constitute a quorum for purposes of any meeting of the Board. Except as may otherwise be provided by this Agreement, each of the Directors will be entitled to vote on any action to be taken by the Board, except that the Senior Executive (if a Director) shall not be entitled to vote on matters relating to his or her powers, compensation or performance.]

[(b) All quorum and voting requirements shall be adjusted accordingly for the suspension of any Member made pursuant to Sections 5.8 or 8.2(f). Any Director shall be entitled to vote the votes allocated to another Director after having received such Director's proxy in writing. Meetings of the Board may be attended by other representatives of the Members and other persons related to the Company as agreed to from time to time by the Board and as otherwise specified in this Agreement. Any action required or permitted to be taken at a meeting of the Board or any committee thereof may be taken without a meeting if (i) all members of the Board or committee consent to voting on such action without a meeting, and (ii) written consents, setting forth the action so taken, are executed by the members of the Board or committee, as the case may be, representing the minimum number of votes that would be necessary to authorize or to take such action at a meeting at which all members of the Board or committee, as the case may be, permitted to vote were present and voted. The Board will set up procedures relating to the recording of minutes of its meetings.]

[(c) Voting Trusts. Members are prohibited from entering into voting trust agreements with respect to their Units.]

[(d) Standard Voting Requirement. Unless otherwise provided by this Agreement, for purposes of taking any action or voting on any matter coming before the Board, each Director shall have one (1) vote, and any action to be taken by the Board shall be considered effective only if approved by a majority of the Directors entitled to vote on such action.]

[4.4 Special Voting Requirements. Notwithstanding anything contained in this Agreement or the Related Agreements to the contrary, so long as the Company is or operates a facility of BSE, in the event that BSE, in its sole discretion, determines that any action, transaction or aspect of an action or transaction, is necessary or appropriate for, or interferes with, the performance or fulfillment of BSE's regulatory functions, its responsibilities under the Exchange Act or as specifically required by the SEC (collectively, "Regulatory Requirements"), (i) without BSE's affirmative vote no such

action, transaction or aspect of an action or transaction shall be authorized, undertaken or effective, and (ii) BSE shall have the sole and exclusive right to direct that any such required, necessary or appropriate act, as it may determine in its sole discretion, be taken or transaction be undertaken by or on behalf of the Company without regard to the vote, act or failure to vote or act by any other party in any capacity.]

[4.5 Officers. The Board will appoint such officers and agents of the Company, including a Senior Executive, as it shall from time to time deem necessary. Such officers and agents shall have such terms of employment, shall receive such compensation and shall exercise such powers and perform such duties as the Board shall from time to time determine.]

[4.6 Duties of the Chairman of the Board. The Chairman of the Board shall preside at all meetings of the Members and at all meetings of the Board. The Chairman of the Board shall have the general powers and duties of management usually vested in the office of Chairman of the Board of a business corporation organized under the DGCL, and shall have such other duties and responsibilities related to the development of the Company as the Board shall from time to time direct.]

[4.7 Duties of the Senior Executive. Subject to the supervision and direction of the Board, a senior executive (referred to herein as the "Senior Executive") shall have general supervision, direction and control of the business and the officers of the Company. The Senior Executive shall have the general powers and duties of management usually vested in the office of Chief Executive Officer of a business corporation organized under the DGCL, and shall have such other duties and responsibilities related to the Company as the Board shall from time to time direct. The Senior Executive shall be responsible for advising the Board on the status of the Company on a regular basis or more frequently as requested by the Board.]

[4.8 No Management by Members. Except as otherwise expressly provided herein or as requested by the Board, no Member shall take part in the day-to-day management or operation of the business and affairs of the Company. Except and only to the extent expressly provided for in this Agreement and the Related Agreements and as delegated by the Board to committees of the Board or to duly appointed officers or agents of the Company, no Member or other Person other than the Board shall be an agent of the Company or have any right, power or authority to transact any business in the name of the Company or to act for or on behalf of or to bind the Company.]

[4.9 Reliance by Third Parties. Any Person dealing with the Company or the Board may rely upon a certificate signed by the Chairman of the Board, or such other officer of the Company designated by the Board, as to:]

[(a) the identity of the members of the Board or any committee thereof, any officer or agent of the Company or any Member hereof;]

- (b) the existence or non-existence of any fact or facts which constitute a condition precedent to acts by the Board or in any other manner germane to the affairs of the Company;]
- (c) the Persons who are authorized to execute and deliver any agreement, instrument or document of or on behalf of the Company; or]
- (d) any act or failure to act by the Company or any other matter whatsoever involving the Company or any Member.]

## Article 5

### **[Powers, Duties, and Restrictions of the Company and the Members] Officers**

5.1 [Powers of the Company. In furtherance of the purposes set forth in Article 3, and subject to the provisions of Article 4, the Company, acting through the Board (and the Members hereby delegate such authority to the Board), will possess the power to do anything not prohibited by the Act, by other applicable law, or by this Agreement, including but not limited to the following powers: (i) to undertake any of the activities described in Article 3; (ii) to make, perform, and enter into any contract, commitment, activity, or agreement relating thereto; (iii) to open, maintain, and close bank and money market accounts, to endorse, for deposit to any such account or otherwise, checks payable or belonging to the Company from any other Person, and to draw checks or other orders for the payment of money on any such account; (iv) to hold, distribute, and exercise all rights (including voting rights), powers, and privileges and other incidents of ownership with respect to assets of the Company; (v) to borrow funds, issue evidences of indebtedness, and refinance any such indebtedness in furtherance of any or all of the purposes of the Company, to guarantee the obligations of others, and to secure any such indebtedness or guarantee by mortgage, security interest, pledge, or other lien on any property or other assets of the Company; (vi) to employ or retain such agents, employees, managers, accountants, attorneys, consultants and other Persons necessary or appropriate to carry out the business and affairs of the Company, and to pay such fees, expenses, salaries, wages and other compensation to such Persons as the Board shall determine; (vii) to bring, defend, and compromise actions, in its own name, at law or in equity; and (viii) to take all actions and do all things necessary or advisable or incident to the carrying out of the purposes of the Company, so far as such powers and privileges are necessary or convenient to the conduct, promotion, or attainment of the Company's business, purpose, or activities.] In General. Except as provided herein, BX may, from time to time as it deems advisable, select natural persons who are officers of BX and designate them as officers of the Company (the "Officers") and assign titles (including, without limitation, President, Vice President, Secretary and Treasurer) to any such person. Officers of the Company must also be officers of BX. Any number of offices may be held by the same person. BX may appoint such Officers as it shall deem necessary or advisable who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by BX. The salaries of all Officers of the Company shall be fixed by or in the manner prescribed by

BX. The Officers of the Company shall hold office until their successors are chosen and qualified. Any vacancy occurring in any office of the Company shall be filled by BX. Unless otherwise determined by BX, any officer of BX upon designation by BX shall automatically and without any action by any Person be appointed as an Officer of the Company with the same title and powers with respect to the Company as such Officer has with respect to BX.

5.2 [Powers of Members. Except as otherwise specifically provided by this Agreement or required by the Act or by the SEC pursuant to the Exchange Act, no Member shall have the power to act for or on behalf of, or to bind, the Company, and unless otherwise determined by the Board, all Members shall constitute one class or group of members of the Company for all purposes of the Act.] Officers as Agents. The Officers, to the extent of their powers set forth in this Agreement or otherwise vested in them by action of BX not inconsistent with this Agreement, are agents of the Company for the purpose of the Company's business, and the actions of the Officers taken in accordance with such powers shall bind the Company.

5.3 [Member Conduct. The Company and each Member agrees to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the SEC and the BSE pursuant to their regulatory authority and the provisions of this Agreement; and to engage in conduct that fosters and does not interfere with the Company's or BSE's ability to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.] Duties and Conduct of Officers. Except to the extent otherwise modified herein, each Officer shall have a fiduciary duty of loyalty and care similar to that of officers of business corporations organized under the General Corporation Law of the State of Delaware. Each Officer shall comply with the federal securities laws of the United States and the rules and regulations thereunder; shall cooperate with the SEC pursuant to its regulatory authority and the provisions of this Agreement; and shall engage in conduct that fosters and does not interfere with the Company's ability: 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.

[5.4 Member's Compensation. Except as otherwise specifically provided in this Agreement or in any of the Related Agreements, the Members shall not be entitled to any compensation for their services hereunder.]

[5.5 Resignation. Except as contemplated by Article VIII, no Member shall resign from the Company unless and until such Member's required Initial Capital

Contribution has been satisfied or specifically assumed by another Person and such Person has become a Member in accordance with this Agreement.]

[5.6 Cessation of Status as a Member. A Member will cease to be a member of the Company upon the Bankruptcy or the dissolution of such Member.]

