



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93094; File No. SR-BOX-2021-14]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, in Connection with the Proposed Establishment of BSTX as a Facility of the Exchange

September 21, 2021.

On June 7, 2021, BOX Exchange LLC (“Exchange” or “BOX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt rules in connection with the establishment of the Boston Security Token Exchange LLC (“BSTX”) as a facility of the Exchange. The proposed rule change was published for comment in the Federal Register on June 24, 2021.³ On August 3, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On September 16, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92206 (June 17, 2021), 86 FR 33402 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92556, 86 FR 43572 (August 9, 2021). The Commission designated September 22, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

originally filed.⁶ The Commission has received no comments on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

I. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Exchange proposes to establish BSTX⁸ as a facility of the Exchange. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet website at <http://boxoptions.com>.

⁶ In Amendment No. 1, the Exchange revised the proposal to: (1) adopt the BSTX LLC Third Amended and Restated Limited Liability Company Agreement ("BSTX LLC Agreement") prior to the commencement of operations of BSTX as a facility of the Exchange, which, among other things, (a) changes the legal name of the facility from "Boston Security Token Exchange LLC" to "BSTX LLC," (b) modifies certain defined terms, including "BSTX Product" and "Competing Business," (c) defines the term "Governmental Authority" and modifies certain provisions to permit access to certain confidential information by any such authority, and (d) adds a provision that would, among other things, require an effective rule filing pursuant to Section 19 of the Exchange Act prior to any Member, or Related Person of such Member, becoming a BSTX Participant if such Member, alone or together with any Related Persons of such Member, has the right to appoint more than 20% of the BSTX Directors entitled to vote; (2) provide additional information about ownership of non-voting Class B Units; (3) clarify how limitations on voting of interests in BOX Holdings are implemented by reallocating voting rights to other BOX Holdings owners, and how a similar provision in the BSTX LLC Agreement would operate; (4) discuss certain provisions and associated definitions in the BSTX LLC Agreement that are the same or different from those that currently apply to BOX Holdings and BOX Options, particularly with respect to the board structure, intellectual property, and automatic admission of Class B Units as Members; (5) provide additional description of limitations on voting and ownership of interests in the Exchange; (6) provide additional description of the roles, obligations, and authorities of BOX Digital, tZERO, and the Exchange with respect to BSTX; (7) describe the funding of operations of BSTX; (8) clarify representation of BSTX Participants on the Exchange's Board and committees, and how those representatives would be appointed at the commencement of operations; and (9) make other technical, clarifying and conforming changes. Amendment No. 1 is available on the Commission's website at: <https://www.sec.gov/comments/sr-box-2021-14/srbox202114-9251558-250847.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The Company's current legal name is Boston Security Token Exchange LLC and its legal name will be changed to BSTX LLC prior to adoption of the LLC Agreement and commencement of operations.

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 self-regulatory organization 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 self-regulatory organization 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

The Exchange is submitting this Proposed Rule Change to the Commission in connection with the proposed establishment of BSTX as a facility of the Exchange, as that term is defined in Section 3(a)(2) of the Act.⁹ Pending trading rules filed as part of a separate rule filing pursuant to the rule filing process under Section 19 of the Act and approved by the Commission, BSTX will operate the BSTX Market.¹⁰ The Proposed Rule Change is to establish BSTX as a facility of the Exchange and, without trading rules approved by the Commission, will not permit BSTX to commence operations of the BSTX Market. However, the approval of the Proposed Rule Change, and BSTX as a facility of the Exchange, will trigger the regulatory oversight responsibilities of the Exchange with respect to BSTX.

BSTX is controlled jointly by BOX Digital, a Delaware limited liability company and a subsidiary of BOX Holdings Group LLC, and tZERO Group, Inc., a Delaware corporation and an affiliate of Overstock.com, Inc. BSTX is an affiliate of the Exchange and, when approved as a facility of the Exchange, will be subject to regulatory oversight by the Exchange. In addition, the Exchange will enter into a facility agreement with BSTX (the “Facility Agreement”)

⁹ 15 U.S.C. 78c(a)(2).

¹⁰ See Securities Exchange Act Release No. 92017 (May 25, 2021), 86 FR 29634 (June 2, 2021) (“BSTX Rulebook Proposal”).

pursuant to which the Exchange will regulate the Company as a facility of the Exchange. The Exchange's powers and authority under the Facility Agreement ensure that the Exchange has full regulatory control over BSTX, which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company. The Exchange will also provide certain business services to the Company such as providing human resources and office technology support pursuant to an administrative services agreement between the Exchange and BSTX.

The LLC Agreement is the source of governance and operating authority for the Company and, therefore, functions in a similar manner as articles of incorporation and bylaws would function for a corporation. The Exchange submitted a separate filing to establish rules relating to trading on BSTX.¹¹ The Exchange also submitted a separate filing to introduce structural changes to the Exchange to accommodate regulation of BSTX in addition to the Exchange's existing facility,¹² which was approved (the "Multiple Facilities Filing").¹³ With the addition of BSTX as a facility of the Exchange, BSTX Participants¹⁴ will have the same

¹¹ See BSTX Rulebook Proposal.

¹² Currently, there is only one facility of the Exchange, BOX Options Market LLC.

¹³ See Securities Exchange Act Release No. 88934 May 22, 2020, 85 FR 32085 May 28, 2020.

¹⁴ A BSTX Participant is a firm or organization that is registered with the Exchange pursuant to Exchange Rules for the purposes of participating in Trading on the BSTX Market as an order flow provider or market maker. "Trading" means the availability of the BSTX System to authorized users for entering, modifying, and canceling orders of BSTX Products. "BSTX System" means the technology, know-how, software, equipment, communication lines or services, services and other deliverables or materials of any kind as may be necessary or desirable for the operation of the BSTX Market. "BSTX Product" means a Security, as defined in the Exchange Rules, trading on the BSTX System. "Exchange Rules" means the rules of the Exchange that constitute the 'rules of an exchange' within the meaning of Section 3 of the Act, and that pertain to the BSTX Market. "BSTX Market" means the market operated by BSTX. See Section 1.1, LLC Agreement.

representation, rights and responsibilities as Exchange Facility Participants¹⁵ on the Exchange's other facility.

The Exchange currently operates BOX Options Market LLC ("BOX Options"), which is a facility of the Exchange, as that term is defined in Section 3(a)(2) of the Act. The proposed LLC Agreement provisions are generally the same as the provisions of the Amended and Restated Limited Liability Company Agreement of BOX Options Market LLC, dated as of August 15, 2018 (the "BOX Options LLC Agreement") or, where indicated herein, are the same as provisions of the Second Amended and Restated Limited Liability Company Agreement of BOX Holdings, dated as of September 13, 2018, as amended (the "BOX Holdings LLC Agreement").¹⁶ Currently, BOX Holdings has nine separate, unaffiliated owners. BOX Holdings owns 100% of BOX Options so BOX Holdings is essentially the alter ego of BOX Options. By contrast, the Company has two separate, unaffiliated voting owners, BOX Digital and tZERO, each of which owns 50% of the voting class of equity of the Company. Ownership diverges for BOX Options directly above BOX Holdings in its ownership structure and ownership diverges for the Company directly above the Company in its ownership structure. Therefore, as discussed below, when comparing various provisions in the LLC Agreement, some provisions are more appropriately compared with the BOX Holdings LLC Agreement, particularly with respect to ownership issues. The Exchange believes that governance consistent with established provisions that have already received Commission approval harmonizes rules

¹⁵ "Exchange Facility Participant" means a firm or organization that is registered with the Exchange pursuant to the Exchange Rules for purposes of participating in trading on any Exchange Facility. See the Second Amended and Restated Limited Liability Company Agreement of BOX Exchange LLC, dated as of May 29, 2020, as amended, (the "Exchange LLC Agreement") Section 1.1.

¹⁶ The Exchange notes, as further described in the Proposed Rule Change, that certain provisions of the BOX Holdings LLC Agreement and BOX Options LLC Agreements are not included in the LLC Agreement because they are not applicable. For example, certain provisions in the BOX Holdings LLC Agreement that are related to different voting classes of ownership are not present in the LLC Agreement because BSTX has only one voting class of ownership. See, e.g., Sections 4.1, 4.4, 4.13 and 7 of the BOX Holdings LLC Agreement.

and practices across the Exchange's facilities, which may foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Act.¹⁷

Structure of the Company

In the discussion below, the Exchange describes provisions in the LLC Agreement related to the structure of the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or the BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Ownership interests of the Company are represented by Units.¹⁸ The Company has two classes of Units: Class A Units¹⁹ and Class B Units.²⁰ Except as otherwise provided in the LLC Agreement, all Units are identical to each other and accord the holders thereof the same obligations, rights, and privileges as accorded to each other holder thereof.²¹ The duly admitted holders of Units are referred to as the members of the Company ("Members"). The Units

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ "Units" mean Class A Units and Class B Units. 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 shall be vested only in duly admitted Members of the Company), or to exercise any right of a Member of the Company under the LLC Agreement, the LLC Act, or other applicable law. See Section 1.1, LLC Agreement. References herein to "Units" refer to Class A and Class B Units of the Company unless a separate class is specified.

¹⁹ "Class A 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 the LLC Agreement. See Section 1.1, LLC Agreement.

²⁰ "Class B Units" shall be identical to Class A Units except that Class B Members shall not have the right to vote on any matter related to the Company as a result of holding Class B Units. See Section 1.1, LLC Agreement.

²¹ Pursuant to Section 2.5(b) of the LLC Agreement, upon the consummation of any sale or transfer of a majority of the Class A Units or a majority of the assets of the Company, directly or indirectly, to any party or group of related parties, including through a series of transactions, all then outstanding Class B Units shall automatically convert into an equal number of Class A units without the need of any action by any person. For the avoidance of doubt, a Class B Member's Capital Account does not change as a result of the conversion of the Class B Units.

represent equity interests in the Company and entitle the duly admitted holders thereof to participate in the Company's allocations and distributions. Voting Class A Units are held 50/50 by BOX Digital and tZERO with each having an economic interest of over 45% in the Company. Non-voting Class B Units are held by various officers, directors, agents, and employees of the Company, each of whom holds less than 5% economic interest in the Company.²² Accordingly, no single Member can unilaterally exert control over the Company. Pursuant to Section 1.1 of the LLC Agreement, a record of the Members is maintained by the Secretary of the Company and updated from time to time as necessary and as provided in the LLC Agreement ("Membership Record").²³ These provisions are substantially the same as those in the BOX Holdings LLC Agreement.²⁴

BOX Digital is a subsidiary of BOX Holdings and an affiliate of the Exchange and, therefore, the Company will be an affiliate of the Exchange. BOX Holdings owns 98% of BOX Digital and 2% of BOX Digital is held by Lisa Fall. BOX Holdings already owns one subsidiary that is an existing facility of the Exchange. The existing facility – BOX Options – operates a market for trading option contracts on U.S. equities. BOX Holdings is the parent company for both BOX Digital and BOX Options. BOX Holdings has nine separate, unaffiliated owners, including MX US 2, Inc. ("MXUS2"), a wholly owned, indirect subsidiary of TMX Group Limited ("TMX"), which holds 42.62% of the outstanding units of BOX Holdings, IB Exchange Corp. ("IB"), which holds 22.69% of the outstanding units of BOX Holdings, and Citadel Securities Principal Investments LLC ("Citadel"), which holds 13.80%. The other six owners of BOX Holdings, Citigroup Financial Products Inc., UBS Americas Inc., CSFB Next Fund Inc.,

²² Three current Directors hold non-voting Class B Units; specifically, these Directors are Members and hold, directly or indirectly, the following economic interest percentages in the Company: Alan Konevsky 0.36%, Will Easley 0.36%, and Lisa Fall 4.98%. Ms. Fall is CEO of BSTX and BOX Digital.

²³ The Membership Record shall include the name and address of each Member and the number of Units of each class held by each Member.

²⁴ See BOX Holdings LLC Agreement Sections 1.1 and 2.5.

LabMorgan Corp., Wolverine Holdings, L.P. and Aragon Solutions Ltd, each hold less than 10% of the outstanding units of BOX Holdings.

Owners of BOX Holdings (“BOX Holdings Members”) hold Class A and Class B Units (together, “Holdings Units”).²⁵ Holdings Units represent equal units of economic rights in BOX Holdings. Voting rights of BOX Holdings Members generally follow the ownership percentage (the “Holdings Ownership Percentage”) based on the ratio of the number of Holdings Units held by each BOX Holdings Member to the total number of Holdings Units issued and outstanding.²⁶ As discussed above, the Holdings Ownership Percentage of each BOX Holdings Member greater than 10% is as follows: MXUS2: 42.62%; IB: 22.69% and Citadel: 13.80%.

