

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79260; File No. SR-BX-2016-055)

November 8, 2016

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Cease and Desist Authority Rules

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 28, 2016, NASDAQ BX, Inc. (“BX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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 adopt Rules 9556 and 9800, which were previously adopted as a pilot the term of which has since expired, and to make related changes to the 9100, 9200, 9300, 9550, and 9800 Rule Series.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqomxbx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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

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

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange is proposing to adopt new Rules 9556 and 9800, which were previously adopted as a pilot the term of which has since expired, and to make related changes to the 9100, 9200, 9300, 9550, and 9800 Rule Series. In May 2003, the Commission approved, on a pilot basis, a rule change to adopt NASD Rules 9556 and 9800 that gave NASD, now known as FINRA, authority to issue temporary cease and desist orders and made explicit NASD's ability to impose permanent cease and desist orders as a remedy in disciplinary cases.<sup>3</sup> Because NASD was, and now FINRA is, the Exchange's regulatory services provider and administers the Exchange's disciplinary program under contract, the Exchange seeks to maintain comparability between its disciplinary procedure rules and those of NASD and now FINRA. As a consequence, the Exchange adopted Rules 9556 and 9800 to mirror the then-FINRA rules to operate as a pilot in conjunction with the related FINRA pilot.<sup>4</sup>

On June 23, 2009, the Exchange's Rule 9556 and 9800 pilot programs expired, at which time those rules and certain references thereto became obsolete, notwithstanding that they

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<sup>3</sup> See Securities Exchange Act Release No. 47925 (May 23, 2003) (File No. SR-NASD-98-80), 68 FR 33548 (June 4, 2003). See also Securities Exchange Act Release No. 51860 (June 16, 2005), 70 FR 36427 (June 23, 2005) (SR-NASD-2005-061) (extending the pilot to June 23, 2007 and making non-substantive changes); and Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (SR-NASD-2007-033) (extending the pilot to June 23, 2009 and making non-substantive changes).

<sup>4</sup> See Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48).

remained in the rulebook. The FINRA pilot program, however, continued and was approved on July 14, 2009 on a permanent basis.<sup>5</sup>

Neither the Exchange nor FINRA, acting on behalf of the Exchange pursuant to agreement, have [sic] used the cease and desist authority under Rules 9556 and 9800 during the time that the rules were effective. Nonetheless, the Exchange believes that, in addition to maintaining similar disciplinary rules, adoption of Rules 9556 and 9800 is important to the Exchange's disciplinary program. The authority under these rules will provide the Exchange and FINRA, operating on behalf of the Exchange, with a mechanism to take appropriate remedial action against a member or an associated person that has engaged (or is engaging) in violative conduct that could cause continuing harm to the investing public if not addressed expeditiously, such as dissipation or conversion of assets. It must be emphasized, however, that the cease and desist provisions contain numerous procedural protections for respondents to ensure that the proceedings are fair. Consequently, the Exchange believes that adoption of these rules is important to its regulatory program, notwithstanding that it anticipates exercising the authority provided by the rules sparingly.

The Exchange is proposing to delete Rules 9556 and 9800 (and related references in other rules<sup>6</sup>) because the pilot period for these rules has expired rendering them void, and adopt new Rules 9556 and 9800 (and related references in other rules)<sup>7</sup> based on FINRA's analogous cease

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<sup>5</sup> Securities Exchange Act Release No. 60306 (July 14, 2009), 74 FR 36292 (July 22, 2009) (SR-FINRA-2009-035). The Exchange notes that FINRA, in its rule change proposal to make its pilot program permanent, noted that it had used the authority under Rules 9556 and 9800 sparingly. *Id.* at 36293.

<sup>6</sup> The Exchange is deleting text from related provisions of Rules 8310, IM-8310-3(c)(1), 9120(r), 9241(c), 9290, 9311(b), 9312(b), and 9360 that also expired on June 23, 2009 and is inserting new text identical to what was deleted.

