

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93848; File Nos. SR-BX-2021-050; SR-BX-2021-051)

December 21, 2021

Self-Regulatory Organizations; Nasdaq BX, Inc.; Order Approving Proposed Rule Changes Regarding the Transfer of Ownership of Nasdaq BX Equities LLC and the Merger of Nasdaq BX Equities LLC with and into the Exchange

I. Introduction

On October 22, 2021, Nasdaq BX, Inc. (“BX” or “Exchange”) 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 regarding the transfer of Nasdaq, Inc.’s (“Nasdaq HoldCo”) entire ownership interest in Nasdaq BX Equities LLC (“BX Equities”) to the Exchange (“Transfer Proposal”). The Transfer Proposal was published for comment in the Federal Register on November 9, 2021.³ Also on October 22, 2021, the Exchange filed with the Commission, pursuant to Section 19(b)(1) of the Act⁴ and Rule 19b-4 thereunder,⁵ a proposed rule change regarding the merger of BX Equities with and into the Exchange (“Merger Proposal”). The Merger Proposal was published for comment in the Federal Register on November 9, 2021.⁶ The Commission received no comment letters on the proposed rule changes. This order approves the proposed rule changes.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 93514 (November 3, 2021), 86 FR 62229 (“Transfer Notice”).

⁴ 15 U.S.C. 78s(b)(1).

⁵ 17 CFR 240.19b-4.

⁶ See Securities Exchange Act Release No. 93513 (November 3, 2021), 86 FR 62222 (“Merger Notice”).

II. Description of the Proposals

The Exchange proposes, through the Transfer Proposal and the Merger Proposal, a two-step process that will first allow the Exchange to become the 100% direct owner and sole LLC member of BX Equities, and subsequently allow the merger of BX Equities with and into the Exchange (“Transactions”).

A. Transfer Proposal

BX Equities was acquired by Nasdaq HoldCo in 2008, and was established as a facility of and controlled subsidiary owned and operated by the Exchange for the listing and trading of cash equity securities.⁷ Currently, Nasdaq HoldCo⁸ directly owns 100% of the Exchange, and the Exchange and Nasdaq HoldCo are the only owners and LLC members of BX Equities – the Exchange directly owns 53.21% of BX Equities and Nasdaq HoldCo directly owns the remaining 46.79% of BX Equities.⁹ BX Equities is currently governed by, among other things, the Nasdaq BX Equities LLC Fifth Amended and Restated Operating Agreement (“Operating Agreement”), which provides that management of BX Equities is vested in the Exchange.¹⁰ Nasdaq HoldCo has no direct management role in the operation of BX Equities, with the exception of its limited

⁷ See Transfer Notice, supra note 3, at 62229.

⁸ Nasdaq HoldCo was formerly known as NASDAQ OMX Group, Inc. See id. at 62229 n.5. The Transactions will have no effect on Nasdaq HoldCo’s direct ownership of the Exchange. See id. at 62229; Merger Notice, supra note 6, at 62222.

⁹ See Transfer Notice, supra note 3, at 62229-30. Nasdaq HoldCo previously remained an LLC member of BX Equities to avoid certain adverse tax consequences that would be associated with contributing its ownership interest to the Exchange, but according to the Exchange, these tax considerations have since expired. See id. at 62230 n.7. See also Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468, 80469-70 n.20 (December 31, 2008).

¹⁰ See Transfer Notice, supra note 3, at 62230.

role as tax matters member¹¹ and its limited rights with regard to capital contributions in and dissolution of BX Equities.¹²

As proposed, Nasdaq HoldCo will transfer its entire ownership interest in BX Equities to the Exchange, which will result in the Exchange becoming the 100% direct owner and sole LLC member of BX Equities.¹³ The Exchange represents that the Transfer Proposal merely seeks to simplify the corporate structure of BX Equities, that the Exchange will operate in a substantially similar manner following the transfer as it currently operates (with the addition of the Exchange's role as the tax matters member of BX Equities), and that the transfer will have no impact on how the Exchange operates its equities market.¹⁴

The Exchange proposes to amend the Operating Agreement to reflect the transfer. In particular, the Exchange proposes to add a description of the Contribution Agreement,¹⁵ remove references to Nasdaq HoldCo as an LLC member of BX Equities,¹⁶ replace references to Nasdaq HoldCo with references to the Exchange to reflect that Nasdaq HoldCo will no longer be the tax

¹¹ See definitions of “Capital Account” and “Tax Amount” in Section 1.1, and Sections 10.9 and 12.6 of the Operating Agreement.

¹² See Sections 7.4 and 11.1 of the Operating Agreement. See also Transfer Notice, supra note 3, at 62230.

¹³ Section 8.1 of the Operating Agreement states that the Exchange must obtain Commission approval for transfers of ownership interest in BX Equities. According to the Exchange, upon Commission approval of the Transfer Proposal, the Exchange and Nasdaq HoldCo will enter into a contribution and assignment agreement (“Contribution Agreement”) pursuant to which Nasdaq HoldCo will transfer its entire 46.79% ownership interest in BX Equities, and all of its other rights and obligations arising thereunder, to the Exchange, resulting in the Exchange directly owning 100% of BX Equities. See Transfer Notice, supra note 3, at 62230.

¹⁴ See id.

¹⁵ See proposed changes to the Recitals section of the Operating Agreement.