However, Exchange Facility Participants are limited to a maximum of 20% voting power for votes of BOX Holdings Members and votes of directors appointed by an Exchange Facility Participant on the BOX Holdings board of directors.²⁷ IB holds a Holdings Ownership Percentage greater than 20% and therefore, as an Exchange Facility Participant, is limited to voting power with respect to BOX Holdings of no greater than 20%. As a result, IB’s voting power with respect to votes of BOX Holdings Members that would otherwise be greater than 20% is counted for quorum purposes and voted by the person presiding over quorum and vote matters in the same proportion as the remainder of the vote. This limitation effectively automatically reallocates IB’s voting power above 20% to the other BOX Holdings Members and, as a result, each of the other BOX Holdings Members has greater voting power at BOX Holdings than its Holdings Ownership Percentage. The respective voting power of each BOX Holdings Member that is greater than 10% is as follows: MXUS2: 44.10%; IB: 20.00% and Citadel: 14.28%.

²⁵ Class B Units of BOX Holdings are identical to Class A Units except Class B Units include conversion rights, a liquidation preference and class voting rights with respect to those matters. See BOX Holdings LLC Agreement §§1.1 and 2.5.

²⁶ See BOX Holdings LLC Agreement Section 1.1.

²⁷ See BOX Holdings LLC Agreement Section 7.4(h).

Further, one BOX Holdings Member, Wolverine Holdings, L.P. (“Wolverine”), does not currently have a right to designate a director to the BOX Holdings board of directors, where the voting power of each director is tied to the voting power of the BOX Holdings Member that appointed such director.²⁸ As a result of IB’s limited voting power and Wolverine’s lack of board representation, the voting power of the respective BOX Holdings directors designated by each of the other BOX Holdings Members is greater than the respective BOX Holdings Member’s voting power with respect to BOX Holdings Member matters. The BOX Holdings board voting power of directors designated by each of the BOX Holdings Members greater than 10% is as follows: MXUS2: 45.50%; IB: 20.00% and Citadel: 14.73%.

Medici Ventures, L.P. (“Medici”), a Delaware limited partnership, owns 44% of the outstanding shares of tZERO, Overstock.com, Inc. (“Overstock”), a publicly held corporation organized under the laws of the state of Delaware, owns 43% of the outstanding shares of tZERO, Joseph Cammarata holds 7.53% of the outstanding shares of tZERO, and each of the following owns less than 3% of the outstanding shares of tZERO: Todd Tobacco, Newer Ventures LLC, Schalk Steyn, Raj Karkara, Alec Wilkins, Dohi Ang, Brian Capuano, Trent Larson, Eric Fish, Kristen Anne Bagley, Kirstie Dougherty, SpeedRoute Technologies Inc., Tommy McSherry, Rob Collucci, John Gilchrist, John Paul DeVito, Jimmy Ambrose, Jason Heckler, Max Melmed, Alex Vlastakis, Olalekan Abebefe, Samson Arubuola, Ryan Mitchell, Zachary Wilezol, Anthony Bove, Ralph Daiuto, Rob Christiansen, Amanda Gervase, Derek Tobacco, Steve Bailey, and Dinosaur Financial. Pelion MV GP, L.L.C. (“Medici GP”), a Delaware limited liability company, serves as the general partner of Medici and has the sole right to manage its affairs. Medici GP owns 1% of the partnership interests in Medici (along with a profits interest in Medici), and Overstock owns 99% of the partnership interests in Medici. Membership interests in Medici GP are held by the following, each of which holds less than 25%

²⁸ See BOX Holdings LLC Agreement Section 4.3(b).

of Medici GP: Carine Clark, Susannah Duke, Steve Glover, Brad Hintze, Jeff Kearl, Trevor Lund, Matt Mosman, Erika Nash, Zain Rizavi, Laura Summerhays, The Blake G Modersitzki 2020 Irrevocable Trust (affiliated with Blake G. Modersitzki), The Capitola Trust (affiliated with Chad Packard), The GP Investment Trust (affiliated with Chris Cooper) and The Oaxaca Dynasty Trust (affiliated with Ben Lambert). Therefore, both tZERO and the Company are affiliates of Overstock, Medici and Medici GP.

Pursuant to Section 7.4(g)(ii) of the LLC Agreement, any Controlling Person²⁹ is required to become a party to the LLC Agreement and abide by its provisions, to the same extent and as if they were Members. This provision and the associated definitions of Controlling Person and

²⁹ A “Controlling Person” is defined as “a Person who, alone or together with any Related Persons of such Person, holds a Controlling Interest in a Member.” See Section 7.4(g)(v)(B), LLC Agreement. A “Controlling Interest” is 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 Related Persons of such Person.” See Section 7.4(g)(v)(A), LLC Agreement. A “Related Person” is defined as “with respect to any Person: (A) any Affiliate of such Person; (B) any other Person with which such first Person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Units; (C) in the case of a Person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b-7 under the [Act]) or director of such Person and, in the case of a Person that is a partnership or limited liability company, any general partner, managing member or manager of such Person, as applicable; (D) in the case of any BSTX Participant who is at the same time a broker-dealer, any Person that is associated with the BSTX Participant (as determined using the definition of “person associated with a member” as defined under Section 3(a)(21) of the [Act]); (E) in the case of a Person that is a natural person and a BSTX Participant, any broker or dealer that is also a BSTX Participant with which such Person is associated; (F) in the case of a Person that is a natural person, any relative or spouse of such Person, or any relative of such spouse who has the same home as such Person or who is a director or officer of the Exchange or any of its parents or subsidiaries; (G) in the case of a Person that is an executive officer (as defined under Rule 3b-7 under the [Act]) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (H) in the case of a Person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable.” A “Person” is defined as “any individual, partnership, corporation, association, trust, limited liability company, joint venture, unincorporated organization and any government, governmental department or agency or political subdivision thereof.” See Section 1.1, LLC Agreement.

Controlling Interest are the same as currently apply to BOX Holdings.³⁰ Accordingly, prior to commencing operations as a facility of the Exchange, BSTX will obtain, from each Controlling Person, an instrument of accession substantially in the form attached hereto as Exhibit 5B [sic]. Related Persons that are otherwise Controlling Persons are not required to become parties to the LLC Agreement if they are only under common control of an upstream owner but are not in the upstream ownership chain above a Company owner because they will not have the ability to exert any control over the Company. BOX Holdings, Medici, Medici GP and Overstock are indirect owners of the Company. Medici GP owns 1% of the partnership interests and a profits interest in Medici and acts as Medici's general partner. Overstock owns 43% of tZERO directly and 99% of Medici, which owns 44% of tZERO. As a result, Overstock owns, directly or indirectly, more than 80% of tZERO, which owns 50% of the voting class of equity of BSTX. Overstock, Medici and Medici GP will be required to become parties to the Company's LLC Agreement by executing an instrument of accession and abide by its provisions, to the same extent and as if they were Members, because they are Controlling Persons of the Company. Similarly, BOX Digital, BOX Holdings, MXUS2, MX US 1, Inc., Bourse de Montreal Inc., and TMX Group Limited will also each be required to become parties to the LLC Agreement by executing an instrument of accession and abide by its provisions to the same extent and as if they were Members because they are Controlling Persons of the Company. TMX Group Limited owns 100% of Bourse de Montreal Inc., which owns 100% of MX US 1, Inc., which owns 100% of MXUS2, which owns more than 40% of BOX Holdings. Each of these upstream owners of BOX Holdings is a Controlling Person required to be, and is, a party to, and be subject to, the BOX Holdings LLC Agreement. BOX Holdings owns 98% of BOX Digital, which owns 50% of the voting class of equity of BSTX.

³⁰ See Section 7.4(g), BOX Holdings LLC Agreement.

Pursuant to Section 7.4(h) of the LLC Agreement,³¹ in the event any Member, or any Related Person of such Member, is approved by the Exchange as a BSTX Participant pursuant to the Exchange Rules, and such Member owns more than 20% of the Units, alone or together with any Related Person of such Member (Units owned in excess of 20% being referred to as “Excess Units”), the Member and its appointed Member Directors shall have no voting rights whatsoever with respect to any action relating to the Company nor shall the Member or its appointed Member 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 appointed Member 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). In addition, an effective rule filing pursuant to Section 19 of the Act shall be required prior to any Member, or any Related Person of such Member, becoming a BSTX Participant if such Member, alone or together with any Related Persons of such Member, has the right to appoint more than 20% of the Directors entitled to vote and, unless a rule filing authorizing the foregoing is first effective, such Member, or any Related Person of such Member, shall not be registered as a BSTX Participant. These limitations are designed to prevent a market participant from exerting undue influence on a facility of the Exchange. Related Persons will be grouped together when applying these limits. Accordingly, any Related Persons of tZERO or another Member will not be a BSTX Participant without completing the rule filing process. The Exchange believes the proposed voting cap provision is consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to

³¹ LLC Agreement Section 7.4(h) is based on Section 7.4(h) of the BOX Holdings LLC Agreement.

carry out the purposes of the Act.³² In particular, the voting cap is designed to minimize the ability of a BSTX Participant to improperly interfere with or restrict the ability of the Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

Any Member shall provide the Company with written notice fourteen (14) days prior, and the Company shall provide the SEC and the Exchange with written notice ten (10) days prior, to the closing date of any acquisition that results in such Member's Percentage Interest,³³ alone or together with any Related Person of such Member, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.³⁴ Further, rule filings are required for any Transfer³⁵ that results in the acquisition and holding by any Person, alone or together with its Related Persons, 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.).³⁶ These are the same provisions as are contained in the BOX Holdings LLC Agreement. The Exchange believes the proposed notification provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.³⁷ In particular, SEC notification of ownership

³² 15 U.S.C. 78f(b)(1).

³³ "Percentage Interest" means "with respect to a Member, the ratio of the number of Unit held by the Member to the total of all of the issued Units, expressed as a percentage and determined with respect to each class of Units whenever applicable." See Section 1.1, LLC Agreement.

³⁴ See LLC Agreement, Section 7.4(e). LLC Agreement Section 7.4(e) is based on Section 7.4(e) of the BOX Holdings LLC Agreement.

³⁵ "Transfer" means the actions of a Person to "directly or indirectly, whether voluntarily, involuntarily, by operation of law or otherwise, dispose of, sell, alienate, assign, exchange, participate, subparticipate, encumber, or otherwise transfer in any manner" its Units but does not include "transfers among Members, transfers to any Person directly or indirectly owning, controlling or holding with power to vote all of the outstanding voting securities of and equity or beneficial interests in that Member, or transfers to any Person that is a wholly owned Affiliate of a transferring Member." See LLC Agreement, Section 7.1(a).

³⁶ See LLC Agreement, Section 7.4(f). LLC Agreement Section 7.4(f) is based on Section 7.4(f) of the BOX Holdings LLC Agreement.

³⁷ 15 U.S.C. 78f(b)(1).

interests exceeding certain percentage thresholds can help improve the Commission's ability to effectively monitor and surveil for potential undue influence and control over the operation of the Exchange.

The Exchange is the entity that will have regulatory oversight of BSTX. All owners of the Exchange are limited to 40% economic ownership and 20% voting power on the Exchange.³⁸ In addition, owners of the Exchange that are also Exchange Facility Participants are further limited to a maximum of 20% economic ownership of the Exchange and are still subject to the general limitation of 20% voting power of the Exchange.³⁹ The Exchange notes these existing ownership limits applicable to owners of the Exchange are not changing.⁴⁰ The Exchange believes these existing ownership limits will help to ensure the independence of the Exchange's regulatory oversight of BSTX and facilitate the ability of the Exchange to carry out its regulatory responsibilities and operate in a manner consistent with the Act, and are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.⁴¹

The Company does not have the same ownership as BOX Options or BOX Holdings; therefore, the Members of the Company differ from those of BOX Options and BOX Holdings. The Exchange believes that the structure of the Company will promote just and equitable principles of trade, and, in general, protect investors and the public interest, consistent with Section 6(b)(5) of the Act.⁴²

Term and Termination

³⁸ See Exchange LLC Agreement Section 7.3.

³⁹ See Exchange LLC Agreement Section 7.3.

⁴⁰ See Securities Exchange Act Release No. 34-66871 (April 27, 2012) 77 FR 26323 (May 3, 2012) (Order granting approval of BOX Exchange).

⁴¹ 15 U.S.C. 78f(b)(1).

⁴² 15 U.S.C. 78f(b)(5).