[5.7 Claims Against or By Members. Except as set forth in the Related Agreements or required by the SEC pursuant to the Exchange Act, any and all matters relating to claims: (i) by the Company against a Member or a former Member or any Affiliate of a Member or a former Member (collectively the “Member Entities”); or (ii) by a Member Entity against the Company shall be controlled by the Directors designated by the Member or Members that are not affiliated with such Member Entity. No Director shall be entitled to vote on (A) whether to initiate a claim by the Company against the Member that appointed such Director or an Affiliate of such Member, (B) any matter concerning a claim initiated by the Company against the Member that appointed such Director or a Member Entity affiliated with such Member, or (C) any matter concerning a claim initiated against the Company by the Member that appointed such Director or a Member Entity affiliated with such Member. Any action to be taken by the Board with respect to any such claim shall be considered effective only if approved by a majority of the Directors (that are not affiliated with such Member Entity).]

[5.8 Suspension of Voting Privileges and Termination of Membership. For purposes of voting under this Section 5.8, there shall be a total of 100 votes (the “Total Votes”) available to be voted on any action to be taken by the Board. Each Director, except as otherwise limited herein, shall be entitled to vote that percentage of the Total Votes equal to the quotient obtained by dividing (i) the quotient of (A) the number of Units held by the Member that designated such Director (if applicable, rounded down to the nearest whole Unit) divided by (B) the aggregate number of Units held by all Members that designated Directors by (ii) the number of Directors designated by such Member. After appropriate notice and opportunity for hearing, the Board, by a vote of Directors representing 2/3 of the Total Votes, including the affirmative vote of the BSE and excluding the vote of such Member subject to sanction, may suspend or terminate a Member’s voting privileges or membership in the Company, under the Act or this Agreement: (i) in the event such Member is subject to a “statutory disqualification,” as defined in Section 3(a)(39) of the Exchange Act; or (ii) in the event such Member has violated any material provision of this Agreement, or any federal or state securities law which would have a material adverse effect on the Company; or (iii) if the Board determines that such action is necessary or appropriate in the public interest or for the protection of investors.]

## **Article 6**

### **Operating Budget**

The Company’s operating budget for each Fiscal Year must be approved by [a majority of the Board] BX.

## Article 7

### Members; Financing Company

#### 7.1 Initial Capital Contributions – Units.

(a) Subject to the [BSE]BX Contribution Schedule, the Initial Capital Contribution by, and the date such Initial Capital Contribution was made or shall be made to the Company, as the case may be, by each Member is set forth opposite their respective names on Schedule 1 hereto, as amended from time to time.

(b) The number of Units (and class designation) held by, and Percentage Interest of, each Member is set forth in Schedule 2 hereto, as amended from time to time.

(c) The value assigned to each Initial Capital Contribution is equal to the amount of cash and the fair market value of all other assets, services and/or properties contributed by such Member, determined as set forth on Schedule 1.

(d) In the event of any dispute as to the fair market value of any Capital Contribution made through the provision of services or the contribution of assets or property, the fair market value of such Capital Contribution shall be finally determined by an independent accounting firm of national prominence that has no current business relationship with any of the disputing Members or the Company or as the Members shall otherwise agree.

7.2 Members; Capital. NASDAQ OMX and BX hereby continue as Members of the Company upon their execution of the Agreement. The Capital Contributions of the Members shall be set forth on the books and records of the Company. No interest shall be paid on any Capital Contribution to the Company. No Member shall have any personal liability for the repayment of the Capital Contribution of any Member, and no Member shall have any obligation to fund any deficit in its Capital Account. Each Member hereby waives, for the term of the Company, any right to partition the property of the Company or to commence an action seeking dissolution of the Company under the Act.

#### 7.3 Additional Capital Contributions.

[The Board]BX shall, at its sole discretion, determine the capital needs of the Company. If at any time, or from time to time after the Effective Date, the Board shall determine that additional capital is required in the interests of the Company, additional working capital shall be raised in such manner as determined by [the Board]BX, including but not limited to the following: (i) if filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder, the issuance of new Units to third parties; (ii) if filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder, the issuance of convertible debt; (iii) borrowing funds from new sources; (iv) borrowing funds from existing Members or deferring payment for services performed by then-existing Members; and (v) the issuance of additional Units to then-existing Members. In all cases, [the Board]BX shall pursue

those financing alternatives deemed non-dilutive to the existing Members before all other financing alternatives.

7.4 Borrowings and Loans. If any Member shall lend any monies to the Company, the amount of any such loan shall not constitute an increase in the amount of such Member's Capital Contribution unless specifically agreed to by the [Board and such] the Members. The terms of such loans and the interest rate(s) thereon shall be commercially reasonable terms and rates, as determined by [the Board in accordance with Article 4]BX.

7.5 General. Except as otherwise provided in this Agreement, any Member and its Affiliate may lend money to, borrow money from, act as surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with the Company and, subject to applicable law, shall have the same rights and obligations with respect thereto as a Person who is not a Member in the Company. Any such transactions with a Member or an Affiliate of a Member shall be on the terms approved by [all of the members of the Board]BX from time to time [or, if such transaction is contemplated by this Agreement, or any other Related Agreement, on the terms provided for in this Agreement or such Related Agreement].

7.6 Liability of the Members [and Directors]. Except as otherwise provided by the Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, will be solely the debts, obligations and liabilities of the Company and not that of any Member [or Director].

## Article 8

### Transferability of Units

#### 8.1 Restrictions on Transfer.

[(a)] No Person shall directly or indirectly, whether voluntarily, involuntarily, by operation of law or otherwise, transfer, dispose of, sell, lend, pledge, hypothecate, encumber, assign, exchange, participate, subparticipate, or otherwise transfer in any manner (each, a "Transfer") all or any portion of its Units, or any rights arising under, out of or in respect of this Agreement, unless such Transfer shall be filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder [including, without limitation, any right to damages for breach of this Agreement unless prior to such Transfer the transferee is approved by the Board. To be eligible for such Board approval, the proposed transferee must (i) have sufficient financial assets to support such Transfer, (ii) be able to carry out its duties as a Member hereunder, if admitted as such, and (iii) be under no regulatory or governmental bar or disqualification. Notwithstanding the foregoing, registration as a broker-dealer or Self-Regulatory Organization is not required to be eligible for such Board approval].

[(b)] In addition to the foregoing requirements, and notwithstanding anything to the contrary contained in this Agreement, a Person shall be admitted to the

Company as an additional or substitute member of the Company only upon (i) such Person's execution of a counterpart of this Agreement to evidence its written acceptance of the terms and provisions of this Agreement, and acceptance thereof by resolution of the Board, which acceptance may be given or withheld in the sole discretion of the Board, (ii) if such Person is a transferee, its agreement in writing to its assumption of the obligations hereunder of its assignor, and acceptance thereof by resolution of the Board, which acceptance may be given or withheld in the sole discretion of the Board, (iii) if such Person is a transferee, confirmation by the Board that the Transfer was permitted by this Agreement, and (iv) approval of the Board. Whether or not a transferee who acquired any Units has accepted in writing the terms and provisions of this Agreement and assumed in writing the obligations hereunder of its predecessor in interest, such transferee shall be deemed, by the acquisition of such Units, to have agreed to be subject to and bound by all the obligations of this Agreement with the same effect and to the same extent as any predecessor in interest of such transferee.]

(c) All costs incurred by the Company in connection with the admission to the Company of a substituted Member pursuant to this Article 8 shall be borne by the transferor Member (and if not timely paid, by the substituted Member), including, without limitation, costs of any necessary amendment hereof, filing fees, if any, and reasonable attorneys' fees.]

[8.2 Additional Restrictions. Anything contained in the foregoing provisions of this Article 8 expressed or implied to the contrary notwithstanding:]

(a) In no event shall a Transfer, whether direct or indirect, voluntary or involuntary, by operation of law or otherwise, of any Units or any rights arising under, out of or in respect of this Agreement, including, without limitation, any right to damages for breach of this Agreement take place if such Transfer: (i) in the opinion of tax counsel to the Company, could cause a termination of the Company within the meaning of Section 708 of the Code or, (ii) in the opinion of the Board, based on advice of tax counsel, could cause a termination of the Company's status as a partnership or cause the Company to be treated as a publicly traded partnership for federal income tax purposes, (iii) is prohibited by any state, federal or provincial securities laws, or (iv) is prohibited by this Agreement.]

(b) The Board may, in addition to any other requirement that it may impose, require as a condition of any Transfer, whether direct or indirect, voluntary or involuntary, by operation of law or otherwise, of any Units that the Transferring Member furnish to the Company an opinion of counsel satisfactory (both as to such opinion and as to such counsel) to counsel to the Company that such Transfer, whether direct or indirect, voluntary or involuntary, by operation or law or otherwise, complies with applicable federal and state securities laws.]

(c) Notwithstanding anything to the contrary contained in this Agreement, any Transfer, whether direct or indirect, voluntary or involuntary, by operation of law or otherwise, in contravention of any of the provisions of this Article 8



shall be void ab initio, and ineffectual and shall not bind or be recognized by the Company.]

[(d) Beginning after SEC approval of this Agreement, the Company shall provide the SEC with written notice ten (10) days prior to the closing date of any acquisition that results in a Member's Percentage Interest, alone or together with any Affiliate of such Member, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.]