¹⁶ See proposed changes to the introductory paragraphs, Sections 1.1 and 7.2, and Schedules 1 and 2 of the Operating Agreement.

matters member of BX Equities;¹⁷ provide that Nasdaq HoldCo will no longer have limited rights with respect to capital contributions in BX Equities¹⁸ and the dissolution of BX Equities;¹⁹ and delete a provision relating to the books, records, premises, officers, directors, agents, and employees of Nasdaq HoldCo.²⁰

B. Merger Proposal

Following the transfer of ownership interest in BX Equities as described above, the Exchange proposes to merge BX Equities with and into the Exchange.²¹ As a result, BX Equities will be eliminated, the Exchange will be the surviving entity, and the Exchange will directly operate its equities market.²²

Currently, the Exchange has delegated certain responsibilities to BX Equities to operate the Exchange's equities market under a Delegation Agreement.²³ The delegation is limited to the Exchange's equities market functions and does not include other functions not specifically mentioned in the limited delegation.²⁴ Pursuant to the Delegation Agreement, the Exchange retains ultimate responsibility for its equities market, including the responsibility to ensure the fulfillment of statutory and self-regulatory obligations under the Act.²⁵ In connection with the

¹⁷ See proposed changes to the definitions of "Capital Account" and "Tax Amount" in Section 1.1, and Sections 10.9 and 12.6 of the Operating Agreement.

¹⁸ See proposed changes to Section 7.4 of the Operating Agreement.

¹⁹ See proposed changes to Section 11.1 of the Operating Agreement.

²⁰ See proposed changes to Section 18.6 of the Operating Agreement.

²¹ See Merger Notice, supra note 6, at 62222-23. The Exchange anticipates that the merger will occur immediately after the transfer. See id. at 62223.

²² See id. at 62222-23.

²³ See id. at 62222.

²⁴ See id. at 62223.

²⁵ See id.

proposed merger, the Exchange proposes to terminate the delegation of functions to BX Equities and delete the Delegation Agreement from its rules. With the termination of the Delegation Agreement, all of the functions previously delegated to BX Equities will be performed by the Exchange, and the Exchange will directly operate its equities market.²⁶ The Exchange will continue to bear responsibility over its equities market of ensuring the fulfillment of its statutory and self-regulatory obligations.²⁷

As described above, BX Equities is also currently governed by the Operating Agreement, which provides that management of BX Equities is vested in the Exchange.²⁸ In connection with the proposed merger and the proposed termination of the Delegation Agreement, BX Equities will no longer be operating the Exchange's equities market and the Operating Agreement will become obsolete.²⁹ Accordingly, the Exchange proposes to delete the Operating Agreement from its rules.

Finally, the Exchange proposes to make conforming changes to its rules to reflect the proposed merger and the proposed deletion of the Delegation Agreement and Operating Agreement. In particular, the Exchange proposes to delete General 2, Section 8, which relates to the Delegation Agreement and the staff, books, records, premises, officers, employees, and agents of BX Equities. The Exchange also proposes to amend Equity 1, Section 1 to remove references to the Operating Agreement, Delegation Agreement, and BX Equities.

²⁶ See id.

²⁷ See id.

²⁸ The Exchange also states that BX Equities can only act through the action of the Exchange and the Exchange's officers and directors, because there is no separate BX Equities board of directors and all BX Equities officers are officers of the Exchange. See id.

²⁹ See id.

III. Discussion and Commission Findings

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁰ In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(1) of the Act,³¹ 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 Act, the rules and regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,³² 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 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.

As described above, the proposed rule changes will allow (i) the transfer of Nasdaq HoldCo's ownership interest in BX Equities to the Exchange, and (ii) the merger of BX Equities with and into the Exchange. The proposed transfer will have no impact on how the Exchange operates its equities market and, as described above, the Exchange anticipates that the merger will occur immediately after the transfer. Following the merger, the Exchange will directly operate its equities market and perform the functions that were previously delegated to BX

³⁰ In approving the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78f(b)(1).

³² 15 U.S.C. 78f(b)(5).

Equities. Moreover, the Exchange will continue to have ultimate responsibility over its equities market, including the responsibility to ensure the fulfillment of its statutory and self-regulatory obligations under the Act.³³ Because the proposed rule changes will allow the Exchange to directly operate its equities market (rather than through a subsidiary) and the Exchange will continue to have ultimate regulatory responsibility over its equities market, the Commission believes that the proposed rule changes are consistent with the Act and will not impair the ability of the Commission or the Exchange to discharge their respective responsibilities under the Act. The Commission also believes that the Exchange's proposals to amend the Operating Agreement in connection with the transfer, and to subsequently remove the Delegation Agreement and the amended Operating Agreement and make conforming changes to its rules in connection with the merger, are consistent with the Act and will allow the Exchange's rulebook to reflect the Transactions.

³³ The Exchange states that its independent regulatory oversight committee ("ROC") will continue to oversee the Exchange's regulatory and self-regulatory organization responsibilities with regard to both its equities and options markets, and the Exchange's regulatory department will continue to carry out its regulatory functions with respect to both markets under the oversight of the ROC. See Merger Notice, supra note 6, at 62224.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁴ that the proposed rule changes (SR-BX-2021-050; SR-BX-2021-051) be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

J. Matthew DeLesDernier
Assistant Secretary

³⁴ 15 U.S.C. 78s(b)(2).

³⁵ 17 CFR 200.30-3(a)(12).