In the discussion below, the Exchange describes provisions in the LLC Agreement related to the term and termination of the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Pursuant to Section 2.3 of the LLC Agreement, the Company will have a perpetual legal existence unless it is sooner dissolved as a result of an event specified in the Delaware Limited Liability Company Act, as amended and in effect from time to time, and any successor statute (the “LLC Act”) or by agreement of the Members. The term is the same as the provision in the BOX Options LLC Agreement,⁴³ but also provides that the Company can be dissolved by agreement of the Members. In addition, Section 10.1 of the LLC Agreement provides that the Company shall be dissolved upon (i) the election to dissolve the Company made by the Board pursuant to Section 4.4(b)(v) of the LLC Agreement; (ii) the entry of a decree of judicial dissolution under § 18-802 of the LLC Act; (iii) the resignation, expulsion, bankruptcy or dissolution 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 LLC Act; or (iv) the occurrence of any other event that causes the dissolution of a limited liability company under the LLC Act unless the Company is continued without dissolution in accordance with the LLC Act. The dissolution events are generally the same as those in the BOX Options LLC Agreement;⁴⁴ however, the Company may also be dissolved by the affirmative vote of Members holding a majority of all of the then outstanding Percentage Interests (excluding any Percentage Interests held directly or indirectly by tZERO and its Affiliates⁴⁵ from the numerator and the denominator

⁴³ See BOX Options LLC Agreement Section 2.3.

⁴⁴ See BOX Options LLC Agreement Section 8.1.

⁴⁵ An “Affiliate” is defined as “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

for such calculation) taken within 180 calendar days after the occurrence of any “Trigger Event” as such term is defined in the IP License and Services Agreement entered into by and between tZERO and the Company (the “LSA”) and described in more detail below.⁴⁶ The Exchange believes that the addition of such dissolution events will promote just and equitable principles of trade, and, in general, protect investors and the public interest, consistent with Section 6(b)(5) of the Act.⁴⁷

Upon the occurrence of any of the events set forth in Section 10.1(a) of the LLC Agreement, the Company will be dissolved and terminated in accordance with the provisions of Article 10 of the LLC Agreement.

Governance of the Company

In the discussion below, the Exchange describes provisions in the LLC Agreement related to the governance of the Company, highlighting areas that vary in comparison to the

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 security 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.” See Section 1.1, LLC Agreement.

⁴⁶ The LSA defines a “Trigger Event” as meaning “any of the following events: (a) a material breach by tZERO of any of its obligations under this LSA (being either a single event which is a material breach or a series of breaches which taken together are a material breach) which material breach or failure is not cured by tZERO within 90 days after Company gives written notice of such breach or failure to tZERO hereunder, except for system availability issues in which case the cure period shall be 10 days; (b) any bankruptcy, reorganization, debt arrangement, or other case or proceeding under any bankruptcy or insolvency Law or any non-frivolous dissolution or liquidation proceedings commenced by or against tZERO; and if such case or proceeding is not commenced by tZERO, it is acquiesced by tZERO in or remains undismissed for 30 days; (c) tZERO ceasing active operation of its business without a successor or discontinuing any of the Base Services; (d) tZERO becomes judicially declared insolvent or admits in writing its inability to pay its debts as they become due; or (e) tZERO applies for or consents to the appointment of a trustee, receiver or other custodian for tZERO, or makes a general assignment for the benefit of its creditors.”

⁴⁷ 15 U.S.C. 78f(b)(5).

BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Section 4.1 of the LLC Agreement establishes a board of directors of the Company (the “Board of Directors” or the “Board”) to manage the development, operations, business and affairs of the Company without the need for any approval of the Members or any other person. Section 4.10 of the LLC Agreement provides that, except and only to the extent expressly provided for in the LLC Agreement and the Related Agreements and as delegated by the Board of Directors to committees of the Board of Directors or to duly appointed Officers or agents of the Company, neither a Member nor any other Person other than the Board of Directors 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. Section 4.12(a) of the LLC Agreement provides that each of the Members and the Directors, Officers, employees and agents of the Company (a) shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange and to its obligations to investors and the general public and shall not take any actions which would interfere with the effectuation of decisions by the board of directors of the Exchange relating to its regulatory functions (including disciplinary matters) or which would interfere with the Exchange’s ability to carry out its responsibilities under the Act; (b) comply with the federal securities laws and the rules and regulations promulgated thereunder; and (c) cooperate with the Exchange pursuant to its regulatory authority and with the SEC. Section 3.2 of the LLC Agreement provides that the Exchange will (a) act as the SEC-approved SRO for the BSTX Market, (b) have regulatory responsibility for the activities of the BSTX Market and provide regulatory services to the Company pursuant to the Facility Agreement. These are the same provisions that are contained in the BOX Options LLC Agreement.⁴⁸ These provisions ensure that the Exchange has full regulatory control over BSTX,

⁴⁸ See BOX Options LLC Agreement Sections 4.1, 4.10, 4.12, and 3.2.

which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company.

Section 4.1 of the LLC Agreement provides that the Board will consist of six (6) directors (each a “Director”), comprised of two (2) Directors appointed by BOX Digital, two (2) Directors appointed by tZERO (together with the BOX Digital Directors, each a “Member Director”), one (1) Director (the “Independent Director”) appointed by the unanimous vote of all of the then serving Member Directors, and one (1) non-voting Director (the “Regulatory Director”) appointed by the Exchange. As long as the Company is a facility of the Exchange pursuant to Section 3(a)(2) of the Act, the Exchange will have the right to appoint a Regulatory Director to serve as a Director. The Regulatory Director must be a member of the senior management of the regulation staff of the Exchange. By comparison, the board of directors of BOX Options is the same as BOX Holdings because it is a wholly-owned subsidiary of BOX Holdings. The remaining structure of the Board of Directors for the Company differs from that of BOX Holdings because the ownership of the Company differs from that of BOX Holdings, which has more than two owners of its voting class of equity, as discussed above. By comparison, the BOX Holdings board of directors uses a tiered system in which board voting is based on ownership percentage of the BOX Holdings owner that appointed each director. Specifically, in the BOX Holdings system, each owner of BOX Holdings is entitled to appoint a number of directors based on the percentage of total outstanding units of BOX Holdings held by such owner⁴⁹ and all of the BOX Holdings directors appointed by a single owner of BOX Holdings, together, possess voting power on the BOX Holdings board of directors commensurate with the percentage of outstanding units of BOX Holdings held by the owner appointing such directors.⁵⁰ The Exchange believes the organization of the BSTX Board is simple and effective in limiting any one Member to be able to control a maximum of 40% of voting power of the full Board. Further,

⁴⁹ See Section 4.1(a), BOX Holdings LLC Agreement.

⁵⁰ See Section 4.3(b), BOX Holdings LLC Agreement.

the Exchange believes the organization of the BSTX Board is consistent with Section 6(b)(1) of the Act by helping to ensure the Exchange, including in the operation of any facilities, continues to be so organized and has the capacity to carry out the purposes of the Act. The Company has an Independent Director to avoid either Member from controlling or creating deadlock on the Board. However, the presence of a Regulatory Director selected by the Exchange on the Board is identical to the longstanding practice at the Exchange's other facility, BOX Options. The Exchange believes that the proposed board structure, and in particular, the inclusion of the proposed Independent Director and Regulatory Director, will 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, to 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, consistent with Section 6(b)(5) of the Act.⁵¹ Further, the Exchange believes that inclusion of the Regulatory Director on the BSTX Board would also be consistent with Section 6(b)(1) of the Act. This is because the Regulatory Director is required to be someone who is a member of the senior management of the regulation staff of the Exchange and is therefore a person who is knowledgeable of the rules of the Exchange and the regulations applicable to it and, in turn, is someone who would be well positioned to help ensure the Exchange, including in the operation of any facilities, continues to be so organized and has the capacity to carry out the purposes of the Act, including to prevent inequitable and unfair practices.

Section 4.3 of the LLC Agreement provides that the Board will meet as often as it deems necessary, but at least four (4) times per year.⁵² Meetings of the Board or any committee thereof may be conducted in person or by telephone or in any other manner agreed to by the Board or,

⁵¹ 15 U.S.C. 78f(b)(5).

⁵² LLC Agreement Section 4.3 is based on Section 4.3 of the BOX Options LLC Agreement.

respectively, by the members of a committee. Any of the Directors or the Exchange 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 the meeting may be given not less than forty-eight (48) hours before the meeting is to be held. No notice of a meeting shall be necessary when all Directors are present. The attendance of at least a majority of all the Directors shall constitute a quorum for purposes of any meeting of the Board. Except as may otherwise be provided by the LLC Agreement, each of the Directors will be entitled to one vote on any action to be taken by the Board, except that the Regulatory Director shall not vote on any action to be taken by the Board or any committee, the CEO (if a Director) shall not be entitled to vote on matters relating to the CEO's powers, compensation or performance, and a Director shall not be entitled to vote on any matter pertaining to that Director's removal from office. A Director may vote the votes allocated to another Director (or group of Directors) pursuant to a written proxy. Except as otherwise provided by the LLC Agreement, any action to be taken by the Board shall be considered effective only if approved by at least a majority of the votes entitled to be voted on that action. Meetings of the Board may be attended by other representatives of the Members, the Exchange and other persons related to the Company as the Board may approve.⁵³ 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 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 that

⁵³ Section 4.3 of the BOX Options LLC Agreement varies from Section 4.3 of the LLC Agreement in that the corresponding sentence in Section 4.3 of the BOX Options LLC Agreement references BOX Holdings Members rather than Members of the existing facility, BOX Options, while Section 4.3 of the LLC Agreement references Members of the proposed facility, BSTX. This difference is because BOX Options is wholly-owned by BOX Holdings and, therefore, BOX Options has only one owner. Accordingly, ownership of the existing facility, BOX Options, diverges with the Members of BOX Holdings while ownership of the proposed facility, BSTX, diverges with the Members of BSTX.

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 determine procedures relating to the recording of minutes of its meetings. The Exchange believes that the proposed board structure will 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, to 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, consistent with Section 6(b)(5) of the Act.⁵⁴

Pursuant to Section 4.4 of the LLC Agreement, no action with respect to any major action (each a “Major Action”), will be effective unless approved by the Board, including the affirmative vote of all then serving Member Directors, in each case acting at a meeting. A vacancy on the Board will not prevent approval of a Major Action. No other Member votes are required for a Major Action. For purposes of the LLC Agreement, “Major Action” means any of the following: (i) a merger or consolidation of the Company with any other entity or the sale by the Company of any material portion of its assets; (ii) entry by the Company into any line of business other than the business outlined in Article 3 of the LLC Agreement; (iii) conversion of the Company from a Delaware limited liability company into any other type of entity; (iv) except as expressly contemplated by the LLC Agreement and then existing Related Agreements, entering into any agreement, commitment, or transaction with any Member or any of its Affiliates other than transactions or agreements upon commercially reasonable terms that are no less favorable to the Company than the Company would obtain in a comparable arms-length transaction or agreement with a third party; (v) to the fullest extent permitted by law, taking any action (except pursuant to a vote of the Members pursuant to Section 10.1(a)(iii)) of the LLC Agreement to effect the voluntary, or which would precipitate an involuntary, dissolution or

⁵⁴ 15 U.S.C. 78f(b)(5).

winding up of the Company; (vi) operating the BSTX Market utilizing any other software system, other than the BSTX System, except as otherwise provided in the LSA or to the extent otherwise required by the Exchange to fulfill its regulatory functions or responsibilities or to oversee the BSTX Market as determined by the board of the Exchange; (vii) operating the BSTX Market utilizing any other regulatory services provider other than the Exchange, except as otherwise provided in the Facility Agreement or to the extent otherwise required by the Exchange to fulfill its regulatory functions or responsibilities or to oversee the BSTX Market as determined by the board of the Exchange; (viii) entering into any partnership, joint venture or other similar joint business undertaking; (ix) making any fundamental change in the market structure of the Company from that contemplated by the Members as of the date of the LLC Agreement, except to the extent otherwise required by the Exchange to fulfill its regulatory functions or responsibilities or to oversee the BSTX Market as determined by the board of the Exchange; (x) issuing any new Units pursuant to Section 7.6 of the LLC Agreement or admitting additional or substitute Members pursuant to Section 7.1(b); (xi) altering the provisions for Board membership applicable to any Member, except to the extent otherwise required by the Exchange to fulfill its regulatory functions or responsibilities or to oversee the BSTX Market as determined by the board of the Exchange; and (xii) altering the definition of or requirements for approving a Major Action, except to the extent otherwise required by the Exchange to fulfill its regulatory functions or responsibilities or to oversee the BSTX Market as determined by the board of the Exchange. The Major Action events are generally the same as those in the BOX Options LLC Agreement and BOX Holdings LLC Agreement⁵⁵ with the exception of deletions to references to BOX Options affiliates and owners and to include cross references to other provisions of the LLC Agreement; however, the Company's LLC Agreement also provides that a Major Action also includes provisions (viii), (x), and (xi) as described above. The Exchange

⁵⁵ See Section 4.4 of the BOX Options LLC Agreement and Section 4.4 of the BOX Holdings LLC Agreement.

believes that such events should be deemed Major Actions for commercial fairness. The Exchange believes that deeming the above referenced events as Major Actions will 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, to 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, consistent with Section 6(b)(5) of the Act.⁵⁶ In addition, such requirements enhance the ability of the Exchange and its proposed facility, BSTX, to effectively carry out its regulatory responsibilities under the Act, particularly with Section 6(b)(1) thereof, which requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.