<sup>7</sup> As a consequence of the expiration of the pilot rendering the existing related rule text void, in certain cases the Exchange is deleting the void text and reinserting identical rule

and desist rules, which include amendments to the former BX cease and desist rules to reflect changes that FINRA has made to its cease and desist rules in 2011 and 2015 after they were made permanent.<sup>8</sup> The Exchange is also proposing to amend other Rules under the 9000 Series to incorporate changes that FINRA made to its analogous rules in 2015, as discussed below. These proposed changes include significant amendments made by FINRA to not only its Rules 9556 and 9800, but also to its 9100, 9200, 9300, 9550, and 9800 Rule Series in 2015. Unless otherwise noted, BX is adopting the FINRA Rules with only minor changes to reflect the Exchange's committee structure and rules,<sup>9</sup> as described below.

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text thereafter so the text may have effect once again. For example, the Exchange is deleting Rule 8310(a)(6), concerning imposition of a temporary or permanent cease and desist order, and adopting a new Rule 8310(a)(6) identical to what was deleted.

<sup>8</sup> In 2013, FINRA consolidated the publication standards for expedited proceeding decisions, including under FINRA Rule 9556, in FINRA Rule 8313(a)(3) and consequently amended FINRA Rule 9556 to remove paragraph (h) "Notice to Membership" from the rule. See Securities Exchange Act Release No. 69825 (June 21, 2013), 78 FR 38771 (June 27, 2013) (SR-FINRA-2013-018). The Exchange did not have such a provision in its Rule 9556. The Exchange's disclosure obligations are provided under IM-8310-3, including the Exchange's disclosure obligations related to expedited proceedings. See IM-8310-3(c).

<sup>9</sup> The Exchange is replacing references to FINRA and FINRA staff with references to the Exchange and Exchange staff, which are the appropriate analogous parties at BX. The Exchange is also replacing FINRA text that states "Chief Executive Officer or such other senior officer as the Chief Executive Officer may designate" with "Chief Regulatory Officer," which is the Exchange officer vested with the authority described under the rules. For example, old Rules 9556(a) and 9860 vested authority with the Chief Regulatory Officer to authorize notice and initiation of proceedings, respectively, whereas the analogous FINRA rules authorize its Chief Executive Officer or such other senior officer as the Chief Executive Officer may designate instead. Last, the Exchange is adding clarifying language to Rule 9810 to make it clear that initiation of a proceeding must not only be authorized by FINRA's Chief Executive Officer or such other senior officer as the Chief Executive Officer may designate, but also BX's Chief Regulatory Officer. As a practical matter, the Chief Regulatory Officer must agree that such a proceeding should be brought pursuant to BX rules.

### 2011 FINRA Rule Changes

In 2011, FINRA amended Rules 9552(b), 9553(b), 9554(b), 9555(b), and 9556(b), all of which concern service of notice.<sup>10</sup> Each of these rules concern [sic] the process followed when a person or entity subject to FINRA's jurisdiction fail [sic] to comply with various requirements under its rules. FINRA amended the rule provisions noted above to allow notice of failure to comply with a temporary or permanent cease and desist order to be served on counsel representing the member or person, or other person authorized to represent others under FINRA Rule 9141,<sup>11</sup> when counsel or other person authorized to represent others under FINRA Rule 9141 agrees to accept service for the member or person.

### 2015 FINRA Rule Changes

In 2015, FINRA made significant changes to its temporary and permanent cease and desist rules.<sup>12</sup> FINRA lowered the evidentiary standard to obtain a temporary cease and desist order, adopted a new expedited proceedings [sic] to address situations involving repeated violations of temporary or permanent cease and desist orders, and made a series of rule amendments to the temporary cease and desist order rules under FINRA Rule Series 9800, the expedited proceedings rules under FINRA Rule Series 9550,<sup>13</sup> and FINRA's Code of Procedure

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<sup>10</sup> Securities Exchange Act Release No. 60306 (January 4, 2012), 77 FR 1524 (January 10, 2012) (SR-FINRA-2011-044). FINRA also amended other rules in the FINRA Rule 9000 Series not addressed in this filing. Id.

<sup>11</sup> FINRA Rule 9141, entitled "Appearance and Practice; Notice of Appearance," provides, among other things, what is permissible in terms of representation before an Adjudicator. Exchange Rule 9141 is consistent with FINRA Rule 9141.

<sup>12</sup> Securities Exchange Act Release No. 75629 (August 6, 2015), 80 FR 48379 (August 12, 2015) (SR-FINRA-2015-019).