[(e) Beginning after SEC approval of this Agreement, in addition to the notice requirement in subsection (d), the parties agree that the following Transfers are subject to the rule filing process pursuant to Section 19 of the Exchange Act: (i) any Transfer that results in the acquisition and holding by any Person, alone or together with any Affiliate of such Person, of an aggregate Percentage Interest level which meets or crosses the threshold level of 20% or any successive 5% Percentage Interest level (i.e., 25%, 30%, etc.); or (ii) any Transfer that results in a reduction of the BSE's aggregate Percentage Interest to below the 20% threshold. Additionally, SEC approval will be required to permit any Person, alone or together with any Affiliate of such Person, to control greater than 20% of the Total Votes, regardless of Percentage Interest.]

[(f) (i) Except as provided in subsection (f)(iii) below, a Controlling Person shall be required to execute, and the relevant Member shall take such action as is necessary to ensure that a Controlling Person executes, an amendment to this Agreement upon establishing a controlling interest in any Member that, alone or together with any Affiliate of such Member, holds a Percentage Interest in the Company equal to or greater than 20%.]

[(ii) In such amendment, the Controlling Person shall agree (A) to become a party to this Agreement and (B) to abide by all the provisions of this Agreement.]

[(iii) Notwithstanding the foregoing, a Person shall not be required to execute an amendment to this agreement pursuant to this subsection (f) if such Person does not, directly or indirectly, hold any interest in a Member.]

[(iv) Beginning after SEC approval of this Agreement, any amendment to this Agreement executed pursuant to this subsection (f) is subject to the rule filing process pursuant to Section 19 of the Exchange Act. The rights and privileges, including all voting rights, of the Member in whom a controlling interest is held under this Agreement and the Act shall be suspended until such time as the amendment executed pursuant to this subsection (f) has become effective pursuant to Section 19 of the Exchange Act or the Controlling Person no longer holds a controlling interest in the Member.]

[(v) For purposes of this subsection (f): (A) a "controlling interest" shall be defined as the direct or indirect ownership of 25% or more of the total voting power of all equity securities of a Member (other than voting rights solely with respect to

matters affecting the rights, preferences, or privileges of a particular class of equity securities), by any Person, alone or together with any Affiliate of such Person; and (ii) a “Controlling Person” shall be defined as a Person who, alone or together with any Affiliate of such Person, holds a controlling interest in a Member.]

[8.3 Ownership Concentration Limit.]

[(a) No Person, either alone or with its Affiliates, who is a BSE member, shall be permitted at any time to own in the aggregate more than 20% of the outstanding Units of the Company (the “Ownership Concentration Limit”); provided, however, that this restriction shall not be construed to limit the ownership of Units of the Company by NASDAQ OMX or BSE.]

[(b) In the event that a Person that is not a BSE member, either alone or together with its Affiliates, exceeds the Ownership Concentration Limit and subsequently becomes a BSE member, then that Person shall, within 180 days of the date that he/she became a BSE member, transfer sufficient ownership interest so that the Person that is now also a BSE member does not exceed the Ownership Concentration Limit; provided, however, that this restriction shall not be construed to apply to NASDAQ OMX or BSE.]

[8.4 Voting Limitation. In the event that a Member, or any Affiliate of such Member, is approved by the BSE as a BSE member and such Member owns more than 20% of the Units, alone or together with any Affiliates of such Member, the Member and its designated Directors shall have no voting rights whatsoever with respect to any action relating to the Company nor shall the Member or its designated Directors, if any, be entitled to give any proxy in relation to a vote of the Members, in each case solely with respect to the Excess Units held by such Member; provided, however, that whether or not such Member or its designated Directors, if any, otherwise participates in a meeting in person or by proxy, such Member's Excess Units shall be counted for quorum purposes and shall be voted by the person presiding over quorum and vote matters in the same proportion as the Units held by the other Members are voted (including any abstentions from voting); provided, however, that this restriction shall not be construed to apply to NASDAQ OMX or BSE.]

[8.5] 8.2 Continuation of LLC. The liquidation, dissolution, bankruptcy, insolvency, death, or incompetency of any Member shall not terminate the business of the Company or, in and of itself, dissolve the Company, which shall continue to be conducted upon the terms of this Agreement by the other Members and by the personal representatives and successors in interest of such Member.

[8.6] 8.3 No Retroactive Effect. No new Members shall be entitled to any retroactive allocation of losses, income or expense deductions incurred by the Company. The Board may, at the time an additional Member is admitted, close the Company books (as though the Company's Fiscal Year has ended) or make pro-rata allocations of loss, income and expense deductions to an additional Member for that portion of the Company's Fiscal Year in which an additional Member was admitted in accordance with the provisions of §706(d) of the Code.

## Article 9

### Distributions

9.1 Current Distributions. If at any time and from time to time [the Board] BX determines that the Company has cash that is not required for the operations of the Company, the payment of liabilities or expenses of the Company, or the setting aside of reserves to meet the anticipated cash needs of the Company (“Distributable Cash”), then:

(a) Within 10 days after the end of each fiscal quarter, the Company shall make distributions (“Tax Distributions”) to the Members of their respective Tax Amounts for such fiscal quarter (or, in the event that Distributable Cash is less than the total of all such Tax Amounts, the Company shall distribute the Distributable Cash in proportion to such Tax Amounts). If after the end of any fiscal year it is determined that a Member’s Tax Amount for the fiscal year exceeds the sum of the Tax Distributions made to the Member hereunder and the distributions made to such member under Section 9.1(b) for such fiscal year (any such excess, a “Shortfall Amount”), then the Company shall, on or before the 75th day of the next fiscal year, make an additional Tax Distribution to the members of their respective Shortfall Amounts (or, in the event that Distributable Cash is less than the total of all such Shortfall Amounts, the Company shall distribute the Distributable Cash in proportion to such Shortfall Amounts). If the aggregate Tax Distributions to any Member pursuant to this subsection for a fiscal year exceed the Member’s Tax Amount for such fiscal year, such excess shall be deducted from the Member’s Tax Amount when calculating the Tax Distributions to be made to such Member for each subsequent fiscal year until the excess has been fully accounted for. All Tax Distributions to a Member shall be treated as advances against any subsequent distributions to be made to such Member under Section 9.1(b) or Section 11.2. Subsequent distributions made to the Member pursuant to Sections 9.1(b) and Section 11.2 shall be adjusted so that when aggregated with all prior distributions to the Member pursuant to those provisions, and with all prior Tax Distributions to the Member, the amount distributed shall be equal, as nearly as possible, to the aggregate amount that would have been distributable to such member pursuant to Section 9.1(b) and Section 11.2 if this Agreement contained no provision for Tax Distributions.

(b) After making the Tax Distributions described in subsection (a) hereof, [the Board]BX may distribute all or any portion of remaining Distributable Cash to the Members in proportion to their Percentage Interests, unless the distribution is a liquidating distribution, which shall be made in the manner set out in Section 11.1(b).

9.2 Limitation. The Company, and [the Board]BX on behalf of the Company, shall not make a distribution to any Member on account of its interest in the Company if and to the extent such distribution would violate the Act or other applicable law. Distributions shall not be paid using Regulatory Funds.

9.3 Withholdings Treated as Distributions. Any amount that the Company is required to withhold and pay over to any governmental authority on behalf of a Member shall be treated as a distribution made to such Member pursuant to Section 9.1(a), 9.1(b)

or 11.2, and shall be deducted from the amounts next distributable to such Member pursuant to any of those provisions until the withholding has been fully accounted for. To the extent that such an amount is treated, pursuant to the previous sentence, as a distribution under Section 9.1(a), it shall also be treated as a Tax Distribution, with the consequences described in Section 9.1(a).

## **Article 10**

### **Allocations of Profits and Losses**

10.1 Allocations of Profits; General. Except as provided in Sections 10.3 through 10.9 below, all profits and credits of the Company (for both accounting and tax purposes) for each fiscal year shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of losses under Section 10.2 not previously taken into account pursuant to this clause first, to the extent of such losses, and second, in proportion to their Percentage Interest.

10.2 Allocations of Losses; General. (a) Except as provided in Sections 10.3 through 10.9 below, all net losses of the Company for each fiscal year (for both accounting and tax purposes), and all Nonrecourse Deductions, shall be allocated to the Members from time to time (but no less often than once annually and before making any distribution to the Members) first, in proportion to any prior allocations of profits under Section 10.1 not previously taken into account pursuant to this clause first, to the extent of such profits, second, in proportion to the Members' Capital Contributions, to the extent thereof, and third, in proportion to their Percentage Interest.

(b) Allocations of Nonrecourse Deductions shall be made pursuant to Treasury Regulation Section 1.752-3(a).