Pursuant to Section 4.1(b) of the LLC Agreement, a Member Director may be removed by the Member entitled to appoint that Member Director, with or without cause. The Independent Director may be removed by a majority vote of the then serving Member Directors, with or without cause. Any Member Director or Independent Director may be removed by the Board if the Board determines, in good faith, that the Director has violated any provision of the LLC Agreement or any federal or state securities law or that such action is necessary or appropriate in the public interest or for the protection of investors. A Director shall not participate in any vote regarding that Director's removal. The Company shall promptly notify the Exchange in writing of the commencement or cessation of service of a Member Director or Independent Director. Like BOX Options, Directors may be removed by the Board for reasons related to protection of investors and the owners with rights to appoint a Member Director have power to remove and replace their respective designees. The removal provisions for the Company's Independent Director differ from those of BOX Options and BOX Holdings because those entities do not have an Independent Director. The Exchange believes that the proposed

⁵⁶ 15 U.S.C. 78f(b)(5).

removal provisions will 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, to 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, consistent with Section 6(b)(5) of the Act. Further, the Exchange believes that the ability for Member Directors and Independent Directors to be removed from the Board in the circumstances described above would be consistent with Section 6(b)(1) of the Act.⁵⁷ This is because removal of such Directors who have violated the LLC Agreement or federal or state laws would help ensure that the Exchange, including in its operation of facilities, is so organized and has the capacity to be able to carry out the purposes of the Act, including the prevention of inequitable and unfair practices.

Section 4.1(c) of the LLC Agreement provides that, if a vacancy is created on the Board as a result of the death, disability, retirement, resignation or removal (with or without cause) of a Member Director or otherwise there shall exist or occur any vacancy on the Board, the Member whose designee created the vacancy will fill that vacancy by written notice to the Company. Each Member shall promptly fill vacancies on the Board, and the Board shall consider the advisability of taking further action until the vacancies are filled. The vacancy provisions are not in the BOX Options LLC Agreement; however, the Exchange believes that providing for contingencies in the event of a vacancy are important to avoid business disruption and, therefore, this proposal will foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Act.⁵⁸ Further, the Exchange believes that filling Director vacancies, as described above, would provide a predetermined and transparent manner for filling Director vacancies and therefore help avoid business disruptions at BSTX.

⁵⁷ 15 U.S.C. 78f(b)(1).

⁵⁸ 15 U.S.C. 78f(b)(5).

The Exchange believes that this, in turn, would be consistent with Section 6(b)(1) of the Act⁵⁹ because it would help ensure that the Exchange, including in the operation of facilities, is so organized and has the capacity to be able carry out the purposes of the Act, including to remove impediments to and perfect the mechanisms of a national market system for securities.

Section 4.1(d) of the LLC Agreement provides that the Regulatory Director may be removed (a) by the Exchange, with or without cause, (b) by the Board if the Board determines, in good faith, that the Regulatory Director has violated any provision of the LLC Agreement or any federal or state securities law, or (c) by the Board if the Board determines, in good faith, that the Regulatory Director does not meet the requirements of a Regulatory Director as set forth in the LLC Agreement. If the Regulatory Director ceases to serve for any reason, the Exchange shall appoint a new Regulatory Director in accordance with the requirements in the LLC Agreement. The removal provisions in the Company's LLC Agreement are substantially the same as those in the BOX Options LLC Agreement.⁶⁰

Section 4.12(b) of the LLC Agreement provides that the Company and its Members shall comply with the federal securities laws and the rules and regulations promulgated thereunder and shall cooperate with the SEC and the Exchange pursuant to and to the extent of their respective regulatory authority. The Directors, Officers, employees and agents of the Company, by virtue of their acceptance of such position, shall comply with the federal securities laws and the rules and regulations promulgated thereunder and shall be deemed to agree to cooperate with the SEC and the Exchange in respect of the SEC's oversight responsibilities regarding the Exchange, and the Company shall take reasonable steps necessary to cause its Directors, Officers, employees

⁵⁹ 15 U.S.C. 78f(b)(1).

⁶⁰ See Section 4.1(d) of the BOX Options LLC Agreement.

and agents to so cooperate. These provisions in the LLC Agreement are the same as those in the BOX Options LLC Agreement and BOX Holdings LLC Agreement.⁶¹

Section 3.2(a)(ii) of the LLC Agreement provides that the Exchange shall receive notice of planned or proposed changes to the Company (but not including changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team building events, meetings of the Members, communication with the Members, finance, location and timing of Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the BSTX Market and de minimis items (“Non-Market Matters”)) or the BSTX Market (including, but not limited to the BSTX System) which will require an affirmative approval by the Exchange prior to implementation, not inconsistent with the LLC Agreement. Planned changes include, without limitation: (a) planned or proposed changes to the BSTX System means the technology, know-how, software, equipment, communication lines or services, services and other deliverables or materials of any kind as may be necessary or desirable for the operation of the BSTX Market.; (b) the sale by the Company of any material portion of its assets; (c) taking any action to effect a voluntary, or which would precipitate an involuntary, dissolution or winding up of the Company; or (d) obtaining regulatory services from a regulatory services provider other than the Exchange. Procedures for requesting and approving changes shall be established by the mutual agreement

⁶¹ See Section 4.12(b) of the BOX Options LLC Agreement and Section 4.12(b) of the BOX Holdings LLC Agreement.

of the Company and the Exchange.⁶² These provisions in the LLC Agreement are the same as those in the BOX Options LLC Agreement.⁶³

Section 3.2(a)(iii) of the LLC Agreement provides that in the event that the Exchange, in its sole discretion, determines that the proposed or planned changes to the Company or the BSTX Market (including, but not limited to, the BSTX System) set forth in Section 3.2(a)(ii) of the LLC Agreement could cause a Regulatory Deficiency⁶⁴ if implemented, the Exchange may direct the Company, subject to approval of the Exchange board of directors, to modify the proposal as necessary to ensure that it does not cause a Regulatory Deficiency. The Company will not implement the proposed change until it, and any required modifications, are approved by the Exchange board of directors. The costs of modifications undertaken shall be paid by the Company. These provisions in the LLC Agreement are the same as those in the BOX Options LLC Agreement.⁶⁵ These provisions ensure the Exchange maintains full regulatory control and authority over BSTX while it operates as a facility of the Exchange. The Exchange believes this provision helps guarantee the Exchange's ability to fulfill its regulatory responsibilities and operate in a manner consistent with the Act, in particular with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁶⁶

⁶² The language providing that procedures for requesting and approving changes shall be established by the mutual agreement of the Company and the Exchange does not diminish the power and authority of the Exchange to regulate such changes because, if the Company and the Exchange cannot agree on procedure, the Exchange simply will not approve any such change. By the terms of Section 3.2(a)(ii) of the LLC Agreement, planned or proposed changes to the Company will require an affirmative approval by the Exchange prior to implementation and such affirmative approval will not be given.

⁶³ See Section 3.2(a)(ii) of the BOX Options LLC Agreement.

⁶⁴ "Regulatory Deficiency" is defined as "the operation of the Company (in connection with matters that are not Non-Market Matters) or the BSTX Market (including, but not limited to, the BSTX System) in a manner that is not consistent with the Exchange Rules and/or the SEC Rules governing the BSTX Market or BSTX Participants, or that otherwise impedes the Exchange's ability to regulate the BSTX Market or BSTX Participants or to fulfill its obligations under the Act as an SRO.

⁶⁵ See Section 3.2(a)(iii) of the BOX Options LLC Agreement. See Section 1.1, LLC Agreement.

⁶⁶ 15 U.S.C. 78f(b)(1).

Section 3.2(a)(iv) of the LLC Agreement provides that in the event that the Exchange, in its sole discretion, determines that a Regulatory Deficiency exists or is planned, the Exchange may direct the Company, subject to approval of the Exchange board of directors, to undertake such modifications to the Company (but not to include Non-Market Matters) or the BSTX Market (including, but not limited to, the BSTX System), as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow the Exchange to perform and fulfill its regulatory responsibilities under the Act.⁶⁷ The costs and modifications undertaken shall be paid by the Company. These provisions in the LLC Agreement are substantially the same as those in the BOX Options LLC Agreement, with the exception of a reference to an agreement that is not applicable to the Company.⁶⁸

Section 3.2(c) of the LLC Agreement states that BOX Digital will provide executive leadership and exclusive rights to the regulatory services of the Exchange with respect to BSTX Products. With the consent of the Exchange, BOX Digital holds exclusive rights to the regulatory services of the Exchange with respect to BSTX Products. BOX Digital directors, officers and employees, including its CEO, Lisa Fall, are experienced executive managers of SROs and exchange facilities. In becoming a Member of BSTX and becoming a party to the LLC Agreement, BOX Digital agreed to contribute these assets to the Company.

Regulatory Funds

The Exchange represents that the Facility Agreement will require the Company to provide adequate funding for the Exchange's operations with respect to the Company, including

⁶⁷ As discussed above, the Exchange will appoint a Regulatory Director who may, among other things, serve as a Director of any regulatory committee(s). Such individual will also have insight and access to important information related to the Company; for example, while the Regulatory Director may not serve as a Director on Board committees other than authorized regulatory committees, the Regulatory Director nevertheless shall (A) have the right to attend all meetings of the Board and committees thereof; (B) receive equivalent notice of meetings as other Directors; and (C) receive a copy of the meeting materials provided to other Directors, including agendas, action items and minutes for all meetings. (See LLC Agreement §4.2(c).)

⁶⁸ See Section 3.2(a)(iv) of the BOX Options LLC Agreement.

the regulation of the Exchange. The Facility Agreement will provide that the Exchange receives all fees, including regulatory fees and trading fees, payable by BSTX Participants, as well as any funds received from any applicable market data fees, tape and other revenue. The Exchange represents that fees received from all Exchange facilities, including fees from BSTX Participants, will be adequate to operate the Exchange and to regulate the Company. The Facility Agreement will further provide that the Company will reimburse the Exchange for its costs and expenses to the extent the Exchange's assets are insufficient. The Exchange will require the Company to allocate sufficient available funds to adequately operate the facility until it begins receiving revenues from operations. Prior to commencing operations as a facility of the Exchange, the Company will have all such necessary funds and assets, including furnishings, equipment and servers. To the extent the Company needs any additional funding to meet this requirement, such funds will be provided to the Company by one or more of its Members.

Pursuant to Section 9 of the Facility Agreement, the Company will agree that the Exchange has the right to receive all fees, fines and disgorgements imposed upon BSTX Participants with respect to the Company's trading system ("Regulatory Funds") and all market data fees, tape and other revenues ("Non-regulatory Funds"). All Regulatory Funds and Non-regulatory Funds collected by the Exchange with respect to the Company may be used by the Exchange for regulatory purposes, which will be determined in the sole discretion of the Exchange. In determining the excess funds to remit to the Company, the Exchange will exercise prudent financial management (including cash flow management) and may retain funds for anticipated and unanticipated expenses. To the extent the Company incurs costs and expenses for regulatory purposes, the Exchange may reimburse the Company using Regulatory Funds. In the event the Exchange, at any time, determines that it does not hold sufficient funds to meet all regulatory purposes, the Company will reimburse the Exchange for any such additional costs and expenses. All Regulatory Funds collected by the Exchange will be retained by the Exchange and not transferred to the Company. Non-regulatory funds collected by the Exchange may be

transferred to the Company after the Exchange makes adequate provision for all regulatory purposes. These provisions ensure that the Exchange has full control over BSTX with respect to its regulated functions and is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company.

