

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-86051; File No. SR-BX-2019-002)

June 6, 2019

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Reassign Certain Investigation and Enforcement Functions Under the Exchange's Authority and Supervision

I. Introduction

On April 5, 2019, Nasdaq BX, Inc. ("Exchange" or "BX") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to assume operational responsibility for certain investigation and enforcement functions currently performed by the Financial Industry Regulatory Authority ("FINRA") under the Exchange's authority and supervision. The proposed rule change was published for comment in the Federal Register on April 24, 2019.<sup>3</sup> On May 2, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change as originally filed.<sup>4</sup> The Commission did not receive any comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and

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

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

<sup>3</sup> See Securities Exchange Act Release No. 85691 (April 18, 2019), 84 FR 17219.

<sup>4</sup> In Amendment No. 1, the Exchange: (1) clarified that the staff performing surveillance work on behalf of BX's options and equities markets is the same that performs surveillance work on behalf of all The Nasdaq Stock Market LLC ("Nasdaq")-affiliated equities and options markets; (2) clarified the equities surveillance patterns and related review functions that were previously reallocated from FINRA to the Exchange; (3) clarified that the Exchange bears the ultimate responsibility for self-regulatory conduct and primary liability for self-regulatory failures; and (4) made other technical, clarifying, and conforming changes. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-bx-2019-002/srbx2019002-5442622-184831.pdf>.

is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Description of the Proposal

Since its acquisition by The NASDAQ OMX Group, Inc., the Exchange has contracted with FINRA through various regulatory services agreements to perform certain regulatory functions on its behalf.<sup>5</sup> At the same time, the Exchange has retained operational responsibility for a number of regulatory functions, including real-time surveillance and most surveillance related to its affiliated options markets.<sup>6</sup>

The Exchange now proposes to reallocate operational responsibility from FINRA to the Exchange's Regulation Department<sup>7</sup> for certain investigation and enforcement activities, specifically: (1) investigation and enforcement responsibilities for conduct occurring on The BX Options Market,<sup>8</sup> and (2) investigation and enforcement responsibilities for conduct occurring on BX's equity market only (i.e., not also on non-Nasdaq-affiliated equities markets).<sup>9</sup> The

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<sup>5</sup> See Amendment No. 1, *supra* note 4 at 4.

<sup>6</sup> See *id.* at 4-5.

<sup>7</sup> The Exchange's Regulation Department includes the Exchange's Enforcement Department. See *id.* at 6 n.7. The Exchange states that the staff that comprises the Exchange's Regulation Department is the same that comprises the Nasdaq Regulation Department. See *id.*

<sup>8</sup> The Exchange states that, as appropriate, the Exchange's Regulation Department will coordinate with other self-regulatory organizations to the extent it is investigating activity occurring on non-Nasdaq-affiliated options markets to ensure no regulatory duplication occurs. See *id.* at 6 n.8.

<sup>9</sup> See *id.* at 5-6. The Exchange believes its expertise in its own market structure, coupled with its expertise in surveillance activities, would enable it to conduct investigation and enforcement responsibilities for the Exchange effectively, efficiently, and with immediacy. See *id.* at 7. The Exchange also states that Commission approval of the proposal would allow it to better leverage its surveillance, investigation, and enforcement teams, to deliver increased efficiencies in the regulation of its market, and to act promptly and provide more effective regulation. See *id.* at 10.

Exchange states that it anticipates a phased transition whereby it would assume increasing investigation and enforcement responsibility throughout 2019 and into 2020.<sup>10</sup> The Exchange also anticipates transitioning certain matters currently pending with FINRA to the Exchange's Enforcement Department if the Exchange's Enforcement Department believes doing so is consistent with ensuring prompt resolution of regulatory matters.<sup>11</sup>

The Exchange states that FINRA will continue to perform certain functions, including, among other things: (1) the investigation and enforcement of conduct occurring on the BX equity market that also relates to cross market activity on non-Nasdaq-affiliated exchanges; (2) the handling of contested disciplinary proceedings arising out of BX Regulation-led investigation and enforcement activities;<sup>12</sup> and (3) matters covered by agreements to allocate regulatory responsibility under Rule 17d-2 of the Act.<sup>13</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations

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<sup>10</sup> See id. at 9.

<sup>11</sup> See id.