10.3 Limitation. Notwithstanding anything otherwise provided in Section 10.2, no Member will be allocated any losses not attributable to Nonrecourse Debt to the extent such allocation (without regard to any allocations based on Nonrecourse Debt), and after taking into account any reductions to the Member's Capital Account required by Treasury Regulations § 1.704-1 (b)(2)(ii)(d)(4), (5), or (6) results in a deficit in such Member's Capital Account in excess of such Member's actual or deemed obligation, if any, to restore deficits on the dissolution of the Company (any such excess, an "Unpermitted Deficit"). Any losses not allocable to a Member under this sentence shall be allocated to the other Members. In the event any Member's Capital Account is adjusted (by way of distribution, allocation or otherwise) to create an Unpermitted Deficit, the Company shall allocate to such Member, as soon as possible thereafter, items of income or gain sufficient to eliminate the Unpermitted Deficit. In the event that upon liquidation of the Company or the liquidation of a Member's interest, such Member's Capital Account has an Unpermitted Deficit, the Member must make a Capital Contribution to such Member's Capital Account so as to cure the Unpermitted Deficit.

10.4 **Qualified Income Offset.** In the event any Member unexpectedly receives adjustments, allocations, or distributions described in Treasury Regulations § 1.704-1 (b)(2)(ii)(d)(4), (5) or (6), items of income and gain of the Company shall be specially allocated to such Member in an amount and manner sufficient to eliminate the deficit balance in such Member's Capital Account created by such adjustments, allocations or distributions as promptly as possible. The preceding sentence is intended to comply with the "qualified income offset" requirement in Treasury Regulations § 1.704-1 (b)(2)(ii)(d), and shall be interpreted consistently therewith.

10.5 **Nonrecourse Debt and Chargebacks.** If at the end of any fiscal year of the Company, after taking into account all distributions made and to be made in respect of such year but prior to any allocation of profits and losses for such year except the allocations required by Section 10.3, any Member shall have a negative Capital Account by reason (and to the extent) of allocations of items of loss or deduction attributable in whole or part to Nonrecourse Debt secured by any of the assets of the Company, such Member shall be allocated (or if more than one Member has such a negative Capital Account, all such Members shall be allocated ratably among them in accordance with the respective proportions of such negative balances as are attributable to such deductions or losses) that portion of any items of income and gain for such year as may be equal to the amount by which the negative balance of such Member's Capital Account exceeds the sum of (A) such Member's allocable share of the aggregate Minimum Gain with respect to all of the Company's assets securing such Nonrecourse Debt plus (B) such Member's allocable share of aggregate Company debt which is not Nonrecourse Debt, such allocable share to be determined in accordance with the provisions of Section 752 of the Code and the Treasury Regulations thereunder. In addition, if there is a net decrease in the Company's aggregate Minimum Gain with respect to all of its assets for a taxable year, each Member shall be allocated items of income and gain ratably in an amount equal to that Member's share of such net decrease in the manner and to the extent required by Treasury Regulations Section 1.704-2(f) or any successor regulation. The preceding sentence is intended to comply with the minimum gain chargeback requirement of Treasury Regulations § 1.704-2(f), and shall be interpreted and applied in a manner consistent therewith.

10.6 **Member Nonrecourse Deductions.** Any Member Nonrecourse Deductions for any fiscal year or other period shall be allocated to the Member that (in its capacity, directly or indirectly, as lender, guarantor, or otherwise) bears the economic risk of loss with respect to the loan to which such Member Nonrecourse Deductions are attributable in accordance with Treasury Regulations § 1.704-2(i). If, during any fiscal year or other period, there is a net decrease in Member Nonrecourse Debt Minimum Gain, that decrease shall be charged back among the Members in accordance with Treasury Regulations § 1.704-2(i) (4). The preceding sentence is intended to comply with the partner nonrecourse debt minimum gain chargeback requirement of Treasury Regulations § 1.704-2(i)(4), and shall be interpreted and applied in a manner consistent therewith.

10.7 **Calculation of Profits and Losses.** Net Profit and Net Loss shall be computed for each Fiscal Year as an amount equal to the Company's taxable income or loss for such Fiscal Year determined in accordance with Code Section 703(a), including

pursuant to Code Section 703(a)(1), all items of income, gain loss or deduction required to be stated separately and with adjustments as follows: (a) In computing Net Profit or Net Loss pursuant to this Section, there shall be added any income of the Company exempt from federal income tax and not otherwise taken into account in computing the Company's taxable income or loss; (b) Any expenditure of the Company, that was not otherwise taken into account in computing Net Profit or Net Loss, which is described in Code Section 705(a)(2)(B) or that pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(i) is treated as an expenditure that is described in Code Section 705(a)(2)(B), shall be subtracted from such taxable income or loss; (c) To the extent that the net book value of any asset of the Company is adjusted to equal such asset's fair market value or to the extent that the net book value of any asset of the Company is adjusted as a result of a distribution in kind to any Member, where such distribution equals to the fair market value of such asset on the date of distribution, then such adjustment shall be taken into account as gain or loss from the disposition of such asset for the purposes of computing Net Profit or Net Loss; (d) To the extent that any gain or loss is recognized for federal income tax purposes as a result of the disposition of any asset of the Company, such gain or loss for the purposes of this Section, such gain or loss will be computed by reference to the net book value of the asset disposed of, notwithstanding that the adjusted tax basis of such asset differs from its net book value; and (e) Any items allocated pursuant to Section 10.2(b) Allocations of Nonrecourse Deductions, or Section 10.3 Limitation, or Section 10.4 Qualified Income Offset, or Section 10.5 Nonrecourse Debt and Chargebacks shall not be taken into account in computing Net Profit or Net Loss.

10.8 Section 704(c) and Capital Account Revaluation Allocations. The Members agree that to the fullest extent possible with respect to the allocation of depreciation and gain for U.S. federal income tax purposes, Section 704(c) of the Code shall apply with respect to non-cash property contributed to the Company by any Member. For purposes hereof, any allocation of income, loss, gain or any item thereof to a Member pursuant to Section 704(c) of the Code shall affect only its tax basis in its Percentage Interest and shall not affect its Capital Account. In addition to the foregoing, if the Company's assets are reflected in the Capital Accounts of the Members at a book value that differs from the adjusted tax basis of the assets (e.g., because of a revaluation of the Members' Capital Accounts under Treasury Regulations § 1.704-1(b)(2)(iv)(f)), allocations of depreciation, amortization, income, gain or loss with respect to such property shall be made among the Members in a manner consistent with the principles of Section 704(c) of the Code and this Section 10.8.

10.9 Offset of Regulatory Allocations. The allocations required by Sections 10.3 through 10.6 and Section 10.8 are intended to comply with certain requirements of the Treasury Regulations. [The Board] NASDAQ OMX may, in its discretion and to the extent not inconsistent with Section 704 of the Code, offset any or all such regulatory allocations either with other regulatory allocations or with special allocations of income, gain, loss or deductions pursuant to this section in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the regulatory allocations were not part of this Agreement.

10.10 Terminating and Special Allocations. Notwithstanding the foregoing allocation provisions, any profits or losses resulting from a liquidation, merger or consolidation of the Company, the sale of substantially all the assets of the Company in one or a series of related transactions, or any similar event (and, if necessary, specific items of gross income, gain, loss, or deduction incurred by the Company in the fiscal year of such transaction(s)) shall be allocated among the Members so that after such allocations and the allocations required by Section 11.3, and immediately before the making of any liquidating distributions to the Members under Section 11.2, the Members' Capital Accounts equal, as nearly as possible, the amounts of the respective distributions to which they are entitled under Section 11.2.

## Article 11

### Dissolution and Winding Up

11.1 (a) The Company shall be dissolved and its affairs shall be wound up upon:

(i) the election to dissolve the Company made by the [Board]the consent of both Members; or

(ii) the entry of a decree of judicial dissolution under § 18-802 of the Act; or

(iii) the [resignation, expulsion, Bankruptcy or dissolution]termination of the legal existence of the last remaining Member[,] or the occurrence of any other event which terminates the continued membership of the last remaining Member in the Company, unless [the business of] the Company is continued without dissolution in accordance with the Act; or

(iv) the occurrence of any other event that causes the dissolution of a limited liability company under the Act unless the Company is continued without dissolution in accordance with the Act.

[The legal representatives, if any, of any Member shall succeed as assignee to such Member's interest in the Company upon the Bankruptcy, or dissolution of such Member, but shall be admitted as a substitute Member, subject to Article 8, only with the written consent of the Board (such consent to be in the Board's sole discretion); unless and until such consent is given, any Percentage Interest in the Company held by such legal representatives of a Member shall not be included in calculating the Percentage Interests of the Members required to take any action under this Agreement.] Notwithstanding any other provision of this Agreement, the Bankruptcy of a Member shall not cause the Member to cease to be a Member of the Company and upon the occurrence of such an event, the Company shall continue without dissolution.

(b) Upon dissolution of the Company, the business of the Company shall continue for the sole purpose of winding up its affairs. The winding up process shall be carried out by all of the Members unless the dissolution is caused by the sole

remaining Member's ceasing to be a member of the Company, in which case a liquidating trustee may be appointed for the Company by [vote of a majority of the Directors] the personal representative of the last remaining Member (the Members or such liquidating trustee is referred to herein as the "Liquidator"). In winding up the Company's affairs, every effort shall then be made to dispose of the assets of the Company in an orderly manner, having regard to the liquidity, divisibility and marketability of the Company's assets. If the Liquidator determines that it would be imprudent to dispose of any non-cash assets of the Company, such assets may be distributed in kind to the Members, in lieu of cash, proportionately to their rights to receive cash distributions hereunder; provided, that the Liquidator shall in its sole discretion determine the relative shares of the Members of each kind of those assets that are to be distributed in kind. The Liquidator shall not be entitled to be paid by the Company any fee for services rendered in connection with the liquidation of the Company, but the Liquidator (whether one or more Members or a liquidating trustee) shall be reimbursed by the Company for all third-party costs and expenses incurred by it in connection therewith and shall be indemnified by the Company with respect to any action brought against it in connection therewith by applying, *mutatis mutandis*, the provisions of Article 14.