Capital Contributions and Distributions

In the discussion below, the Exchange describes provisions in the LLC Agreement related to capital contributions and distributions by the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Pursuant to Section 6.1 of the LLC Agreement, all capital contributions contributed to the Company by holders of Units shall be reflected on the books and records of the Company. No interest will be paid on any capital contribution to the Company. No Member will have any personal liability for the repayment of the capital contribution of any Member, and no Member will have any obligation to fund any deficit in its Capital Account. Each Member waived any right to partition the property of the Company or to commence an action seeking dissolution of the Company under the LLC Act. These provisions are substantially the same as those in the BOX Holdings LLC Agreement.⁶⁹

Under Section 6.2 of the LLC Agreement, the Board, in its sole discretion, will determine the capital needs of the Company. If at any time the Board determines that additional capital is required in the interests of the Company, additional working capital shall be raised in such manner as determined by a vote of the Board, including the affirmative vote of at least one Member Director appointed by each Member, but the Board will not have the power to require the Members to make any additional capital contributions. These provisions in the LLC Agreement are substantially the same as those in the BOX Options LLC Agreement, with the

⁶⁹ See Section 6.1 of the BOX Holdings LLC Agreement.

exception of the requirement for at least one Member Director appointed by each Member to affirmatively vote on the manner to raise additional working capital.⁷⁰ The Exchange believes that this added provision exists for purposes of commercial fairness and is necessary due to the ownership structure of the Company and that it will foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Act.⁷¹

Pursuant to Section 8.1 of the LLC Agreement, if at any time and from time to time the Board 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 the Company shall make cash distributions to its Members in the following manner and priority: first, the Company shall make tax distributions (“Tax Distributions”) to the Members to cover each Member’s estimated income tax for that period (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). All tax distributions to a Member will be treated as advances against any subsequent distributions to be made to that Member. Subsequent distributions made to the Member 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 will be equal, as nearly as possible, to the aggregate amount that would have been distributable to that Member pursuant to the LLC Agreement if the LLC Agreement contained no provision for Tax Distributions; second, when, as and if declared by the Board, the Company shall make cash distributions to each of the Members pro rata in accordance with that Member’s respective Percentage Interest. Since the Company does not have the same ownership as BOX Options, the distribution provisions in the LLC Agreement differ from the BOX Options

⁷⁰ See Section 6.2 of the BOX Options LLC Agreement.

⁷¹ 15 U.S.C. 78f(b)(5).

LLC Agreement and BOX Holdings LLC Agreement. These provisions relate to tax and accounting rules to which the Company is subject, due to its ownership structure. As such, these provisions are standard or not novel for a similarly situated commercial business registered as a limited liability company under the laws of the state of Delaware.

Section 8.2 of the LLC Agreement provides that the Company, and the Board on behalf of the Company, shall not make a distribution to any Member on account of its ownership interest in the Company if, and to the extent, such distribution would violate the LLC Act or other applicable law. This provision in the LLC Agreement is the same as the provision in the BOX Options LLC Agreement and BOX Holdings LLC Agreement.⁷²

Section 9.1 of the LLC Agreement provides that all profits, losses 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) pro rata among the Members based on that Member's respective Percentage Interest, subject to limitations, offsets, chargebacks, deductions and revaluations. Since the Company does not have the same ownership as BOX Options, the allocation of profits and losses provisions in the LLC Agreement differ from the BOX Options LLC Agreement. These provisions relate to tax and accounting rules to which the Company is subject, due to its ownership structure. As such, these provisions are standard or not novel for a similarly situated commercial business registered as a limited liability company under the laws of the state of Delaware.

Under Section 9.9 of the LLC Agreement, 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

⁷² See Section 7.1 of the BOX Options LLC Agreement and Section 8.2 of the BOX Holdings LLC Agreement.

year of the transaction(s)) shall be allocated among the Members so that after those allocations and the allocations required pursuant to capital account adjustments, and immediately before the making of any liquidating distributions to the Members, the Members' Capital Accounts equal, as nearly as possible, the amounts of the respective distributions to which they are entitled in a winding up. Since the Company does not have the same ownership as BOX Options, the termination and special allocation provisions in the LLC Agreement differ from the BOX Options LLC Agreement. These provisions relate to tax and accounting rules to which the Company is subject, due to its ownership structure. As such, these provisions are standard or not novel for a similarly situated commercial business registered as a limited liability company under the laws of the state of Delaware.

Pursuant to Section 10.2 of the LLC Agreement, the assets of the Company in winding up 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 provisions 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 LLC Act for distributions to those Members and former Members; and third, to the Members in proportion to their respective Percentage Interests. 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 the winding up is completed or the reserve is otherwise deemed no longer necessary by the liquidator. These provisions are substantially the same as those in the BOX Holdings LLC Agreement, with the exception of certain provisions that were not included in the LLC Agreement because they are inapplicable to the Company's structure.⁷³

⁷³ See Section 10.2 of the BOX Holdings LLC Agreement.

Intellectual Property

In the discussion below, the Exchange describes provisions in the LLC Agreement related to intellectual property of the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Pursuant to Section 3.2(b) of the LLC Agreement, tZERO will provide to the Company the intellectual property license and services necessary to operate the BSTX trading system as set forth in the LSA and will make the necessary arrangements with any applicable third parties which will permit the Company to be an authorized sublicensee of any required third-party software necessary for Trading on the BSTX System. The intellectual property provisions in the LLC Agreement are materially similar to those in the BOX Options LLC Agreement, although these documents contain certain differences reflecting the fact that, under the LLC Agreement, BSTX has a license with, and receives services from, tZERO pursuant to the LSA and, under the BOX Options LLC Agreement, the software and technology were provided to BOX Options by MX pursuant to a TOSA. The rights of the Members of each of BOX Options and BSTX with respect to their respective intellectual property are substantially similar.⁷⁴

Under the LSA, tZERO will provide the Company and the Exchange with a perpetual, fully paid up, royalty-free license to use its intellectual property comprising the BSTX trading system. In addition, the LSA provides that tZERO will provide services to the Company, including services related to implementing, administering, maintaining, supporting, hosting, developing, testing and securing the trading system. These services to be provided by tZERO relate to the specialized trading system operated by BSTX and are separate from any administrative or office technology services provided to BSTX by the Exchange discussed above.

⁷⁴ See Article 17 of the LLC Agreement and Article 13 of the BOX Options LLC Agreement.

Pursuant to the LSA, tZERO retains its ownership of the BSTX trading system and tZERO's trademarks and service marks; provided, however, that the Company will own deliverables, enhancements and other technology that are developed or created by tZERO for the Company, including any related documentation and intellectual property.

Employees of tZERO will provide to the Company the services discussed above under the LSA. This relationship will be similar to the employees of any other technology service provider providing services to the Exchange or a facility of the Exchange. Pursuant to the LSA and Article 15 of the LLC Agreement, tZERO directors, officers and employees will only receive confidential information of the Company or the Exchange, including regulatory information, on a need-to-know basis as it relates to the technology services being provided or specific roles with respect to the Company and the Exchange. Directors, officers and employees of tZERO will be subject to confidentiality obligations with respect to any confidential information they receive in the course of performing their services, including regulatory information. tZERO employees providing technology services to the Company or the Exchange will have offices physically separate from employees of the Company and the Exchange. As discussed below, the Exchange will continue to have all authority to direct its facilities and service providers, including tZERO. tZERO and its employees will not have operational control of the Company or its systems and will not have authority to make changes to the BSTX System except under the direction of, and after receiving the consent of, the facility under the direction of the Exchange or the Exchange itself. All operational control of BSTX and the BSTX System will be retained by BSTX, under the regulatory authority of the Exchange, except for regulatory and surveillance systems which will be controlled directly by the Exchange. tZERO will provide technology support services to the Exchange and the proposed facility, BSTX.

Non-competition

Section 16.1 of the LLC Agreement provides that, for so long as it holds, directly or indirectly, a combined Percentage Interest in the Company of five percent (5%) or more, a

Member will not hold or invest in more than five percent (5%) of, or participate in the creation and/or operation of, any U.S.-based market for the secondary trading of securities with a blockchain component or in any person engaged in the creation and/or operation of any U.S.-based market for the secondary trading of securities with a blockchain component. The non-competition provision is substantially the same as the non-competition provision in the BOX Holdings LLC Agreement.⁷⁵

Changes in Ownership of the Company

In the discussion below, the Exchange describes provisions in the LLC Agreement related to changes in ownership of the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Section 7.1(a) of the LLC Agreement provides that no person will directly or indirectly, whether voluntarily, involuntarily, by operation of law or otherwise, dispose of, sell, alienate, assign, exchange, participate, subparticipate, encumber, or otherwise transfer in any manner (each, a “Transfer”) its Units unless prior to that Transfer the transferee is approved by a vote of the Board. To be eligible for Board approval, a proposed transferee must be of high professional and financial standing, be able to carry out its duties as a Member hereunder, if admitted as a Member, and 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 Board approval. However, the following will not be included in the definition of “Transfer”: transfers among Members, transfers to any Person directly or indirectly owning, controlling or holding with power to vote all of the outstanding voting securities of and equity or beneficial interests in that Member, or transfers to any Person that is a wholly owned Affiliate of a transferring Member. A holder of Units will provide prior written notice to the Exchange of

⁷⁵ See Section 16.1 of the BOX Holdings LLC Agreement.

any proposed Transfer. Any Transfer which violates the Transfer restrictions in the LLC Agreement will be void and ineffectual and will not bind or be recognized by the Company.

Section 7.1(b) of the LLC Agreement establishes that a person will be admitted to the Company as an additional or substitute Member of the Company only upon that person's execution of a counterpart of the LLC Agreement to evidence its written acceptance of the terms and provisions of the LLC Agreement, and acceptance thereof by resolution of the Board, which acceptance may be given or withheld in the sole discretion of the Board; if that person is a transferee, its agreement in writing to its assumption of the obligations under the LLC Agreement of its assignor, and acceptance thereof by resolution of the Board; if that person is a transferee, a determination by the Board that the Transfer was permitted by the LLC Agreement; and approval of the Board. Whether or not a transferee who acquired any Units has accepted in writing the terms and provisions of the LLC Agreement and assumed in writing the obligations hereunder of its predecessor in interest, that transferee will be deemed, by the acquisition of those Units, to have agreed to be subject to and bound by all the obligations of the LLC Agreement with the same effect and to the same extent as any predecessor in interest of that transferee. Notwithstanding the foregoing, any Person to which the Company issues new Class B Units shall be automatically admitted as a Member upon such Person's execution of a counterpart of the LLC Agreement.⁷⁶ Pursuant to Section 7.1(c) of the LLC Agreement, all costs incurred by the Company in connection with the admission of a substituted Member will be paid by the transferor Member. The transfer provisions in Section 7.1 of the LLC Agreement are not contained in the BOX Options LLC Agreement; however, the Exchange notes that the provisions of Section 7.1 are substantially based on provisions in the BOX Holdings LLC Agreement.⁷⁷

⁷⁶ Automatic admission of Class B Units as Members upon such Person's execution of a counterpart of the LLC Agreement is not included in the BOX Holdings LLC Agreement because BOX Holdings does not have a non-voting class of units similar to the non-voting Class B Units issued by the Company to service providers to the Company under the authority of the Board.

⁷⁷ See Section 7.1 of the BOX Holdings LLC Agreement.

Pursuant to Section 7.2 of the LLC Agreement, the Company will have a right of first refusal if a Member desires to Transfer its Units, and obtains a bona fide offer therefor from a third-party transferee. Further, Section 7.3 of the LLC Agreement provides that, if the Company does not elect to exercise its right of first refusal, the non-transferring Member(s) next have a right of first refusal. The provisions in Sections 7.2 and 7.3 of the LLC Agreement are substantially based on provisions found in the BOX Holdings LLC Agreement, with certain variations to account for differences in corporate and ownership structure.⁷⁸ The Exchange believes that such variations are necessary to ensure proper application of the LLC Agreement's provisions to the Company, which serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, consistent with Section 6(b)(5) of the Act.⁷⁹ Further, the Exchange believes that the variations in Sections 7.2 and 7.3 of the LLC Agreement that tailor those provisions to the corporate and ownership structure of BSTX would help ensure that persons subject to the Exchange's jurisdiction are able to navigate and more readily understand the LLC Agreement. The Exchange believes that this, in turn, would be consistent with Section 6(b)(1) of the Act⁸⁰ because it would help ensure that the Exchange, including in its operation of facilities, is so organized and has the capacity to be able to carry out the purposes of the Act.

Pursuant to Section 7.4 of the LLC Agreement, no Transfer may occur if the Transfer could cause a termination of the Company, 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, is prohibited by any securities laws, is prohibited by the LLC Agreement, or is to a minor or incompetent person.

⁷⁸ See Sections 7.2 and 7.3 of the BOX Holdings LLC Agreement.

⁷⁹ 15 U.S.C. 78f(b)(5).

⁸⁰ 15 U.S.C. 78f(b)(1).

