

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95676; File No. SR-BX-2022-014)

September 6, 2022

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Enhance the BX Retail Price Improvement Program

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 24, 2022, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Equity 4, Rule 4780 to enhance the BX Retail Price Improvement Program, as described further below. The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

1. Purpose

The purpose of the proposed rule change is to amend Equity 4, Rule 4780³ to enhance the BX Retail Price Improvement Program in a manner that will attract more liquidity providers to participate in the Program. Specifically, the Exchange proposes to amend paragraph (e) of Rule 4780 to provide Participants a choice whether to disseminate the Retail Liquidity Identifier (defined below) when submitting Retail Price Improvement interest to the Exchange.

Retail Price Improvement Program (“RPI Program”)

In June 2019, the Commission approved making permanent the Exchange’s pilot RPI Program.⁴ The RPI Program is designed to attract retail order flow to the Exchange and allow such order flow to receive potential price improvement. The RPI Program is limited to trades occurring at prices equal to or greater than \$1.00 per share. Under the RPI Program, Retail Member Organizations are eligible to submit Retail Orders to the Exchange. BX members (“Members”) are permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is priced more aggressively than the Protected National Best Bid or Offer (“Protected NBBO”).⁵ The Exchange publishes a price improvement indicator notifying

³ Hereinafter, references to the Rule 4000 Series shall mean the Rule Series set forth in Equity 4 of the Exchange’s Rulebook.

⁴ Securities Exchange Act Release No. 86194 (June 25, 2019), 84 FR 31385 (July 1, 2019) (SR-BX-2019-011) (“RPI Approval Order”). In addition to approving the proposal to make the RPI Program permanent, the Commission granted the Exchange’s request for limited exemptive relief from Rule 612 of Regulation NMS, 17 CFR 242.612 (“Sub-Penny Rule”), which among other things prohibits a national securities exchange from accepting or ranking orders priced greater than \$1.00 per share in an increment smaller than \$0.01. See id.

⁵ The term Protected Quotation is defined in Equity 1, Section 1(a)(16) and has the same meaning as is set forth in Regulation NMS Rule 600. The Protected NBBO is the best-priced protected bid and offer. Generally, the Protected NBBO and the national best bid

market participants that such price improving liquidity is available.

The SEC approved making the RPI Program permanent, in part, because it concluded, “the Exchange’s Program data and analysis about price improvement for retail investors... supports the Exchange’s conclusion that the program provides meaningful price improvement to retail investors on a regulated exchange venue and has not demonstrably caused harm to the broader market.”⁶ In approving the pilot RPI Program, the Commission found that “while the Program would treat retail order flow differently from order flow submitted by other market participants, such segmentation would not be inconsistent with Section 6(b)(5) of the Act, which requires that the rules of an exchange are not designed to permit unfair discrimination.”⁷ As the SEC acknowledged, the retail order segmentation was designed to create greater competition for retail investor orders thereby creating more competition for these orders on transparent and well-regulated exchanges. This would help to ensure that retail investors benefit from competitive price improvement that exchange-based liquidity providers provide.

Retail Liquidity Identifier

Currently, the Exchange disseminates an identifier when RPI interest priced at least \$0.001 better than the Exchange’s Protected Bid or Protected Offer for a particular security is available in the System (the “Retail Liquidity Identifier”). The Retail Liquidity Identifier is disseminated through consolidated data streams (i.e., pursuant to the Consolidated Tape

and offer (“NBBO”) will be the same. However, a market center is not required to route to the NBBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBBO is otherwise not available for an automatic execution. In such case, the Protected NBBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

⁶ See RPI Approval Order, supra note 4 at 31387.

⁷ Securities Exchange Act Release No. 73702 (November 28, 2014), 79 FR 72049, 72051 (December 4, 2014) (SR-BX-2014-048).