#### 11.2 Application and Distribution of Assets.

(a) The assets of the Company in winding up at any time shall be applied or distributed as follows: first, to creditors of the Company, including Members who are creditors, to the extent otherwise permitted by law, whether by payment or the making of reasonable provision for the payment thereof, and including any contingent, conditional and unmatured liabilities of the Company, taking into account the relative priorities thereof; second, to the Members and former Members in satisfaction of liabilities under the Act for distributions to such Members and former Members; and third, to the Members, for the return of their Capital Contributions and then in proportion to their respective Percentage Interests.

(b) Reserve. A reasonable reserve for contingent, conditional and unmatured liabilities in connection with the winding up of the business of the Company shall be retained by the Company until such winding up is completed or such reserve is otherwise deemed no longer necessary by the Liquidator.

11.3 Capital Account Adjustments. For purposes of determining a Member's Capital Account, if, on liquidation and dissolution, some or all of the assets of the Company are distributed in kind, the Company profits (or losses) shall be increased by the profits (or losses) that would have been realized had such assets been sold for their fair market value on the date of dissolution of the Company, as determined by the Liquidator. Such increase shall: (i) be allocated to the Members in accordance with Article 10 hereof and (ii) increase (or decrease) the Members' Capital Account balances accordingly, it being the general intent that the adjustments contemplated by this subsection shall have the effect, as nearly as possible, of causing the Members' Capital Account balances to be in proportion to their Percentage Interests.



11.4 Termination of the LLC. Subject to Section [18.12] 18.10 of this Agreement, the separate legal existence of the Company shall terminate when all assets of the Company, after payment of or due provision for all debts, liabilities and obligations of the Company, shall have been distributed to the Members in the manner provided for in this Article 11, and a Certificate of Cancellation shall have been filed in the manner required by [Section 18-203 of] the Act.

## Article 12

### Books, Records and Accounting

12.1 Books of Account. [The Board]BX shall cause to be entered in appropriate books, kept at the Company's principal place of business, which must be in the United States, all transactions of or relating to the Company. Each Member shall have access to and the right, at such Member's sole cost and expense, to inspect and copy such books and all other the Company records during normal business hours; provided that the inspecting Member shall be responsible for any out-of-pocket costs or expenses incurred by the Company in making such books and records available for inspection. Notwithstanding the foregoing, the books and records of the Company shall be subject at all times to inspection and copying by [the BSE]BX and the SEC at no additional cost to [the BSE]BX or the SEC. The books, records, premises, officers, directors, agents, and employees of the Company shall be deemed to be the books, records, premises, officers, directors, agents, and employees of [the BSE]BX and its Affiliates for the purpose of and subject to oversight pursuant to the Exchange Act. [The Board shall not have the right to keep confidential from the Members any information that the Board would otherwise be permitted to keep confidential pursuant to § 18-305(c) of the Act].

12.2 Deposits of Funds. All funds of the Company shall be deposited in its name in such checking, money market, or other account or accounts as [the Board]BX may from time to time designate; withdrawals shall be made therefrom on such signature or signatures as [the Board]BX shall determine.

12.3 Fiscal Year. The fiscal year of the Company shall begin on [October]January 1st and end on [September 30<sup>th</sup>]December 31st (the "Fiscal Year").

12.4 Financial Statements; Reports to Members. The Company, at its cost and expense, shall prepare and furnish to each of the Members, within 90 days after the close of each taxable year, financial statements of the Company, and all other information necessary to enable such Member to prepare its tax returns, including without limitation a statement showing the balance in such Member's Capital Account.

12.5 Tax Elections. The Members may, by unanimous agreement and in their absolute discretion, make all tax elections (including, but not limited to, elections relating to depreciation and elections pursuant to Section 754 of the Code) as they deem appropriate. Notwithstanding anything contained in Article 10 of this Agreement, any adjustments made pursuant to Section 754 of the Code shall affect only the successor in interest to the transferring Member. Each Member will furnish the Company with all

information necessary to give effect to any such election and will pay the costs of any election applicable as to it.

12.6 Tax Matters Member. NASDAQ OMX shall be the tax matters Member of the Company for purposes of the Code, and shall be entitled to take such actions on behalf of the Company in any and all proceedings with the Internal Revenue Service as it, in its absolute discretion, deems appropriate without regard to whether such actions result in a settlement of tax matters favorable to some Members and adverse to other Members. Notwithstanding the foregoing, NASDAQ OMX shall (a) promptly deliver to the other Members copies of any notices, letters or other documents received by NASDAQ OMX as the tax matters Member of the Company, (b) keep the other Members informed with respect to all matters involving NASDAQ OMX as the tax matters Member of the Company, and (c) consult with the other Members and obtain the approval of the other Members prior to taking any actions as the tax matters Member of the Company. The tax matters Member shall not be entitled to be paid by the Company any fee for services rendered in connection with any tax proceeding, but shall be reimbursed by the Company for all costs and expenses incurred by it in connection with any such proceeding and shall be indemnified by the Company with respect to any action brought against it in connection with the settlement of any such proceeding by applying, *mutatis mutandis*, the provisions of Article 14.

### **Article 13**

**Reserved**

### **Article 14**

#### **Exculpation and Indemnification**

14.1 Members Generally. Except as set forth in the second sentence of this Section 14.1, no Member, nor any Affiliate of a Member, nor any of Member or Affiliate's respective shareholders, directors, employees, Advisors or other agents, nor any [Directors,] officers, agents, Advisors or employees of the Company (collectively, the "Indemnitees"), shall have any liability to the Company, to any other Member, or to any third party for any loss suffered by the Company, such other Member or such third party that arises out of any action or inaction of such Member (or any other Indemnitee), (a) with respect to its activities under this Agreement [or the Related Agreements, unless otherwise specified in the Related Agreements] or (b) otherwise in its capacity as a Member, if such Member or such other Indemnitee, in good faith, determined that such course of conduct was in the best interests of the Company or not inconsistent with the best interests of the Company and such course of conduct did not constitute gross negligence or willful misconduct of such Member (or other Indemnities) or a material breach by such Member of this Agreement. To the fullest extent permitted by law, each Member (and such other Indemnities) shall be indemnified by the Company against any losses, judgments, liabilities, expenses (including, without limitation, reasonable

attorneys' fees and court costs) and amounts paid in settlement of any claims sustained by it arising out of any action or inaction of such Member (or any other Indemnitee), (a) with respect to its activities under this Agreement [or the Related Agreements, unless otherwise specified in the Related Agreements] or (b) otherwise in its capacity as a Member, provided that the same were not the result of gross negligence or willful misconduct of such Member (or such other Indemnitee) or a breach by such Member of this Agreement [or any Related Agreement]. Any Person claiming reimbursement of expenses under this Article 14 shall be paid amounts to which he or it would be entitled hereunder as such expenses are incurred upon presentation of appropriate documentation to the Company, subject to providing a written undertaking to repay any such amounts to which such Person ultimately turns out not to be entitled under the standards herein set forth. The indemnification and advancement of expenses provided by this Article shall continue as to an Indemnitee who has ceased to be a Member (or otherwise an Indemnitee), and shall inure to the benefit of the heirs, executors, administrators, and successors of such Member (and the other Indemnitees). Any indemnification pursuant to this Section 14.1 shall be solely out of the assets of the Company and shall not be a personal obligation of any Member.

14.2 Duties of Indemnitee. To the extent that, at law or in equity, an Indemnitee has duties (including fiduciary duties) and liabilities relating thereto to the Company or to the Members, the Members and any other Indemnitee acting in connection with the Company's business or affairs shall not be liable to the Company or to any Member for its good faith reliance on the provisions of this Agreement. The provisions of this Agreement, to the extent that they restrict the duties and liabilities of an Indemnitee otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such Indemnitee.

## Article 15

### **[Maintenance of Separate Business] Reserved**

[The Company shall at all times: (a) to the extent that any of the Company's offices are located in the offices of an Affiliate, pay fair market rent for its office space located therein; (b) maintain the Company's books, financial statements, accounting records and other limited liability company documents and records separate from those of any Affiliate or any other Person; (c) not commingle the Company's assets with those of any Affiliate or any other Person; (d) maintain the Company's books of account, bank accounts and payroll separate from those of any Affiliate; (e) act solely in its name and through its own authorized agents, and in all respects hold itself out as a legal entity separate and distinct from any other Person; (f) make investments directly or by brokers engaged and paid by the Company or its agents (provided that if any agent is an Affiliate of the Company it shall be compensated at a fair market rate for its services); (g) manage the Company's liabilities separately from those of any Affiliate and pay its own liabilities, including all administrative expenses and compensation to employees, consultants or agents, and all operating expenses, from its own separate assets, except that an Affiliate may pay the organizational expenses of the Company; and (h) pay from the Company's assets all obligations and indebtedness of any kind incurred by the Company.