Section 7.4(e) of the LLC Agreement requires that a Member will provide the Company with written notice fourteen (14) days prior, and the Company will provide the Commission and the Exchange with written notice ten (10) days prior, to the closing date of any acquisition that results in that Member's Percentage Interest, alone or together with any related person of that Member, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%. Any person that, either alone or together with its related persons, owns, directly or indirectly, of record or beneficially, five percent (5%) or more of the then outstanding Units will, immediately upon acquiring knowledge of its ownership of five percent (5%) or more of the then outstanding Units, give the Company written notice of that ownership. In addition, Section 7.4(f) of the LLC Agreement provides that any Transfer that results in the acquisition and holding by any person, alone or together with its related persons, 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.) is also subject to the rule filing process pursuant to Section 19 of the Act.

Under Section 7.4(g) of the LLC Agreement, unless it does not directly or indirectly hold any interest in a Member, a Controlling Person (as defined below) of a Member will be required to execute an amendment to the LLC Agreement upon establishing a Controlling Interest (as defined below) in any Member that, alone or together with any related persons of that Member, holds a Percentage Interest in the Company equal to or greater than 20%. This amendment will be substantially in the form of the instrument of accession attached as Exhibit 5B hereto [sic] and provide that the Controlling Person will agree to become a party to the LLC Agreement and to abide by all of its provisions, to the same extent and as if they were Members. These amendments to the LLC Agreement will be subject to the rule filing process pursuant to Section 19 of the Act. The rights and privileges, including all voting rights, of the Member in whom a Controlling Interest is held, directly or indirectly, under the LLC Agreement and the LLC Act will be suspended until the amendment has become effective pursuant to Section 19 of the Act or

the Controlling Person no longer holds, directly or indirectly, a Controlling Interest in the Member.⁸¹ As a result, any new Member or other direct or indirect owner of an equity interest in BSTX, whether by transfer of such equity interest from an existing owner or otherwise, will be subject to the same requirements as all other Members, namely that it will be required to execute an instrument of accession to the LLC Agreement and be subject to the rule filing process if the new Member holds, directly or indirectly, a Controlling Interest in BSTX.

In accordance with Section 7.4(h) of the LLC Agreement and as discussed above, in the event any Member, or any Related Person of such Member, is approved by the Exchange as a BSTX Participant pursuant to the Exchange Rules, and such Member owns more than 20% of the Units, alone or together with any Related Person of such Member (Units owned in excess of 20% being referred to as “Excess Units”), the Member and its appointed Member Directors shall have no voting rights whatsoever with respect to any action relating to the Company nor shall the Member or its appointed Member 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 appointed Member 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). In addition, an effective rule filing pursuant to Section 19 of the Act shall be required prior to any Member, or any Related Person of such Member, becoming a BSTX Participant if such Member, alone or together with any Related Persons of such Member, has the right to appoint more than 20% of the Directors entitled to vote and, unless a rule filing authorizing the foregoing is first effective, such Member, or any Related Person of such Member, shall not be registered as a BSTX Participant. The Exchange notes that Section 7.4 of

⁸¹ See *supra* note 21.

the Company's LLC Agreement is identical in substance to provisions of the BOX Holdings LLC Agreement.⁸²

In addition to the provisions discussed above, Section 5 of the LLC Agreement includes provisions that relate to changes in ownership of the Company. Because BOX Options is wholly-owned by BOX Holdings, the LLC Agreement differs from the BOX Options LLC Agreement. Under Section 5.5 of the LLC Agreement, a Member will cease to be a Member of the Company upon the Bankruptcy or the involuntary dissolution of that Member. Further, Section 5.8 of the LLC Agreement allows the Board, by unanimous vote and after appropriate notice and opportunity for hearing, to suspend or terminate a Member's voting privileges or membership in the Company for three potential reasons: (i) in the event the Board determines in good faith that such Member is subject to a "statutory disqualification," as defined in Section 3(a)(39) of the Act; (ii) in the event the Board determines in good faith that such Member has violated a material provision of this Agreement, or any federal or state securities law; or (iii) in the event the Board determines in good faith that such action is necessary or appropriate in the public interest or for the protection of investors. The Exchange believes that limiting the ability to participate in the Company for Members who may act in contravention of legal or ethical standards may promote just and equitable principles of trade, and, in general, protects investors and the public interest, consistent with Section 6(b)(5) of the Act.⁸³ Further, the Exchange believes that the ability to suspend or terminate a Member's voting privileges or membership in the Company as described above would be consistent with Section 6(b)(1) of the Act.⁸⁴ This is because such measures in respect of Members who act in contravention of legal or ethical standards would help ensure that the Exchange, including in its operation of facilities, is so

⁸² See Section 7.4 of the BOX Holdings LLC Agreement.

⁸³ 15 U.S.C. 78f(b)(5).

⁸⁴ 15 U.S.C. 78f(b)(1).

organized and has the capacity to be able to carry out the purposes of the Act, including the prevention of inequitable and unfair practices.

Finally, the Exchange notes that Section 18.1 of the Company's LLC Agreement provides that amendments to the LLC Agreement must be approved by the Board, including one Member Director appointed by each of BOX Digital and tZERO, and any amendment of a provision specific to any Class, Member, or the Exchange requires the consent of holders of a majority of the outstanding Units of such Class, or such Member or the Exchange (as applicable). In addition, the Company shall provide prompt notice to the Exchange of any amendment, modification, waiver or supplement to the Agreement formally presented to the Board for approval and the Exchange shall review each such amendment, modification, waiver or supplement and, if such amendment is required, under Section 19 of the 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.⁸⁵ These provisions are similar to provisions in the BOX Holdings LLC Agreement but differ in details related to the different ownership structure of the Company.⁸⁶

Regulation of the Company

In the discussion below, the Exchange describes provisions in the LLC Agreement related to regulation of the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Generally, Section 3.2 of the LLC Agreement, which is identical in substance to a provision in the BOX Options LLC Agreement, provides that the Exchange has authority to act

⁸⁵ A proposed rule change can also become effective by operation of law. See 15 U.S.C. 78s(b)(2).

⁸⁶ See Section 18.1 of the BOX Holdings LLC Agreement.

as the SRO for the Company, will provide the regulatory framework for the BSTX Market and will have regulatory responsibility for the activities of the BSTX Market.⁸⁷ In addition, the Exchange will provide regulatory services to the Company pursuant to the Facility Agreement. Nothing in the LLC Agreement shall be construed to prevent the Exchange from allowing the Company to perform activities that support the regulatory framework for the BSTX Market, subject to oversight by the Exchange. This provision ensures that the Exchange has full regulatory control over BSTX, which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company.

Section 15 of the LLC Agreement deals with how the Company will govern the handling of confidential information, as it relates to the securities regulations and otherwise. All of the provisions in Section 15 of the LLC Agreement are substantively similar to provisions in the BOX Options LLC Agreement, except where noted below.⁸⁸ Under Sections 15.1 and 15.2(a) of the LLC Agreement, subject to certain exceptions set forth below, no Member will make any public disclosures concerning the LLC Agreement without the prior approval of the Company. Each Member and the Exchange may only use confidential information of the Company in connection with the activities contemplated by the LLC Agreement and other written agreements and pursuant to the Act and the rules and regulations thereunder. Furthermore, Section 15.4 of the LLC Agreement provides that representatives of the parties will meet to institute confidentiality procedures and discuss confidentiality and disclosure issues.

Pursuant to Section 15.2(b) of the LLC Agreement, each of the Members and the Exchange may disclose confidential information of the Company only to its respective directors, officers, employees and agents who have a reasonable need to know the information. Also, such individuals may disclose confidential information of the Company to the extent required by

⁸⁷ See Section 3.2 of the BOX Options LLC Agreement.

⁸⁸ See Article 12 of the BOX Options LLC Agreement.

applicable securities or other laws, a court or securities regulators, including the Commission and the Exchange.

Section 15.3 of the LLC Agreement requires that each Member and the Exchange will hold all non-public information concerning the other Members or the Exchange 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 required by law. If a Member or the Exchange is compelled to disclose any Member Information in connection with any necessary regulatory approval or by judicial or administrative process, it will promptly notify the disclosing party to allow the disclosing party to seek a protective order.

Pursuant to Section 15.5 of the LLC Agreement, nothing in the LLC Agreement will be interpreted as to limit or impede the rights of any Governmental Authority,⁸⁹ including the SEC, pursuant to the federal securities laws and rules and regulations thereunder, and the Exchange to access and examine applicable confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any directors, officers, employees, advisors or agents of the Company and any directors, officers, employees, advisors or agents of the Members to disclose that confidential information to any Governmental Authority, including the SEC, or the Exchange. Under Section 15.6 of the LLC Agreement, confidential information of the Company or the Exchange pertaining to regulatory matters (including but not limited to disciplinary matters, trading data, trading practices and audit information) will not be made available to any persons other than to the Company's Directors, officers, employees, advisors and agents that have a reasonable need to know the contents thereof; will be retained in confidence by the Company and the Directors, officers, employees,

⁸⁹ "Governmental Authority" means any United States federal, state or local government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision, or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations or orders of such organization or authority have the force of law), or any arbitrator, court or tribunal of competent jurisdiction. See Section 1.1, LLC Agreement.

advisors and agents of the Company; and will not be used for any non-regulatory purpose. Nothing in the LLC Agreement will be interpreted as to limit or impede the rights of any Governmental Authority, including the SEC, and the Exchange to access and examine that confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any Directors, officers, employees, advisors and agents of the Company to disclose that confidential information to any Governmental Authority, including the SEC, or the Exchange. These are substantially the same provisions that are contained in the BOX Options LLC Agreement, except that these provisions also clarify that advisors are included with Directors, Officers, employees and agents of the Company and provides that any Governmental Authority, including the SEC, can access and examine confidential information, pursuant to the federal securities laws and rules and regulations thereunder.⁹⁰

Finally, Section 18.8 of the LLC Agreement establishes that the Company will not operate as a facility of the Exchange until this rule filing is effective. Upon effectiveness, the Commission and the Exchange will then have regulatory oversight responsibilities with respect to the Company and references in the LLC Agreement to the Exchange, the Commission, any regulation or oversight of the Company by the Commission or the Exchange, and any participation in the affairs of the Company by the Commission or the Exchange, will take effect. The execution of the LLC Agreement by the Exchange will not be required until the approval is obtained, at which time the Exchange will become a party to the LLC Agreement. This provision is not included in the BOX Options LLC Agreement because it would not be applicable. By not operating the Company until this rule filing is effective, the Exchange believes it is fostering cooperation and coordination with persons engaged in regulating (e.g., the

⁹⁰ See Sections 12.5 and 12.6 of the BOX Options LLC Agreement.

Commission), clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Act.⁹¹

Regulatory Jurisdiction Over Members

In the discussion below, the Exchange describes provisions in the LLC Agreement related to regulatory jurisdiction over Members by the Company, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Pursuant to Section 11.1 of the LLC Agreement, which is similar in substance to a provision in the BOX Holdings LLC Agreement, the Board will cause to be entered in appropriate books, kept at the Company's principal place of business, all transactions of or relating to the Company.⁹² Each Member will have the right to inspect and copy those books and records, excluding regulatory and disciplinary information. The Board will 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 LLC Act, except for information required by law or by agreement with any third party to be kept confidential. The Company's independent auditor will be an independent public accounting firm selected by the Board. To the extent related to the operation or administration of the Exchange or the BSTX Market, all books and records of the Company and its Members will be maintained at a location within the United States, the books, records, premises, directors, officers, employees and agents of the Company and its Members will be deemed to be the books, records, premises, directors, officers, employees and agents of the Exchange for the purposes of, and subject to oversight pursuant to, the Act, and the books and records of the Company and its Members will be subject at all times to inspection and copying by the Commission and the Exchange.

⁹¹ 15 U.S.C. 78f(b)(5).

⁹² See Section 11.1 of the BOX Holdings LLC Agreement.