<sup>13</sup> FINRA amended its Rule 9551 "Failure to Comply with Public Communications Standards." BX does not have such a rule (BX Rule 9551 is held in reserve) and is thus not incorporating those changes. In a related change, the Exchange is also amending its

(FINRA Rule Series 9000) that harmonize service provisions in temporary cease and desist proceedings and expedited proceedings, ease administrative burdens in temporary cease and desist proceedings, and clarify the process by which permanent cease and desist orders may be imposed.

*(i) Evidentiary Standard for Imposing a Temporary Cease and Desist Order*

FINRA amended FINRA Rule 9840(a)(1) to change the evidentiary standard applied by Hearing Panels in issuing a temporary cease and desist order. Specifically, FINRA changed the standard for issuing a temporary cease and desist order from “by a preponderance of the evidence that the alleged violation specified in the notice has occurred” to a “showing of a likelihood of success on the merits.” FINRA noted that it believed that the “preponderance of the evidence” standard set too high an evidentiary threshold for this critical investor-protection tool, and noted that it is the identical standard for proving a violation in the underlying disciplinary proceeding that must be pursued at the same time.<sup>14</sup> Thus, to obtain a temporary cease and desist order—and thereby prevent the likely and significant dissipation or conversion of assets or other significant harm to investors—FINRA’s prosecuting department had to make an evidentiary presentation in the temporary cease and desist proceeding that is similar in extent to its evidentiary presentation in the subsequent underlying disciplinary proceeding, but in an expedited manner.

FINRA also made a corresponding amendment to FINRA Rule 9840(a)(2). Prior to the amendment, FINRA Rule 9840(a)(2) provided that a temporary cease and desist order shall be imposed if the Hearing Panel finds that the violative conduct or continuation thereof is likely to

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Rule 9559 to delete the references to Rule 9551, which were erroneously included in the rule.

<sup>14</sup> See Securities Exchange Act Release No. 75333 (June 30, 2015), 80 FR 38783 (July 7, 2015) (Notice of Filing File No. SR-FINRA-2015-019) at 38784.

result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of the underlying proceeding. The 2015 rule change modified this requirement to apply to the “alleged” violative conduct or continuation thereof, to be consistent with the proposed change to the evidentiary standard.

*(ii) Failures to Comply with Temporary Cease and Desist Orders and Permanent Cease and Desist Orders (FINRA Rule 9556)*

FINRA also made amendments to FINRA Rule 9556, which sets forth expedited procedures for enforcing violations of FINRA-issued temporary and permanent cease and desist orders. FINRA was concerned that their [sic] existing expedited procedures may permit cease and desist orders to be circumvented without any real threat of a sanction.<sup>15</sup> Thus, FINRA amended FINRA Rule 9556 to adopt a new paragraph (h) to permit its staff (with prior authorization from FINRA’s Chief Executive Officer or other designated senior officer) to institute a new kind of expedited proceeding if the subject of a temporary or permanent cease and desist order fails to comply with that order and has previously been served with a notice under Rule 9556(a) for failure to comply with any provision of the same temporary or permanent cease and desist order. FINRA adopted the change to prevent a respondent from abusing the existing process by repeatedly violating a cease and desist order and curing that violation before the effective date of any FINRA Rule 9556 notice,<sup>16</sup> without being subject to the immediate sanctions or review by the Office of Hearing Officers for a prolonged period. FINRA noted in

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<sup>15</sup> Id. at 38785.

<sup>16</sup> Under the then-current FINRA Rule 9556, if a member or person failed to comply with a temporary or permanent cease and desist order, FINRA staff (with prior authorization from FINRA’s Chief Executive Officer or other designated senior officer) may have issued a notice stating that the failure to comply within seven days will result in a suspension or cancellation of membership or a suspension or bar from associating with any member and also would have stated what the respondent must do to avoid such action.

its filing that the new FINRA Rule 9556(h) proceeding differs from other FINRA Rule 9556 expedited proceedings in other respects that reflect the response that FINRA believes is warranted for situations involving repeated violations of temporary or permanent cease and desist orders.<sup>17</sup> These differences include the following:

- a FINRA Rule 9556(h) proceeding could be initiated only if the respondent has previously been served, under FINRA Rule 9556(a), with a notice for failing to comply with any provision of the same temporary or permanent cease and desist order;
- FINRA’s prosecuting department would initiate a FINRA Rule 9556(h) proceeding by filing a petition with FINRA’s Office of Hearing Officers (and serving the respondent) that seeks the imposition of sanctions for the violation (rather than issuing a notice to the respondent);
- FINRA’s prosecuting department would seek the imposition of any fitting sanction at the outset of the FINRA Rule 9556(h) proceeding (in contrast to other FINRA Rule 9556 expedited proceedings, where the recipient of a notice is not subject to the imposition of any fitting sanction unless such recipient opts for a hearing);
- a hearing is required in a FINRA Rule 9556(h) proceeding;
- the hearing for a FINRA Rule 9556(h) proceeding must be held in a condensed time frame (ten business days after a respondent is served the petition, versus other Rule 9556 proceedings which require a respondent to request a hearing within seven business days after service of a notice instituting a proceeding and require hearings to be held within 14 days after a request for a hearing is filed);<sup>18</sup>

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<sup>17</sup> See supra note 14 at 38785.

<sup>18</sup> See FINRA Rule 9559(f)(2) and (3); FINRA Rule 9556(e).



- a FINRA Rule 9556(h) proceeding is presided over by a Hearing Officer,<sup>19</sup> rather than a Hearing Panel;<sup>20</sup> and
- the Hearing Officer may issue default decisions in FINRA Rule 9556(h) proceedings.<sup>21</sup>

Under amended FINRA Rule 9556(h)(4), the FINRA department that filed the petition can withdraw it without prejudice and shall be permitted to refile a petition based on allegations concerning the same facts and circumstances that are set forth in the withdrawn petition. FINRA noted that this provision provides it the flexibility to withdraw the petition where, for instance, the respondent evidences a good faith intent to comply with the temporary or permanent cease and desist order without the need to adjudicate the petition, while preserving FINRA’s right to refile the petition if the respondent fails to do so.<sup>22</sup>

*(iii) Service Provisions in Temporary Cease and Desist Proceedings and Expedited Proceedings*

FINRA also made the rules that govern service of documents in temporary cease and desist proceedings and the eight different types of expedited proceedings under the Rule 9550 Series more consistent.<sup>23</sup> Prior to the changes, some provisions of these rules explicitly

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<sup>19</sup> As defined by FINRA Rule 9120(r).

<sup>20</sup> As defined by FINRA Rule 9120(s). See FINRA Rule 9559(d)(1) and (2) for a description of the appointment and authority [sic] of a Hearing Officer and/or Hearing Panel in expedited proceedings.

<sup>21</sup> See FINRA Rule 9559(m)(2).

<sup>22</sup> See supra note 14 at 38785.

<sup>23</sup> The Exchange notes that in SR-FINRA-2015-019 FINRA replaced references to “contact questionnaires” with reference to the “FINRA Contact System,” FINRA’s proprietary system that facilitates member firm reporting of key contacts to FINRA. Exchange members are required to use the FINRA Contact System to report to the Exchange all contact information required by the Exchange and update its required contact information promptly. See Rule 1160. Under the FINRA Rule 9550 Series, the rules cite Article 4, Section III of the FINRA By-Laws as the authority pursuant to which its members have an obligation to report required contact information to it via the FINRA Contact System, whereas the Exchange’s authority is pursuant to Rule 1160, as noted above. Thus, the

addressed service by facsimile and on counsel, while some did not. FINRA's amendments explicitly allow service by facsimile and on counsel across all temporary cease and desist and expedited proceedings, noting that doing so removed unnecessary burdens and inefficiencies. FINRA also amended its rules to permit service by email for all temporary cease and desist proceedings and expedited proceedings. FINRA noted that email service would allow parties to receive information quickly, which is particularly important in these types of proceedings, considering the short time frames involved.<sup>24</sup> As part of the changes allowing service by email, FINRA also now requires duplicate service through some other means such as overnight courier or personal delivery and made changes to its Rule 9550 Series to reflect this requirement.

*(iv) Clarifying FINRA's Authority to Impose Permanent Cease and Desist Orders*

FINRA clarified its rules concerning the process for imposing permanent cease and desist orders in disciplinary proceedings. FINRA noted that when it obtained the authority to impose temporary cease and desist orders, it also obtained the authority to impose permanent cease and desist orders.<sup>25</sup> Thus, the clarifying changes were procedural in nature and did not reflect any change to FINRA's prior representations concerning the context in which it would seek permanent cease and desist orders.