Association Plan/Consolidated Quotation System, or CTA/CQS, for Tape A and Tape B securities, and The Nasdaq Stock Market, LLC (“Nasdaq”) UTP Plan for Tape C securities) as well as through proprietary Exchange data feeds.⁸ The Retail Liquidity Identifier reflects the symbol and the side (buy or sell) of the RPI interest, but does not include the price or size of the RPI interest. In particular, CQS and UTP quoting outputs include a field for codes related to the Retail Liquidity Identifier. The codes indicate RPI interest that is priced better than the Exchange’s Protected Bid or Protected Offer by at least the minimum level of price improvement as required by the RPI Program.

The Exchange proposes to amend Rule 4780(e) to enable Participants that send Retail Price Improvement Orders to elect whether to disseminate the Retail Liquidity Identifier. The Exchange believes that providing Participants with the option to opt out of dissemination of the Retail Liquidity Identifier is appropriate in order to increase liquidity in the RPI Program and improve price improvement for retail investors. The Exchange believes that the mandatory use of the Retail Liquidity Identifier discourages some firms from providing liquidity to the RPI Program due to concerns around signaling to the market. The Exchange is confident that, by allowing firms to opt out of displaying the Retail Liquidity Identifier, the Exchange would be able to increase participation in the RPI Program and generate additional price improvement to orders of retail investors.

Although the Exchange expects that the proposed optionality relating to the Retail Liquidity Identifier would increase liquidity to the RPI Program, the Exchange also recognizes

⁸ The Exchange notes that the Retail Liquidity Identifier for Tape A and Tape B securities are disseminated pursuant to the CTA/CQS Plan. The identifier is also available through the consolidated public market data stream for Tape C securities. The processor for the Nasdaq UTP quotation stream disseminates the Retail Liquidity Identifier and analogous identifiers from other market centers that operate programs similar to the RPI Program.

the value of the Retail Liquidity Identifier, which makes it clear that there is price improving liquidity available. Therefore, the Exchange will monitor the program in light of the change and, if necessary, propose modifications aimed at ensuring the program continues to operate consistent with its design and objectives.

Implementation Date

The Exchange intends to introduce this new functionality no later than the Fourth Quarter of 2022. In any event, the Exchange will issue an Equities Trader Alert not less than 7 days prior to introducing the new functionality.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by promoting competition for retail order flow among execution venues and providing the potential for meaningful price improvement to orders of retail investors. The proposal would allow Participants to choose whether to disseminate the Retail Liquidity Identifier when Participants submit Retail Price Improvement Orders to the Exchange. By providing an option to opt out of disseminating the Retail Liquidity Identifier, the Exchange could attract more liquidity providers to interact with retail order flow.

A significant percentage of retail order flow is executed off-exchanges. The Exchange believes that it is appropriate to continue to improve the RPI Program to encourage on-exchange interaction with retail investor orders. The proposed changes to the RPI Program would increase

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

competition among execution venues, encourage additional liquidity, and offer potential price improvement to retail investors. Increased competition for retail order flow could also lead to increased investor interest in trading securities and innovation within the market, thereby increasing the quality of the national market system.

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. The Exchange believes that, by allowing Participants to choose whether to disseminate the Retail Liquidity Identifier, the proposed rule change would enhance competition for retail order flow among execution venues. This change would encourage expansion of the RPI Program, thereby creating additional price improvement opportunities for retail orders and increasing competition between execution venues. All Participants would have the option to opt out of displaying the Retail Liquidity Identifier.

The Exchange believes that the proposed rule changes would increase competitive interaction with retail investor orders which should lead to increased retail investor order activity on transparent and well-regulated exchanges. This would help to ensure that retail investors benefit from competitive price improvement that exchange-based liquidity providers provide. The Exchange operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues. In such an environment, the Exchange must continually review and consider adjusting the services it offers and the requirements it imposes to remain competitive with other venues. Therefore, the Exchange believes that the proposed rule change reflects this competitive environment.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹¹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

¹¹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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-BX-2022-014 on the subject line.

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-BX-2022-014. 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 offices 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-BX-2022-014, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

J. Matthew DeLesDernier

Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).