Notwithstanding the foregoing, the books, records, premises, officers, directors, agents and employees of the Company shall be deemed to be those of the BSE and its Affiliates for the purpose of and subject to oversight pursuant to the Exchange Act, as amended. In addition, the books and records of the Company shall be subject at all times to inspection and copying by the BSE and its Affiliates and the SEC without charge to such Persons. The Company shall abide by all Act formalities, including the maintenance of current records of the Company affairs, and the Company shall cause its financial statements to be prepared in accordance with generally accepted accounting principles in a manner that indicates the separate existence of the Company. The Company shall (i) pay all its liabilities, (ii) not assume the liabilities of any Affiliate unless approved by unanimous consent of the Board and (iii) not guarantee the liabilities of any Affiliate unless approved by unanimous consent of the Board. The Board shall make decisions with respect to the business and daily operations of the Company independent of and not dictated by any Affiliate.]

## Article 16

### Confidentiality and Related Matters

[16.1 Disclosure and Publicity. The parties hereto agree that the initial public disclosures concerning the transactions contemplated by this Agreement and the Related Agreements shall require prior approval of all Members; provided that the parties shall be entitled to make such public disclosures as are required pursuant to applicable law or the rules of any applicable Government Authority.]

[16.2 Confidentiality Obligations of Members.]

[(a) Each Member agrees that it will use the Confidential Information only in connection with the activities contemplated by this Agreement and the Related Agreements or pursuant to the Exchange Act and rule and regulations thereunder, and it will not disclose any Confidential Information to any Person except as expressly permitted by this Agreement and the Related Agreements or pursuant to the Exchange Act and rules and regulations thereunder.]

[A Member may disclose Confidential Information only:]

[(i) to its directors, officers and employees who have a reasonable need to know the contents thereof and who are subject to similar such confidentiality obligations;]

[(ii) on a confidential basis to those Advisors of the Member who have a reasonable need to know the contents thereof, so long as such disclosure is made pursuant to the procedures referred to in Section 16.4(b);]

[(iii) to the extent required by applicable statute, rule or regulation promulgated under the Exchange Act, the U.S. federal securities laws and rules thereunder; or in response to a valid request from the SEC pursuant to the Exchange Act

and the rules thereunder, the BSE (or through a subsidiary of BSE through delegated authority), or any other applicable self-regulatory organization (including FINRA);]

[(iv) to the extent required by applicable statute, rule or regulation (other than the U.S. federal securities laws and the rules thereunder); or any court of competent jurisdiction; provided that the Member has made reasonable efforts to conduct its relevant business activities in a manner such that the disclosure requirements of such statute, rule or regulation or court of competent jurisdiction do not apply, and provided that the Company is given notice and an adequate opportunity to contest such disclosure or to use any means available to minimize such disclosure; and]

[(v) to the extent that such Confidential Information has become generally available publicly through no fault of the Member or its directors, officers, employees or Advisors.]

[16.3 Member Information Confidentiality Obligation. Each Member shall hold, and shall cause its respective Affiliates and their directors, officers, employees, agents, consultants and Advisors to hold, in strict confidence, unless disclosure to an applicable regulatory authority is necessary or appropriate or unless compelled to disclose by judicial or administrative process or, in the written opinion of its counsel, by other requirement of law or the applicable requirements of any regulatory agency or relevant stock exchange, all non-public records, books, contracts, reports, instruments, computer data and other data and information (collectively, "Member Information") concerning the other Members (or, if required under a contract with a third party, such third party) furnished it by such other Member or its representatives pursuant to this Agreement or any other Related Agreement, except to the extent that such Member Information can be shown to have been: (a) previously known by such Member on a non-confidential basis; (b) available to such Member on a non-confidential basis from a source other than the disclosing Member; (c) in the public domain through no fault of such Members; or (d) later lawfully acquired from other sources by the Member to which it was furnished, and none of the Members shall release or disclose such Member Information to any other person, except such Member's or its Affiliates respective auditors, attorneys, financial advisors, bankers, other consultants and Advisors and, to the extent permitted above, to regulatory authorities. In the event that a Member becomes compelled to disclose any Member Information in connection with any necessary regulatory approval or by judicial or administrative process, such party shall provide the Member who provided such Member Information (the "Disclosing Member") with prompt prior written notice of such requirement so that the Disclosing Member may seek a protective order or other appropriate remedy and/or waive the terms of any applicable confidentiality arrangements. In the event that such protective order, other remedy or waiver is not obtained, only that portion of the Member Information which is legally required to be disclosed shall be so disclosed.]

[16.4 Ongoing Confidentiality Program.]

[(a) In order to ensure that the parties hereto comply with their obligations in Article 16, representatives designated by the Members and the Company

shall meet from time to time as required to discuss issues relating to confidentiality and disclosure and other matters addressed by this Article 16.]

(b) With respect to any disclosure by any of the parties hereto to any of their Advisors pursuant to Article 16, the representatives referred to in paragraph (a) above will institute procedures designed to maintain the confidentiality of the Confidential Information while facilitating the business activities contemplated by this Agreement and the Related Agreements.]

[16.5 SEC's Right to Access. Nothing in this Agreement shall be interpreted as to limit or impede the rights of the SEC or BSE, to access and examine the Confidential Information pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of a Member, officer, director, agent or employee of Member to disclose the Confidential Information to the SEC or BSE.]

[16.6 Business Opportunity. No Member, Director or any of their respective stockholders, directors, officers, members, agents or employees, shall have any obligation to bring any business opportunity to the attention of the Company.]

[16.7] Confidential Regulatory Information. To the fullest extent permitted by applicable law, all Confidential Information pertaining to the self-regulatory function of [BSE]BX or the [BSE Equities Business]business of BX related to the trading of U.S. Equities (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Company shall: (a) not be made available to any person (other than as provided in the proviso at the end of this sentence) other than to those officers, [directors,] employees and agents of the Company who have a reasonable need to know the contents thereof; (b) be retained in confidence by the Company and the officers, [directors,] employees and agents of the Company; and (c) not be used for any [commercial] non-regulatory purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or [BSE]BX 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 the Company to disclose such Confidential Information to the Commission or BX [BSE].

## **Article 17**

### **[Intellectual Property] Reserved**

[Intellectual Property. Except as provided otherwise in the Related Agreements, each Member shall retain all rights, title, and interests to all of its intellectual property.]

## **Article 18**

### **General**

18.1 Entire Agreement; Integration, Amendments. This Agreement [and the Related Agreements] contains the sole and entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to such subject matter. [In the case of any conflict between the provisions of this Agreement and the provisions of the Related Agreements, the provisions of this Agreement shall govern. Subject to Section 4.4 hereof, t]This Agreement may only be changed, amended or supplemented by an agreement in writing executed and delivered by the Members [that is approved by a majority of the Directors without the consent of any Member or other Person. Each of the Members further acknowledges and agrees that, in entering into this Agreement, such Member has not in any way relied upon any oral or written agreements, statements, promises, information, arrangements, understandings, representations or warranties, express or implied, not specifically set forth in this Agreement or the exhibits and schedules hereto]. Any proposed amendment to this Agreement shall be submitted to the [BSE]BX Board of Directors for review and, if such amendment is required, under Section 19 of the Exchange Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the SEC before such amendment may be effective, then such amendment shall not be effective until filed with, or filed with and approved by, the SEC, as the case may be.

18.2 Binding Agreement. The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective representatives, successors in interest and permitted assigns.

18.3 Notices. Any and all notices contemplated by this Agreement shall be deemed adequately given if in writing and delivered in hand, or upon receipt when sent by telecopy confirmed by one of the other methods for providing notice set forth herein, or one (1) business day after being sent, postage prepaid, by nationally recognized overnight courier (e.g., Federal Express), or 5 days after being sent by certified or registered mail, return receipt requested, postage prepaid, to the party or parties for whom such notices are intended. All such notices to Members shall be addressed to the last address of record on the books of the Company; all such notices to the Company shall be addressed to the Company at the address set forth in Section 2.1 or at such other address as the Company may have designated by notice given in accordance with the terms of this subsection.

18.4 Captions. Captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this agreement or the intent of any provisions hereof.

18.5 Governing Law, Etc. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, all rights and remedies being governed by such laws, without regard to its conflict of laws rules.

18.6 Member Books, Records, and Jurisdiction.

(a) [The Members] NASDAQ OMX acknowledges that to the extent they are related to the Company's activities, the books, records, premises, officers,

directors, agents, and employees of [Members]NASDAQ OMX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of [the BSE]BX for the purpose of and subject to oversight pursuant to the Exchange Act.