*(v) Administrative Changes to Temporary Cease and Desist Proceedings*

FINRA also expanded the pool of persons eligible to serve on hearing panels to include those who may serve on hearing panels for disciplinary matters, as provided under FINRA Rules

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Exchange is instead referencing Rule 1160 in the Rule 9550 Series as the authority pursuant to which members have the reporting obligation.

<sup>24</sup> See supra note 14 at 38785-6.

<sup>25</sup> See supra note 14 at 38786.

9231(b) and 9559(d)(2).<sup>26</sup> Specifically, FINRA amended its Rule 9820 to provide that the potential panelists for the Hearing Panels that preside over temporary cease and desist proceedings to [sic] include persons who currently serve or previously served on a District Committee;<sup>27</sup> previously served on the National Adjudicatory Council;<sup>28</sup> previously served on a disciplinary subcommittee of the National Adjudicatory Council or the National Business Conduct Committee;<sup>29</sup> previously served as a member of the Board of Directors of FINRA Regulation or of the Board of Governors of FINRA; or currently serve or previously served on a committee appointed or approved by the Board of Governors of FINRA, but do not serve currently on the National Adjudicatory Council or as a member of the Board of Directors of FINRA Regulation or of the Board of Governors of FINRA. The amendment to FINRA Rule 9820 also required that each panelist be associated with a member of FINRA or retired therefrom. FINRA noted that, while its Office of Hearing Officers has presided over only a limited number of temporary cease and desist proceedings, those experiences have revealed that the narrowly circumscribed set of potential panelists can impede the recruitment of Hearing Panel members, especially considering that the expedited nature of temporary cease and desist

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<sup>26</sup> FINRA harmonized the categories of individuals eligible for appointment as a Hearing Panelist under FINRA Rule 9820 with FINRA Rule 9231(b) (providing that each panelist shall be associated with a member of FINRA or retired therefrom and that the pool of panelists for disciplinary proceedings includes current or previous members of District Committees, former members of the National Adjudicatory Council, past members of disciplinary subcommittees of the National Adjudicatory Council or the National Business Conduct Committee, past members of the Board of Directors of FINRA Regulation or past members of the Board of Governors of FINRA, and current or previous members of committees appointed or approved by the Board of Governors of FINRA); FINRA Rule 9559(d)(2) (providing for the same pool for FINRA Rule 9556 expedited proceedings).

<sup>27</sup> As defined by FINRA Rule 9120(g).

<sup>28</sup> See By-Laws of FINRA Regulation, Inc., Article V, National Adjudicatory Council.

<sup>29</sup> The predecessor to the FINRA National Adjudicatory Council.

proceedings will already preclude many from being able to serve.<sup>30</sup> FINRA also noted that it had concerns that the small pool of potential panelists will often make it difficult to recruit hearing panelists who can serve on both the temporary cease and desist proceeding and the subsequent underlying disciplinary proceeding, as well as any related expedited proceeding under FINRA Rule 9556.<sup>31</sup>

The Exchange is proposing to, likewise, expand the categories of individuals eligible to participate as Hearing Panelists. Like FINRA, the Exchange is harmonizing the categories of eligible individuals with the criteria under Rules 9231(b) and 9559(d)(2).<sup>32</sup> Thus, the Exchange is allowing the Chief Hearing Officer to select as a Panelist pursuant to proposed Rule 9820(a) a person who: previously served on the Exchange Review Council;<sup>33</sup> previously served on a disciplinary subcommittee of the Exchange Review Council, including a Subcommittee, an Extended Proceeding Committee,<sup>34</sup> or their predecessor subcommittees; previously served as a Director, or as a Governor of the Exchange prior to its acquisition by The NASDAQ OMX Group, Inc., but does not serve currently in that position; or is a FINRA Panelist approved by the Exchange Board at least annually, including a member of FINRA's Market Regulation Committee or a person who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended

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<sup>30</sup> See supra note 14 at 38786.

<sup>31</sup> Id.

<sup>32</sup> Like FINRA's Rule 9559(d)(2), Rule 9559(d)(2) provides for the same pool for Rule 9556 expedited proceedings) [sic]. Supra note 26.

<sup>33</sup> See By-Laws of NASDAQ BX, Inc., Article VII, Exchange Review Council.

<sup>34</sup> As defined by Rule 9120(n).

Hearing Panel is being appointed, or from other sources the Board deems appropriate given the responsibilities of Panelists.