Under Section 18.6(a) of the LLC Agreement, to the extent they are related to Company activities, the books, records, premises, officers, directors, agents, and employees of the Member will be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for the purpose of and subject to oversight pursuant to the Act. Further, pursuant to Section 18.6(b) of the LLC Agreement, the Company, the Members and the officers, directors, employees and agents of each, by virtue of their acceptance of those positions, will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission and the Exchange for purposes of any suit, action or proceeding pursuant to U.S. federal securities laws, the rules or regulations thereunder, arising out of, or relating to, activities of the Exchange and the Company, and Delaware state courts for any matter relating to the organization or internal affairs of the Company, and will be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any suit, action or proceeding, any claims that they are not personally subject to the jurisdiction of the U.S. federal courts, the Commission, the Exchange or Delaware state courts, as applicable, 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 those courts or agencies. The Company, the Members and the officers, directors, employees and agents of each, by virtue of their acceptance of those positions, also agree that they will maintain an agent in the United States for the service of process of a claim arising out of, or relating to, the activities of the Exchange and the Company. These provisions are substantially similar to provisions of the BOX Options LLC Agreement.⁹³

Pursuant to Section 18.6(c) of the LLC Agreement, with respect to obligations under the LLC Agreement related to confidentiality regulation, jurisdiction and books and records, the Company, the Exchange, and each Member will ensure that directors, officers and employees of the Company, the Exchange, and each Member consent in writing to the applicability of the

⁹³ See Section 14.6 of the BOX Options LLC Agreement.

applicable provisions to the extent related to the operation or administration of the Exchange or the BSTX Market. This provision is substantially the same as the provision contained in the BOX Options LLC Agreement, with the exception of the deletion of a reference to privacy rules in Canada, which are not applicable to the current Members of the Company.⁹⁴ The Exchange believes that allowing only applicable laws to be referenced in the LLC Agreement helps to ensure that proper legal standards apply to the Company, which may foster cooperation and coordination with persons engaged in regulating transactions in securities, consistent with Section 6(b)(5) of the Act.⁹⁵ Further, the Exchange believes that basing the provisions described above on the BOX Options LLC Agreement but omitting terms that are not applicable would help ensure that persons subject to the Exchange's jurisdiction are able to navigate and more readily understand the LLC Agreement. The Exchange believes that this, in turn, would be consistent with Section 6(b)(1) of the Act⁹⁶ because it would help ensure that the Exchange, including in its operation of facilities, is so organized and has the capacity to be able to carry out the purposes of the Act.

Amendments to LLC Agreement

In the discussion below, the Exchange describes provisions in the LLC Agreement related to amendments to the LLC Agreement, highlighting areas that vary in comparison to the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and provides the statutory basis for such variation.

Section 18.1 of the LLC Agreement, which is substantially similar to a provision in the BOX Holdings LLC Agreement,⁹⁷ provides that the LLC Agreement may only be amended by an agreement in writing approved by the Board, including at least one Member Director

⁹⁴ See Section 14.6(c) of the BOX Options LLC Agreement.

⁹⁵ 15 U.S.C. 78f(b)(5).

⁹⁶ 15 U.S.C. 78f(b)(1).

⁹⁷ See Section 18.1 of the BOX Holdings LLC Agreement.

appointed by each Member, without the consent of any Member or other person. In addition, any terms specific to any Class, or Member or to the Exchange may not be altered or adversely affect that Member or the Exchange without the prior written consent of holders of a majority of the outstanding Units of such Class, or such Member or the Exchange as applicable. The Company will provide prompt notice to the Exchange of any amendment, modification, waiver or supplement to the LLC Agreement formally presented to the Board for approval and the Exchange will review each amendment, modification, waiver or supplement and, if that amendment is required, under Section 19 of the Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the Commission before that amendment may be effective, then that amendment will not be effective until filed with, or filed with and approved by, the Commission, as the case may be. If the Exchange ceases to be the SRO authority of the Company, the Exchange will no longer be a party to the LLC Agreement and thereafter the provisions of the LLC Agreement will not apply to the Exchange except for the provisions referenced in Section 18.12, which will survive.

Additional Provisions

As previously mentioned, BSTX is a Delaware limited liability company. As such, the LLC Agreement contains numerous provisions that are standard or not novel for a similarly situated commercial business registered as a limited liability company under the laws of the state of Delaware.⁹⁸ The Exchange believes that these provisions are consistent with Section 6(b)(1) of the Act⁹⁹ because they are consistent with corporate governance practices, generally, and they would help ensure that the Exchange, including in its operation of facilities, is so organized and has the capacity to be able to carry out the purposes of the Act.

⁹⁸ See LLC Agreement Sections 2.1, 2.2, 2.4, 2.5, 2.6, 2.7, 3.1, 4.2, 4.5, 4.6, 4.7, 4.8, 4.9, 4.11, 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 6.3, 6.4, 6.5, 7.5, 7.6, 7.7, 8.3, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 10.3, 10.4, 11.2, 11.3, 11.4, 11.5, 11.6, 12, 13.1, 14, 16.2, 17, 18.2, 18.3, 18.4, 18.5, 18.7, 18.9, 18.10, 18.11, and 18.12.

⁹⁹ 15 U.S.C. 78f(b)(1).

Exchange Organization

As more fully described in the Multiple Facilities Filing,¹⁰⁰ the bylaws of the Exchange (the “Exchange Bylaws”) require that, upon the Company becoming a facility of the Exchange, at least one member of the Board would be selected from among the officers, directors and employees of BSTX Participants (a “Participant Director”).¹⁰¹ The Executive Committee of the Exchange, if any, is required to include at least one Participant Director from BSTX and a quorum for the transaction of business must include at least one Participant Director from one of the Exchange’s facilities.¹⁰² A Participant Director could serve on other Board committees but would be prohibited from serving on the Compensation and Regulatory Oversight Committees.¹⁰³ The Exchange’s Hearing Committee is not comprised of directors of the Exchange but does include Exchange Facility Participants, which could include one or more BSTX Participants.¹⁰⁴ The Exchange Bylaws also provide that each facility of the Exchange be entitled to designate a “Facility Director” to serve on the Board. The Facility Director could serve on Board committees, including any Executive Committee of the Board,¹⁰⁵ but would be prohibited from serving on the Compensation and Regulatory Oversight Committees.¹⁰⁶

Also as more fully described in the Multiple Facilities Filing, the Exchange Bylaws require that, upon the Company becoming a facility of the Exchange, at least one member of the Exchange Nominating Committee would be selected from among the officers, directors and employees of BSTX Participants (a “Participant Representative”).¹⁰⁷ The Exchange Bylaws also

¹⁰⁰ See Securities Exchange Act Release No. 888934 May 22, 2020, 85 FR 32085 May 28, 2020.

¹⁰¹ See Exchange Bylaws Section 4.02.

¹⁰² See Exchange Bylaws Section 6.04.

¹⁰³ See Exchange Bylaws Sections 6.06 and 6.07.

¹⁰⁴ See Exchange Bylaws Section 6.08(a).

¹⁰⁵ See Exchange Bylaws Section 6.04.

¹⁰⁶ See Exchange Bylaws Sections 6.06 and 6.07.

¹⁰⁷ See Exchange Bylaws Section 4.06(a).

provide that each facility of the Exchange be entitled to designate a “Facility Representative” to serve on the Exchange Nominating Committee.¹⁰⁸

As soon as practicable after the commencement of operations of BSTX as a new facility of the Exchange, a Participant Director, Participant Representative, Facility Director and Facility Representative will be appointed by the Exchange Board from among the eligible individuals with respect to the new facility and such individuals shall serve in such respective capacities until the first annual meeting of the Exchange Members following such appointment, when the regular selection processes shall govern.¹⁰⁹

2. Statutory Basis

In addition to the sections above that discuss provisions of the LLC Agreement, amendments to the LLC Agreement and variations from the BOX Options LLC Agreement and/or BOX Holdings LLC Agreement and their associated statutory bases, the Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,¹¹⁰ in general, and furthers the objectives of Section 6(b)(1),¹¹¹ in particular, in that it enables the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Exchange Facility Participants and persons associated with its Exchange Facility Participants, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Act¹¹² in that it is designed to facilitate transactions in securities, 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

¹⁰⁸ See Exchange Bylaws Section 4.06(a).

¹⁰⁹ See Section 4.02, Exchange Bylaws.

¹¹⁰ 15 U.S.C. 78f(b).

¹¹¹ 15 U.S.C. 78f(b)(5).

¹¹² 15 U.S.C. 78f(b)(5).

transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

The Exchange believes that the provisions in the Exchange Bylaws that BSTX Participants will be represented by a Participant Director on the BOX Exchange Board and a Participant Representative on the Exchange Nominating Committee and that they will be chosen by BSTX Participants provides for the fair representation of BSTX Participants in the selection of directors and the administration of BOX Exchange and is consistent with the requirement in Section 6(b)(3) of the Act.¹¹³ This requirement helps to ensure that BSTX Participants have a voice in the use of self-regulatory authority and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.¹¹⁴ In addition, the Exchange believes the provision in the Exchange Bylaws that a Facility Director representing the Company would serve on the BOX Exchange Board and a Facility Representative would serve on the BOX Exchange Nominating Committee provides additional protection for both the Company and BSTX Participants and helps to ensure these entities have a voice in the use of self-regulatory authority and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.

No Members of BSTX and no Affiliates of such Members are currently Exchange Facility Participants. No Members of BSTX are expected to be BSTX Participants when BSTX begins operations as a facility of the Exchange. Nevertheless, the Exchange believes the provisions discussed above, limiting BSTX Participants to a maximum of 20% voting power at

¹¹³ 15 U.S.C. 78f(b)(3).

¹¹⁴ See, e.g., Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (granting the exchange registration of Nasdaq Stock Market, Inc.) (“Nasdaq Order”), and 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (“BATS Order”), supra note 27. See also Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (“NYSE/Archipelago Merger Approval Order”).

the proposed facility, BSTX, and limiting Exchange Facility Participants to a maximum of 20% economic ownership in the Exchange and 20% voting power at the Exchange, are consistent with the requirements of the Act and Section 6(b)(1) thereof, which requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.¹¹⁵ These limitations are designed to help prevent a BSTX Participant from exercising undue control over the operation of the facility and help prevent an Exchange Facility Participant from exercising undue control over the operation of the Exchange. These limitations are also designed to help ensure the Exchange is able to effectively carry out its regulatory obligations under the Act and its facility, BSTX, is able to effectively carry out its regulatory obligations as a facility of the Exchange under the Act. In addition, these limitations are designed to address conflicts of interests that could arise from a BSTX Participant owning interests in BSTX, a proposed facility of the Exchange, or in the Exchange itself. Without such limitations, a BSTX Participant's interest in the Exchange or its facility, BSTX, could become so large as to cast doubts on whether the Exchange and its facility, BSTX, may fairly and objectively exercise self-regulatory responsibilities with respect to such BSTX Participant.¹¹⁶ If a BSTX Participant became a controlling owner of the Exchange, BSTX could seek to exercise the controlling influence by directing the Exchange or its facility, BSTX, to refrain from, or the Exchange or BSTX could hesitate to, diligently monitor and conduct surveillance of the BSTX Participant's conduct or diligently enforce the Exchange's rules and the federal securities laws with respect to conduct by a BSTX Participant that violates such provisions. As such, these requirements are expected to minimize the potential that a BSTX Participant or any other Exchange Facility Participant could use its ownership to improperly interfere with or restrict the ability of the Exchange or its facility, BSTX, to effectively carry out its regulatory responsibilities under the Act, particularly with Section 6(b)(1) thereof, which

¹¹⁵ 15 U.S.C. 78f(b)(1).

¹¹⁶ See, e.g., Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) ("DirectEdge Exchanges Order") and BATS Order, *supra* note 27.

requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.¹¹⁷

As discussed above, the Exchange at all times has, and will continue to have, regulatory authority over its facilities, including the proposed facility, BSTX. The Exchange's powers and authority under the Facility Agreement ensure that the Exchange has full regulatory control over BSTX, which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company. The Exchange shall receive notice of all planned or proposed changes to BSTX (other than Non-Market Matters). This authority ensures that while BSTX operates as a facility of the Exchange, it will be required to submit to any such changes to the Exchange for approval and the Exchange will have the right to direct BSTX to make any modifications deemed necessary or appropriate by the Exchange to resolve any Regulatory Deficiency. This regulatory authority overrides any authority of BSTX management, its Members or its Board regardless of any Member's level of ownership or control of the Board at the facility level.

The Exchange is the entity that will have and exercise regulatory oversight of the proposed facility, BSTX. As discussed above, the Exchange notes the existing ownership limits of 20% voting power and 40% economic ownership currently applicable to all owners of the Exchange, are not changing. Accordingly, the Exchange believes these existing ownership limits will help to ensure the independence of the Exchange's regulatory oversight of BSTX and facilitate the ability of the Exchange to carry out its regulatory responsibilities and operate in a manner consistent with the Act. The Exchange further believes these ownership limits, which apply to its current facility, continue to be appropriate in connection with the proposed new facility and are consistent with the requirements of the Act and Section 6(b)(1) thereof, which

¹¹⁷ 15 U.S.C. 78f(b)(1).

requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.¹¹⁸

As discussed above, the SEC will be required to be notified if a Member of the facility exceeds 5%, 10% or 15% ownership in the Company and rule filings are required when a Member, together with its Related Persons, crosses above 20% or any subsequent 5% increment. These are the same provisions as are contained in the BOX Holdings LLC Agreement. The Exchange believes these proposed notification provisions are consistent with existing provisions in the BOX Holdings LLC Agreement for the Exchange's current facility and are also consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.¹¹⁹ In particular, SEC notification of ownership interests exceeding certain percentage thresholds can help improve the Commission's ability to effectively monitor and surveil for potential undue influence and control over the operation of the Exchange.