(b) The Company and its Members, officers, [directors,] agents, and employees, as well as the officers, directors, agents and employees of Members irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, the SEC, and [the BSE]BX, for the purposes of any suit, action or proceeding pursuant to U.S. federal securities laws or the rules or regulations thereunder, arising out of, or relating to, the Company's activities or Section 18.6(a) (except that such jurisdictions shall also include Delaware for any such matter relating to the organization or internal affairs of the Company), and hereby waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that they are not personally subject to the jurisdiction of the U.S. federal courts, SEC, or [BSE]BX, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter hereof may not be enforced in or by such courts or agency, and, to the fullest extent permitted by laws, waive the defense or application of any foreign secrecy or blocking statutes or regulations with respect to the Members, their officers, directors, agents and employees, that relate to the Company's activities or their participation therein or in connection therewith.

(c) With respect to Article 16 and Sections 4.2[(a)], 12.1 and 18.6, [BSE and] each Member shall take such action as is necessary to insure that such Member's officers, directors, agents, and employees consent in writing to the applicability of these provisions with respect to the Company related activities.

#### 18.7 [Reserved]

[18.8 Waiver of Certain Damages. EACH OF THE MEMBERS, TO THE FULLEST EXTENT PERMITTED BY LAW, IRREVOCABLY WAIVES ANY RIGHTS THAT THEY MAY HAVE TO PUNITIVE, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES IN RESPECT OF ANY LITIGATION BASED UPON, OR ARISING OUT OF, THIS AGREEMENT OR ANY RELATED AGREEMENT OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS OR ACTIONS OF ANY OF THEM RELATING THERETO.]

[18.9] Construction. The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party.

[18.10]18.8 Severability. The invalidity or unenforceability of any particular provision of this Agreement [or any Related Agreement] shall not affect the other provisions hereof or thereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision was omitted.



[18.11]18.9 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[18.12]18.10 Survival. The provisions of Articles 14, 16, [17,] and 18 shall survive the termination of this Agreement for any reason. All other rights and obligations of the Members shall cease upon the termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of \_\_\_\_\_, 2008.

NASDAQ OMX BX, INC.  
[BOSTON STOCK EXCHANGE, INC.  
an authorized person]

By: \_\_\_\_\_  
Name:  
Title:

THE NASDAQ OMX GROUP, INC.  
[an authorized person]

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT 1  
Certificate of Formation**

Attached.

**SCHEDULE 1**

**Capital Contributions**

Member	Cash Contribution	Other Contribution	Date of Contribution	Additional Capital on 3/14/2007	Total Contribution
[BSE]BX		\$35,000,000	Initial Funding Date	Business Confidential	Business Confidential
NASDAQ OMX	Business Confidential		[____, 2008] <u>Various</u>		Business Confidential
Total:		\$35,000,000		Business Confidential	Business Confidential

## SCHEDULE 2

### Name and Address of Members, Number of Units, and Percentage Interests

Name and Address of Member	Number of Units	Percentage Interest
<p><b>[Boston Stock Exchange]<u>NASDAQ OMX</u> <u>BX</u>, Inc.</b></p> <p><b>100 Franklin Street</b></p> <p><b>Boston, Massachusetts 02110</b></p>	<b>69,095</b>	<b>53.21%</b>
<p><b>The NASDAQ OMX Group, Inc.</b></p> <p><b>One Liberty Plaza</b></p> <p><b>New York, New York 10006</b></p>	<b>60,765</b>	<b>46.79%</b>
<b>Total:</b>	<b>129,860</b>	<b>100%</b>

## SCHEDULE 3

### **[BSE]BX CONTRIBUTION SCHEDULE**

#### 1. CONTRIBUTION.

1.1. Contribution. Pursuant to the terms and conditions contained herein, [the BSE]BX has [shall] assigned, transferred and conveyed to the Company as a contribution to capital (the valuation of \$35,000,000 includes items (a) – (d):

(a) [BSE's]BX's existing book of business and customer base related to the trading of U.S. Equities (the "BX [BSE] Equities Business [(the "Book of Business")]").

(b) All assets and liabilities related to the [BSE]BX Equities Business, excluding BOX Units, and assets and liabilities related to the [BSE's]BX's SRO and regulatory function [(“Contributed BSE Equities Business Items”)].

(c) All goodwill, contract rights and intangible property (including any intellectual property rights that [the BSE]BX may have in its BEACON System) related to the [BSE]BX Equities Business, excluding items related to [the BSE's]BX's SRO and regulatory function [(“Contributed Intangibles”)].

(d) The exclusive right to operate a Facility for the trading of equity securities at BX [the BSE pursuant to the terms and conditions contained in the BSE Facility Services Agreement (the “Exclusive Facility Right”)].

[Pursuant to the terms and conditions contained in the BSE Facility Services Agreement, commencing on the Initial Funding Date and extending for the duration of the BSE Facility Services Agreement, the BSE]BX agrees to transfer to the Company (i) all revenue streams resulting directly from the [BSE’s]BX’s participation in the CTA Plan, the CQS Plan, the Nasdaq UTP Plan, [the ITS Plan] or any other national market plan related to the [BSE]BX Equities Business [or BeX Market] from time to time to the extent that they relate to any equity securities, and (ii) all other revenue streams and other benefits or items of value generated by or through the [BSE]BX Equities Business (excluding items related to [the BSE]BX’s SRO and regulatory function) [(the “Transferred Revenue Streams”)].

## [2. REPRESENTATIONS AND WARRANTIES OF BSE.]

[2.1. Corporate Organization and Qualification. The BSE is a corporation duly incorporated, validly existing and in good standing under the laws of its jurisdiction of incorporation, has all requisite power and authority to carry on its business as presently conducted and is in good standing in each jurisdiction where the properties owned, leased or operated, or the business conducted, by it require such qualification, except for any failure to be so organized, existing, in good standing or to have such power and authority or to so qualify, that, when taken together with all such other failures, is not reasonably likely, individually or in the aggregate, (a) to have a material adverse effect (i) on the business, properties, operations or results of operations, condition (financial or otherwise) or prospects of the BSE and its subsidiaries taken as a whole, (ii) on the BSE Equities Business, (iii) on the BeX Market or (iv) on the authority of the BSE to continue as a national securities exchange and self-regulatory organization (as registered under Section 6 and as defined in Section 3(a)(26), respectively, of the Exchange Act) or (b) to prevent or to limit or restrict in any material respect the BSE from performing their respective obligations under this Agreement or any of the Related Agreements or consummating any of the transactions contemplated hereunder and thereunder (any such material adverse effect, prevention, limitation or restriction, a “ BSE Material Adverse Effect”).]

[2.2. Authorization and Validity of Agreements. The BSE has the requisite power and authority and has taken or will use best efforts to promptly take all corporate action necessary in order to authorize, execute and deliver this Agreement and the Related Agreements to which it is a party and to consummate the transactions contemplated hereby and thereby and to perform the acts contemplated on its part hereunder and thereunder.]

[2.3. Regulatory Approval. The BSE will use best efforts to promptly obtain all authorizations, consents, approvals, orders, permits, notices, reports, filings, registrations, qualifications, exemptions of, with or from, or other actions required to be made by the BSE or any of its subsidiaries, or obtained by the BSE or any of its subsidiaries from, the SEC, any Governmental Authority or any third party required to effect the restructuring

of the BSE's equities trading business as described and contemplated herein, including, without limitation, the transfer of the equities trading business of the BSE to the Company.]

[2.4. No Conflict. Neither the execution and delivery by the BSE of this Agreement or the BSE Facility Services Agreement, the compliance by it with all of the provisions of and the performance by it of its obligations under this Agreement and the BSE Facility Services Agreement nor the consummation of the transactions herein or therein contemplated will conflict with or result in a breach or violation of, or otherwise constitute a default under, any provision of any contract to which it is a party or by which it or any of its assets are bound.]

[2.5. Litigation and Liabilities. Except as set forth in the BSE Disclosure Letter, there are no (a) civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending or, to the knowledge of BSE, threatened against the BSE or any of its subsidiaries, with respect to activities on the trading floor of the BSE or any of its subsidiaries, (b) orders, judgments, decrees, injunctions or rules of any Governmental Authority to which the BSE or any of its subsidiaries is subject, or (c) except as set forth in the BSE Financial Statements (including the notes thereto), obligations or liabilities, whether or not accrued, contingent or otherwise, or, to the knowledge of BSE any other facts or circumstances that could result in any claims against or obligations or liabilities of the BSE or any of its subsidiaries, that, individually or in the aggregate, are reasonably likely to have a BSE Material Adverse Effect.]

[2.6. Compliance. Neither the BSE nor any of its subsidiaries is in conflict with, or in default or violation of, (a) any federal, state, local or foreign law, statute, ordinance, rule, regulation, judgment, order, injunction, decree, arbitration award, agency requirement, writ, franchise, variance, exemption, approval, license or permit of any Governmental Authority or Self-Regulatory Organization applicable to the BSE or any of its subsidiaries or by which its or any of their respective properties is bound or affected, or (b) any agreement to which the BSE or any of its subsidiaries is a party or by which the BSE or any of its subsidiaries or its or any of their respective properties is bound or affected, except for any such conflicts, defaults or violations that, individually or in the aggregate, are not reasonably likely to have a BSE Material Adverse Effect. To the best knowledge of the BSE, the BSE Disclosure Letter lists all current and material investigations, proceedings, or inquiries by the SEC and any other Governmental Authority in connection with the BSE Equities Business.]