FINRA's proposed changes also eased other administrative burdens created by the shortened time frame of a temporary cease and desist proceeding. Those proposed changes were aimed at improving Hearing Panels' and parties' ability to prepare for hearings and giving Hearing Officers some needed flexibility. For example, under FINRA Rule 9830(a) prior to the 2015 amendments a Hearing Officer was not able to extend a hearing date in a temporary cease and desist proceeding unless all parties consented to the extension. The requirement to obtain the parties' consent was problematic in instances whereby the Office of Hearing Officers, rather than one of the parties, had a need for an extension, such as when it encounters difficulty in quickly appointing a Hearing Panel. To address this problem, FINRA amended its Rule 9830(a) to allow hearing deadlines to be extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown.

FINRA also made similar amendments to the process by which extensions are obtained to the deadlines for issuing decisions in temporary cease and desist proceedings and responding to requests to modify, set aside, limit, or suspend a temporary cease and desist order. Before the amendments to FINRA Rule 9840(a), the Hearing Panel's deadline for issuing its written decision could not be extended, even where there was good cause, without the consent of the parties. Likewise, prior to amending FINRA Rule 9850, a Hearing Panel's deadline for responding to an application to have a temporary cease and desist order modified, set aside, limited, or suspended could not be extended, even where there was a good cause, without the consent of the Parties. To allow a Hearing Panel some flexibility where there is a need for additional time to prepare its decision or respond to a FINRA Rule 9850 request (e.g., when a

member of the Hearing Panel becomes ill, where the temporary cease and desist proceeding is highly complex), FINRA amended FINRA Rules 9840(a) and 9850 to permit the deadlines for issuing decisions and responding to FINRA Rule 9850 applications to be extended by the Chief Hearing Officer or Deputy Chief Hearing Officer for good cause shown.

To further address the burdens created by the short time frame of temporary cease and desist proceedings, FINRA amended its rules to: (i) require FINRA's prosecuting department to file a memorandum of points and authorities with the notice initiating a temporary cease and desist proceeding; and (ii) permit the Hearing Officer to order a party to furnish to all other parties and the Hearing Panel such information as deemed appropriate, including any or all of the pre-hearing submissions described in FINRA Rule 9242(a). FINRA noted that requiring its prosecuting department to file a memorandum of points and authorities at the initiation of the proceeding provides more context to the allegations and set [sic] forth legal authorities on which the notice seeking a temporary cease and desist order is premised.<sup>35</sup> FINRA believed that the change would, in turn, facilitate a more efficient process and improve the quality of the hearing through more thorough preparation, which are the same goals of the pre-hearing processes in FINRA disciplinary proceedings. FINRA also noted that requiring the filing of a memorandum of points and authorities at the initiation of a temporary cease and desist proceeding also enhances disclosure of the prosecuting department's allegations, which would inure to the benefit of the respondents and further increases the fairness of the proceeding.<sup>36</sup> Last, FINRA noted that all of these objectives are served by authorizing Hearing Officers to order a party to furnish other pre-hearing submissions.<sup>37</sup>

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<sup>35</sup> See supra note 14 at 38787.

<sup>36</sup> Id.

<sup>37</sup> Id.

FINRA also proposed Rule 9840(e), which is a delivery requirement that requires a member firm that is the subject of a temporary cease and desist order to provide a copy of the order to its associated persons, within one business day of receiving it. Considering the significant nature of the harm that a temporary cease and desist order is aimed at stopping, FINRA believed that there is a heightened need to ensure that the persons who may act on behalf of the member firm are made aware of the contents of a temporary cease and desist order imposed against the member firm and the delivery requirement furthers that goal.<sup>38</sup>

FINRA's rule change clarified the following additional three issues: (1) how settlements may be approved in temporary cease and desist proceedings; (2) which Hearing Panel has jurisdiction to preside over applications filed under FINRA Rule 9850 to modify, set aside, limit or suspend temporary cease and desist orders that are filed after a Hearing Panel has already been appointed in the underlying disciplinary proceeding; and (3) whether temporary and permanent cease and desist orders imposed against a firm also apply to successors of that firm.

With respect to the first issue, new FINRA Rule 9810(c) established that, if the parties agree to the terms of a proposed temporary cease and desist order, the Hearing Officer has the

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<sup>38</sup> Similarly, FINRA made related amendments to FINRA Rules 9269, 9270, and 9840 to require that the Office of Hearing Officers, the Department of Enforcement, the Department of Market Regulation, or the General Counsel, as appropriate, disseminate default decisions, orders of acceptance of settlement, and temporary cease and desist orders to each member of FINRA with which a respondent is associated. FINRA noted that these dissemination requirements are intended to ensure that a respondent's member firm is made aware of the disciplinary history of its associated persons, regardless of the specific disciplinary procedure involved. See supra note 14 at 38787, n. 15. FINRA also noted that the amendments are consistent with other FINRA Rules that already require the Office of Hearing Officers, the National Adjudicatory Council, or the Board of Governors of FINRA to provide copies of a decision issued by a Hearing Panel, an Extended Hearing Panel, the National Adjudicatory Council, or the Board of Governors of FINRA to each member firm with which a respondent is associated. Id.; see also FINRA Rules 9268(d), 9349(c), 9351(e). The Exchange is adopting these amendments to Rules 9269, 9270, and 9840.

authority to approve and issue the order. On the second issue, amended FINRA Rule 9850 provided that the Hearing Panel that presided over the temporary cease and desist order proceeding shall retain jurisdiction to review a FINRA Rule 9850 application unless at the time the application is filed a Hearing Panel has already been appointed in the underlying disciplinary proceeding commenced under FINRA Rule 9211, in which case the Hearing Panel appointed in the disciplinary proceeding has jurisdiction. As to the third issue, amended FINRA Rule 9840(b) and new Rule 9291(a) established that when a temporary or permanent cease and desist order is imposed against a member firm, it also applies to any successor of the member firm.

Finally, FINRA amended certain provisions of FINRA Rule 9120. FINRA amended FINRA Rule 9120(s), “Hearing Panel,” to include an Adjudicator that is constituted under Rule 9231 to conduct a disciplinary proceeding governed by the Rule 9800 Series. The Exchange is adopting this amendment in its Rule 9120(s).

FINRA also amended FINRA Rule 9120(t), “Interested Staff,” to: (1) insert “or petition” under paragraph (2)(A) of the rule, thus expanding the definition to include FINRA staff that filed a petition in a proceeding under the Rule 9520 Series or Rule 9550 Series; and (2) include a new paragraph (4) to list FINRA staff that are defined as Interested Staff in a proceeding under the FINRA Rule 9800 Series. The Exchange is also adopting the amendment to its Rule 9120(t) “Interested Staff,” but is expanding the definition to also include BX Regulation employees who directly participated in the authorization of the notice that initiates a temporary cease and desist proceeding, or directly participated in an examination, investigation, prosecution, or litigation related to a specific temporary cease and desist proceeding, under new paragraphs (t)(4)(C) and (D) of the rule.



FINRA also amended FINRA Rule 9120(w), “Panelists,” to include references to Panelists in the Rule 9550 Series, and the Rule 9800 Series within the definition provided by the rule. The Exchange is adopting this amendment in Rule 9120(z). FINRA also amended Rule 9120(z) “Respondent” to define a Respondent in a proceeding governed by the Rule 9800 Series to mean a FINRA member or associated person that has been served a notice initiating a cease and desist proceeding. The Exchange is adopting this amendment in Rule 9120(bb) “Respondent.”

The Exchange believes that the changes made by FINRA in 2011 and 2015, as described above, improve the cease and desist authority as well as the service provisions. Consequently, the Exchange is proposing to adopt the changes, as described above, as its own.

#### Other Non-Substantive Changes

The Exchange is also proposing to make other non-substantive changes to its rules to correct misuse of the word “FINRA,” which were introduced erroneously when the Exchange adopted the rules. Specifically, the Exchange is proposing to amend Rule 9555(g) to remove reference to FINRA and replace it with reference to the Exchange to make clear that it is BX’s departments that should be contacted. The Exchange is also replacing references to FINRA’s rules under new Rule 9810 with references to analogous rules of BX. Specifically, BX is replacing reference to FINRA Rule 2010 with reference to Equity Rule 2110, reference to FINRA Rule 2020 with reference to Equity Rule 2120, and FINRA Rule 4330 with reference to Equity Rule 2150.<sup>39</sup> The Exchange is also replacing the word “FINRA” with “Exchange” in

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<sup>39</sup> BX notes that the BX rules cited in new Rule 9810 are the same as those that were cited under old Rule 9810(a). BX further notes that under FINRA Rule 9810(a), FINRA cites to FINRA Rules 2010, 2020, and 4330. BX is replacing reference to the FINRA rules with reference to BX’s analogous Equity Rules 2110, 2120 and 2150, as was the case in old Equity Rule 9810(a). While the provisions of Equity Rules 2110 and 2120 closely mirror FINRA Rules 2010 and 2020, Equity Rule 2150 is significantly different than

adopting Rule 9840(d) to make it clear that the rule applies to BX members. Last, the Exchange is proposing not to include the word “FINRA” prior to “Rule 9211” in adopting Rule 9850 to make it clear that the rule referenced is BX’s rule, not FINRA’s.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>40</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>41</sup> 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.

The Exchange also believes that the proposed rule is consistent with Section 6(b)(6) of the Act,<sup>42</sup> which requires the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

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FINRA Rule 4330. FINRA Rule 4330 concerns the permissible use of customers’ margin securities while Equity Rule 2150 requires a member and persons associated with a member to comply with FINRA’s Rule 2150. FINRA Rule 2150 is titled “Improper Use of Customers’ Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts” and, among other things, prohibits members or persons associated with a member from making improper use of a customer’s securities or funds, guaranteeing a customer against loss in connection with any securities transaction or in any securities account of such customer, and setting forth what is permissible in terms of sharing in profits and losses in a customer account. BX believes that Equity Rule 2150 is the appropriate rule cite under new Rule 9810(a) for purposes of alleged violations concerning misuse or conversion of customer assets.

<sup>40</sup> 15 U.S.C. 78f(b).

<sup>41</sup> 15 U.S.C. 78f(b)(5).

<sup>42</sup> 15 U.S.C. 78f(b)(6).

The Exchange believes that the proposed rule change is consistent with these provisions because the proposed changes are based on the cease and desist authority that FINRA has adopted, which the Exchange believes furthers the objectives of the Act by providing it with ability to stop violative conduct that is likely to cause dissipation or conversion of assets or other significant harm to investors, and on other changes to its related rules that clarify, harmonize, and improve its disciplinary process.

The proposed rule change will improve the Exchange's capacity to enforce compliance with applicable laws and rules by its members and persons associated with members and improving [sic] the Exchange's capability to prevent fraudulent and manipulative acts and practices. Thus, this authority is a vitally important tool to have to protect market participants.

The Exchange acknowledges that, when used, the cease and desist authority proposed herein would significantly impact a respondent. The Exchange, however, notes that the proposed rules incorporate numerous procedural protections for respondents to ensure that the proceedings initiated under these rules are fair, including notice and an opportunity to be heard before a neutral tribunal. Moreover, the Exchange anticipates using the authority provided by these rules sparingly.

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 changes are being proposed to provide an important regulatory tool to the Exchange and FINRA, acting on its behalf, which will protect investors when violative conduct is being taken by a member or person associated with a member, and time is of the essence to prevent harm, or further harm, to investors.

The proposed change does not impose a burden on competition among participants or other venues because it will only be used in circumstances where investor harm is imminent or is occurring. Thus, to the extent a burden on competition results from use of the authority provided by the proposed rules, such burden is necessary to protect investors, which is consistent with the purposes of the Act.

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, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>43</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>44</sup>

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange has stated that it is requesting this waiver so that the Exchange could apply, at the earliest time possible, the authority to issue temporary cease and desist orders and explicit authority to impose permanent cease and desist orders as a remedy in disciplinary cases. The Exchange explained that although it does not anticipate that it will be necessary to use this authority, when its cease and desist authority is needed, the Exchange must be able to move swiftly to prevent or stop investor harm. The

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<sup>43</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>44</sup> 17 CFR 240.19b-4(f)(6).

Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because this waiver will enable the Exchange to utilize the temporary or permanent cease and desist authority described herein without delay in the unlikely event that circumstances arise that warrant its use. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.<sup>45</sup>

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2016-055 on the subject line.

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<sup>45</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Paper comments:

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

All submissions should refer to File Number SR-BX-2016-055. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-BX-2016-055, 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.<sup>46</sup>

Brent J. Fields  
Secretary

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<sup>46</sup> 17 CFR 200.30-3(a)(12).