<sup>12</sup> The Exchange states that, for example, pursuant to Rule 9216, if at the conclusion of a BX Regulation-led investigation, BX Regulation has reason to believe that a violation occurred but the Respondent disputes the violation and therefore does not execute an Acceptance, Waiver, and Consent ("AWC") letter, or if the Respondent executes the AWC letter but the Exchange Review Council, Review Subcommittee, or FINRA's Office of Disciplinary Affairs does not accept the executed letter, the Exchange may decide to pursue formal disciplinary proceedings. In such a case, the Exchange would refer the matter to FINRA to handle the formal disciplinary proceedings on its behalf. FINRA's Office of Hearing Officers will continue to be responsible for the administration of the hearing process. See id. at 8 n.15.

<sup>13</sup> See id. at 8. The Exchange represents that, as with all investigation and enforcement work, all tasks delegated to FINRA are subject to BX's supervision and ultimate responsibility. See id.

thereunder applicable to a national securities exchange<sup>14</sup> and, in particular, with Sections 6(b)(5) and 6(b)(7) of the Act.<sup>15</sup> As noted above, since its acquisition by The NASDAQ OMX Group, Inc., the Exchange has contracted with FINRA through various regulatory services agreements to perform certain regulatory functions on its behalf.<sup>16</sup> BX Rule 0150 requires that, unless BX obtains prior Commission approval, the regulatory functions subject to the regulatory services agreement in effect at the time when BX executed the agreement in 2008 must at all times continue to be performed by FINRA or an affiliate thereof or by another independent self-regulatory organization. The Exchange now proposes to reallocate operational responsibility for the specific investigation and enforcement activities discussed above from FINRA to the Exchange's Regulation Department.<sup>17</sup> The Commission believes that the Exchange could leverage its knowledge of its markets and members, its experience with investigation and enforcement work, and its surveillance, investigation, and enforcement staff, in helping it to effectively and efficiently conduct the reallocated investigation and enforcement activities. The Commission also notes that the proposal would be an incremental reallocation of operational responsibility because the staff of the Exchange's Regulation Department currently performs the same investigative and enforcement work on behalf of Nasdaq PHLX LLC, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC.<sup>18</sup> Moreover, the Commission recently approved

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<sup>14</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78f(b)(5), (7).

<sup>16</sup> See supra note 5 and accompanying text.

<sup>17</sup> See supra notes 7-9 and accompanying text.

<sup>18</sup> See Amendment No. 1, supra note 4 at 7. As noted above, the staff that comprises the Exchange' Regulation Department is the same that comprises the Nasdaq Regulation Department. See supra note 7.

a similar proposal by Nasdaq to reallocate operational responsibility for specific investigation and enforcement activities from FINRA to Nasdaq.<sup>19</sup> In addition, the Exchange states that BX Regulation has instituted the requisite infrastructure to accommodate the internalization of the investigative and enforcement work on behalf of the Exchange.<sup>20</sup> Furthermore, the Exchange states that BX Regulation has developed comprehensive plans covering the transition and has met regularly for more than one year to ensure a smooth transition of the work and prevent any gaps in regulatory coverage.<sup>21</sup> Accordingly, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

#### IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 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-2019-002 on the subject line.

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<sup>19</sup> See Securities Exchange Act Release No. 85505 (April 3, 2019), 84 FR 14170 (April 9, 2019) (SR-NASDAQ-2019-007).

<sup>20</sup> See Amendment No. 1, *supra* note 4 at 8. Specifically, BX has created a new investigation and enforcement group to perform the functions covered by this proposal, which included hiring additional staff. See *id.* at 9. The Exchange would also leverage its existing staff of analysts, lawyers, programmers, and market structure experts to assist, where necessary, with performing the new functions covered by this proposal. See *id.*

<sup>21</sup> See *id.* The investigatory and disciplinary processes and related rules applicable to Exchange members that FINRA currently follows on the Exchange's behalf (i.e., the Series 8000 and 9000 rules) will remain the same. See *id.* at 9 n.17.

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-2019-002. 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-BX-2019-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. The Commission notes that, in Amendment No. 1, the Exchange provided additional information to clarify and support the proposal, and did not

materially change the substance of the proposal. The Commission also notes that the original proposal was subject to a 21-day comment period and no comments were received. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>22</sup> to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-BX-2019-002), as modified by Amendment No. 1 be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

Eduardo A. Aleman  
Deputy Secretary

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<sup>22</sup> 15 U.S.C. 78s(b)(2).

<sup>23</sup> Id.

<sup>24</sup> 17 CFR 200.30-3(a)(12).