Subject to the regulatory oversight by the Exchange, the proposed facility's Board has full authority to manage the development, operations, business and affairs of the Company without the need for any approval of the Members. A Member does not have authority to decide matters related to the operations of the Company, except by exercising its right, if any, to appoint Directors. As discussed above, the Board of the proposed facility will consist of six (6) Directors, including five (5) voting Directors and one non-voting Regulatory Director appointed by the Exchange. Regardless of its ownership level, each of tZERO and BOX Digital will have the right to appoint only two Directors, comprising a maximum of 40% of all voting Directors on the facility's Board. The remaining voting Director on the Board will be an Independent Director. Accordingly, the Exchange believes the proposed facility, BSTX, will be so organized

¹¹⁸ 15 U.S.C. 78f(b)(1).

¹¹⁹ 15 U.S.C. 78f(b)(1).

as to avoid undue influence by a Member and to ensure the Exchange has the capacity to carry out the purposes of the Act.

As discussed above, as long as the Company is a facility of the Exchange pursuant to Section 3(a)(2) of the Act, the Exchange will have the right to appoint a Regulatory Director to serve as a Director. The Regulatory Director must be a member of the senior management of the regulation staff of the Exchange. The Company has an Independent Director to avoid either Member from controlling or creating deadlock on the Board. The presence of a Regulatory Director selected by the Exchange on the Board is identical to the longstanding practice at the Exchange's other facility, BOX Options. The Exchange believes that the proposed board structure, and in particular, the inclusion of the proposed Independent Director and Regulatory Director, will 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, to 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, consistent with Section 6(b)(5) of the Act.¹²⁰ Further, the Exchange believes that inclusion of the Regulatory Director on the BSTX Board would also be consistent with Section 6(b)(1) of the Act. This is because the Regulatory Director is required to be someone who is a member of the senior management of the regulation staff of the Exchange and is therefore a person who is knowledgeable of the rules of the Exchange and the regulations applicable to it and, in turn, is someone who would be well positioned to help ensure the Exchange, including in the operation of any facilities, continues to be so organized and has the capacity to carry out the purposes of the Act, including to prevent inequitable and unfair practices.

As discussed above, the Company is not permitted to take any action with respect to a Major Action unless approved by the Board, including the affirmative vote of all then serving

¹²⁰ 15 U.S.C. 78f(b)(5).

Member Directors acting at a meeting. The Exchange believes that, in addition to the regulatory oversight of the Exchange and the other safeguards described above, the requirement that all Member Directors of the facility, not just the Member Directors of a single Member, must approve Major Actions will 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, to 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, consistent with Section 6(b)(5) of the Act. In addition, such requirements enhance the ability of the Exchange and its proposed facility, BSTX, to effectively carry out its regulatory responsibilities under the Act, particularly with Section 6(b)(1) thereof, which requires, in part, an exchange be so organized and have the capacity to carry out the purposes of the Act.

Although the Company is not independently responsible for regulation, its activities with respect to the operation of the Company must be consistent with, and not interfere with, the self-regulatory obligations of the Exchange. The Exchange believes the requirements in the BSTX LLC Agreement applicable to direct and indirect changes in control of the Company described above, the provisions of the Facility Agreement establishing the Exchange's regulatory control over the Company, as well as the voting limitation imposed on owners of the Company who also are BSTX Participants described above, are appropriate to help ensure that the Exchange is able to effectively carry out its self-regulatory responsibilities, including over the Company, and are consistent with the requirements of the Act.

In addition, each Member of BSTX and each Controlling Person thereof must give due regard to the preservation of the independence of the self-regulatory function of the Exchange and must not take any action that would interfere with the effectuation of decisions by the Exchange Board or interfere with the Exchange's ability to carry out its responsibilities under the

Act.¹²¹ Each Member of BSTX and each Controlling Person thereof¹²² also is required to take such action as is necessary to ensure that its directors, officers and employees consent to giving due regard to the preservation of the independence of the self-regulatory function of the Exchange and to not taking any action that would interfere with the effectuation of decisions by the Exchange Board or interfere with the Exchange's ability to carry out its responsibilities under the Act to the extent related to the operation or administration of the Exchange or the Company.

The Exchange believes the provisions which are designed to help maintain the independence of BOX Exchange's regulatory function, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.¹²³

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

The Exchange does not believe that the Proposed Rule Change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Proceedings to Determine Whether to Approve or Disapprove SR-BOX-2021-14, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹²⁴ to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues

¹²¹ See Article 4.6(a) of the Exchange LLC Agreement and Article 4.12(a) of the BSTX LLC Agreement.

¹²² See the LLC Agreement Section 7.4(g)(ii)

¹²³ 15 U.S.C. 78f(b)(1).

¹²⁴ 15 U.S.C. 78s(b)(2)(B).

involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,¹²⁵ the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes to operate BSTX as a facility of the Exchange and adopt the proposed LLC Agreement and Form of Instrument of Accession as rules of the Exchange. Among other things, the Exchange proposes to establish BSTX as a facility of the Exchange that would operate a market for the trading of securities pursuant to rules established by a separate rule filing.¹²⁶ BSTX would be controlled jointly by BOX Digital, a subsidiary of BOX Holdings, which is the parent company of BOX Options, the Exchange's facility for the trading of listed options, and tZERO, an indirect subsidiary of Overstock, a publicly traded company.¹²⁷ On September 16, 2021, the Exchange filed Amendment No. 1 to the proposed rule change. As stated above, the Commission has received no comment letters on the proposal.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposed rule change, as modified by Amendment No. 1, with the Act, including, but not limited to, Section 6(b)(1) of the Act, which requires that a national securities exchange be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange;¹²⁸ Section 6(b)(3) of the Exchange Act,

¹²⁵ Id.

¹²⁶ See Amendment No. 1, supra note 6, at 4.

¹²⁷ See id. at 4, 8-11.

¹²⁸ 15 U.S.C. 78f(b)(1).

which requires that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer;¹²⁹ and Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be 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 to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.¹³⁰

The Exchange states that BSTX will be jointly controlled by BOX Digital and tZERO, which would each own 50% of the voting class of equity of BSTX.¹³¹ According to the Exchange, it will enter into a Facility Agreement with BSTX pursuant to which the Exchange will regulate BSTX, and the Exchange's powers and authority under the Facility Agreement ensure that the Exchange has full regulatory control over BSTX, which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of BSTX.¹³² The Exchange references, among other things, provisions limiting BSTX Participants to a maximum of 20% voting power at BSTX, provisions limiting Exchange Facility Participants to a maximum of 20% voting power at the Exchange, and ownership limits of 20% voting power and

¹²⁹ 15 U.S.C. 78f(b)(3).

¹³⁰ 15 U.S.C. 78f(b)(5).

¹³¹ See Amendment No. 1, supra note 6, at 4, 6.

¹³² See id. at 5. The Exchange also states that certain provisions in the BSTX LLC Agreement are the same as provisions in the BOX Options LLC Agreement and that such provisions ensure that the Exchange has full regulatory control over BSTX, which is designed to prevent any owner of BSTX from exercising undue influence over the regulated activities of the Company. See id. at 18-20.

40% economic ownership applicable to all owners of the Exchange, in stating its belief that the proposal is consistent with the Act.¹³³

In addition, the Exchange states that the Board of Directors of BSTX, which will be comprised of two directors appointed by each of BOX Digital and tZERO and one “Independent Director” that will be appointed by unanimous vote of the directors appointed by each of BOX Digital and tZERO,¹³⁴ will manage the development, operations, business and affairs of the Company without the need for any approval of the Members or any other person.¹³⁵ The Exchange believes that this proposed structure for the BSTX Board effectively limits any one Member to a maximum of 40% voting power of the Board.¹³⁶ The Exchange also states that the BSTX Board will include a Regulatory Director, appointed by the Exchange and who must be a member of the senior management of the regulation staff of the Exchange,¹³⁷ but this Regulatory Director will not have the power to vote on any action to be taken by the Board or any committee.¹³⁸ However, the proposed ownership structure, voting provisions, and board structure raise questions as to whether the proposal would protect against the undue influence of any owner of BSTX over the affairs of BSTX and ensure that BSTX’s operation of the BSTX

¹³³ See id. at 60-62.

¹³⁴ See id. at 20.

¹³⁵ See id. at 18-19. The Exchange states that the purpose of the Independent Director is to avoid either BOX Digital or tZERO from controlling or creating deadlock on the Board. See id. at 21.

¹³⁶ See id.

¹³⁷ See id. at 20.

¹³⁸ See id. at 22. The Exchange states that the proposed structure for the BSTX Board of Directors differs from that of BOX Holdings because the ownership of BSTX differs from that of BOX Holdings, which has more than two owners of its voting class of equity and uses a tiered system in which board voting is based on ownership in BOX Holdings, but that the inclusion of a Regulatory Director selected by the Exchange on the Board is identical to the longstanding practice at the Exchange’s other facility, BOX Options. See id. at 20-21.

Market is consistent with and does not interfere with the Exchange's regulatory responsibilities.¹³⁹

The Exchange states that the provisions in the proposed BSTX LLC Agreement are generally the same as the provisions of the BOX Options LLC Agreement or the BOX Holdings LLC Agreement,¹⁴⁰ that replicating those provisions may foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities,¹⁴¹ and that the structure of the BSTX will promote just and equitable principles of trade, and, in general, protect investors and the public interest, consistent with Section 6(b)(5) of the Act.¹⁴² But the Exchange also states that BSTX does not have the same ownership as BOX Options or BOX Holdings,¹⁴³ and it is unclear how, given the differences between the proposed ownership and proposed governance structure of BSTX compared to those of BOX Options and BOX Holdings, the proposed provisions would ensure that the Exchange and the Commission are able to carry out their regulatory obligations with respect to BSTX.

The Commission believes there are questions as to whether the Exchange's proposed governance structure is consistent with Section 6(b)(1) of the Act, and, in particular, the requirements that the Exchange be so organized and has the capacity to carry out the purposes of the Act; and Section 6(b)(5) of the Act, and in particular the requirement that the rules of an exchange be designed to promote just and equitable principles of trade; and, in general, to protect

¹³⁹ There are also questions about whether the Exchange will have the ability to obtain the information necessary to ascertain whether potential direct or indirect owners of BSTX are required to provide notice to BSTX or to take other actions, such as executing an amendment to the LLC Agreement upon establishing a Controlling Interest, and whether the Exchange and the Commission will have the capacity to monitor compliance with the proposed provisions related to changes in ownership and control.

¹⁴⁰ See id. at 6.

¹⁴¹ See id. at 7.

¹⁴² See id. at 16.

¹⁴³ See id.

investors and the public interest. The Commission also believes there are questions as to whether the Exchange’s proposal is consistent with Section 6(b)(3) of the Act, and in particular the requirement that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs.¹⁴⁴

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”¹⁴⁵ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,¹⁴⁶ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.¹⁴⁷

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment No. 1,

¹⁴⁴ See *id.* at 57-59 (discussing, among other things, the Exchange’s rules that would govern the inclusion of a Participant Director, selected from among the officers, directors and employees of BSTX Participants, on the Exchange’s Board of Directors).

¹⁴⁵ 17 CFR 201.700(b)(3).

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

is consistent with Sections 6(b)(1),¹⁴⁸ 6(b)(3),¹⁴⁹ and 6(b)(5) of the Act¹⁵⁰ or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,¹⁵¹ any request for an opportunity to make an oral presentation.¹⁵²

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,¹⁵³ in addition to any other comments they may wish to submit about the proposed rule change.

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. Please include File Number SR-BOX-2021-14 on the subject line.

¹⁴⁸ 15 U.S.C. 78f(b)(1).

¹⁴⁹ 15 U.S.C. 78f(b)(3).

¹⁵⁰ 15 U.S.C. 78f(b)(5).

¹⁵¹ 17 CFR 240.19b-4.

¹⁵² Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

¹⁵³ See Amendment No. 1, supra note 6.

Paper Comments:

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

All submissions should refer to File Number SR-BOX-2021-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-BOX-2021-14 and should be submitted by **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵⁴

J. Matthew DeLesDernier,

Assistant Secretary.

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¹⁵⁴ 17 CFR 200.30-3(a)(57).