[2.7. Contributed BSE Equities Business Items and Contributed Intangibles. (a) Each of the Contributed BSE Equities Business Items and Contributed Intangibles are legally owned by the BSE free and clear of all liens. The BSE will be assigning, transferring and conveying to the Company good and valid title to the Contributed BSE Equities Business Items and Contributed Intangibles free and clear of all liens.]

[(b) There are no (i) civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending, (ii) orders, judgments, decrees, injunctions or rules of any Governmental Authority, or (iii) obligations or liabilities,

whether or not accrued, contingent or otherwise, or, to the knowledge of BSE any other facts or circumstances that could result in any claims against or obligations or liabilities of the BSE or any of its subsidiaries, to which the Contributed Intangibles or Contributed BSE Equities Business Items are subject.]

[2.8. Transferred Revenue Streams. (a) The transfer of the Transferred Revenue Streams by the BSE to the Company will not (i) conflict with or result in a breach or violation of, or result in any acceleration of any rights or obligations under or other encumbrance on assets pursuant to, or permit any other party any improvement in rights with respect to or permit it to exercise, or otherwise constitute a default under, any provision of any agreement or result in any change in the rights or obligations of any party under any agreement, or (ii) result in any breach or violation, or a default under, the provisions of the organizational documents of the BSE or any of its subsidiaries or any law, order, judgment, decree, ordinance, award, governmental or non-governmental permit or license, rule or regulation or subject the Company, the BSE or any of its subsidiaries to any penalty or sanction.]

[(b) There are no (i) civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending, (ii) orders, judgments, decrees, injunctions or rules of any Governmental Authority, or (iii) obligations or liabilities, whether or not accrued, contingent or otherwise, or, to the knowledge of the BSE any other facts or circumstances that could result in any claims against or obligations or liabilities of the BSE or any of its subsidiaries, to which the Transferred Revenue Streams are subject.]

### [3. COVENANTS.]

[3.1. Transfer of Other Items. From and after the date hereof, BSE shall use its best efforts to obtain all necessary consents and approvals for the assignment, transfer and conveyance of the contributions set forth in Sections 1.1(a) – (c), and (e). The transfer shall be made on the Initial Funding Date.]

**[SCHEDULE 4]****[MATERIAL TERMS & CONDITIONS]****[BSE FACILITY SERVICES AGREEMENT]**

[1. The Company shall have the exclusive right to operate a Facility for the trading of equity securities at the BSE for so long as the BSE owns five percent (5%) or more of the outstanding Units of the Company (the “Exclusive Facility Right”). Notwithstanding the foregoing, the Exclusive Facility Right shall be effective for a minimum of five (5) years after the Launch Date.]

[2. The BSE shall provide the Company with SRO services for a 5-year term with 5-year auto-renewals. The fees throughout the initial term shall be for cost plus a markup which will be negotiated on an annual basis. Fees for any subsequent terms shall be negotiated and comparable to prevailing market rates.]

[3. During the term of the Facility Services Agreement, the BSE shall not provide SRO services to any Competitor of the Company. “Competitor” shall mean any securities market that derives 25% or more of its revenue from the trading of U.S. Equities. Notwithstanding the foregoing, in the event that the BeX Market’s share in U.S. Equities does not reach 5% by the date which is 2 years after Launch Date, the foregoing restriction shall no longer apply.]

[4. During the term of the Facility Services Agreement, the BSE Board of Governors and the BSE Regulatory Oversight Committee shall at all times have overriding regulatory responsibility for the BeX Market.]

**EXHIBIT 5D**

The text of the proposed Delegation Agreement is below. Proposed new language is underlined.

**DELEGATION AGREEMENT**

This DELEGATION AGREEMENT dated \_\_\_\_\_, 2008 (the “Agreement”), is by and between NASDAQ OMX BX, Inc. (the “Exchange”), a Delaware corporation, and NASDAQ OMX BX Equities LLC, a Delaware limited liability company (“BX Equities LLC”).

WHEREAS, the Exchange is a registered national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”);

WHEREAS, BX Equities LLC is a controlled subsidiary of the Exchange; and

WHEREAS, the Exchange desires to delegate to BX Equities LLC, and BX Equities LLC desires to assume, certain limited responsibilities and obligations of the Exchange solely with respect to the operation of a cash equities trading facility, on the terms and subject to the conditions set forth in this Agreement. The delegation set forth below is limited to operation of the cash equities trading facility and does not include operation of an options market or other functions not specifically set forth in this limited delegation.

NOW, THEREFORE, in consideration of the agreements contained herein, the parties hereto agree as follows:

**I. The Exchange**

The Exchange shall have ultimate responsibility for the operations, rules and regulations developed by BX Equities LLC, as well as their enforcement. Actions taken by BX Equities LLC pursuant to delegated authority remain subject to review, approval or rejection by the board of directors of the Exchange in accordance with procedures established by that board of directors. In addition, the Exchange will expressly retain the following authority and functions (together, the “Retained Functions”):

1. To exercise overall responsibility for ensuring that statutory and self-regulatory obligations and functions of the Exchange are fulfilled and to perform any duties and functions not delegated.
2. To delegate authority to BX Equities LLC to take actions on behalf of the Exchange
3. To direct BX Equities LLC to take action necessary to effectuate the purposes and functions of the Exchange, consistent with the independence of the Exchange’s regulatory functions, exchange rules, policies and procedures and the federal securities laws.



## **II. BX Equities LLC**

### *A. Functions and Responsibilities*

Subject to the retention of the Retained Functions, the Exchange shall delegate to BX Equities LLC, and BX Equities LLC shall assume, the following responsibilities and functions of the Exchange, as a registered national securities exchange (each, a “Delegated Market Responsibility” and together the “Delegated Market Responsibilities”):

1. To operate the NASDAQ OMX BX Equities Market, including automated systems supporting it.
2. To provide and maintain a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions in cash equities.
3. To act as a Securities Information Processor for quotations and transaction information related to securities traded on the NASDAQ OMX BX Equities Market and any trading facilities operated by BX Equities LLC.
4. To administer the participation of the Exchange in the National Market System plans governing the listing, quoting, trading and regulation of cash equities and Commission regulations related thereto.
5. To collect, process, consolidate and provide to the Exchange accurate information requisite to operation of a surveillance audit trail for the quoting and trading of cash equities.
6. To establish and assess access fees, transaction fees, market data fees and other fees for the products and services offered by BX Equities LLC.
7. To develop, adopt and administer rules governing participation in the NASDAQ OMX BX Equities Market.
8. To refer to the Exchange any complaints of a regulatory nature involving potential rule violations by member organizations or employees.
9. To establish the annual budget for BX Equities LLC for approval by the Exchange.
10. To determine allocation of BX Equities LLC resources.
11. To manage external relations on matters related to trading on and the operation and functions of the NASDAQ OMX BX Equities Market with Congress, the

Commission, state regulators, other self-regulatory organizations, business groups, and the public.

*B. Covenants Relating to BX Equities LLC*

For so long as BX Equities LLC has any Delegated Market Responsibility pursuant to this Agreement, BX Equities LLC agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange or any Delegated Market Responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange that shall come into the possession of BX Equities LLC shall: (a) not be made available to any person (other than as provided in the proviso at the end of this sentence) other than to those officers, employees and agents of the BX Equities LLC who have a reasonable need to know the contents thereof; (b) be retained in confidence by BX Equities LLC and the officers, employees and agents of BX Equities LLC; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or the Exchange 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, employees or agents of BX Equities LLC to disclose such confidential information to the Commission or the Exchange
2. BX Equities LLC's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by the Exchange.
3. BX Equities LLC's books and records shall be maintained within the United States.
4. The books, records, premises, officers, and employees of BX Equities LLC shall be deemed to be the books, records, premises, officers, and employees of the Exchange for purposes of and subject to oversight pursuant to the Exchange Act.
5. BX Equities LLC shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Exchange pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, the Exchange pursuant to their regulatory authority.
6. BX Equities LLC, its officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of the Exchange relating to their regulatory functions (including disciplinary matters) or that

would interfere with the ability of the Exchange to carry out its responsibilities under the Exchange Act.

7. BX Equities LLC, its officers, and those of its employees whose principal place of business and residence is outside of the United States shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the Exchange or any delegated market responsibility (and shall be deemed to agree that BX Equities LLC may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and BX Equities LLC and each such officer or employee, in the case of any such officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

For so long as BX Equities LLC has any Delegated Market Responsibility pursuant to this Agreement, the Exchange agrees that:

1. The Exchange may not transfer or assign any of its ownership of BX Equities LLC.

### **III. Amendments**

This Agreement may not be modified except pursuant to a written agreement among the Exchange and BX Equities LLC; provided that, prior to the effectiveness of any such amendment, such amendment shall be filed with, and approved by, the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder.