

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88746; File No. SR-BX-2020-007)

April 24, 2020

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, to Assume Operational Responsibility for Certain Enforcement Functions Currently Performed by FINRA under the Exchange's Authority and Supervision

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 April 16, 2020, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change. On April 23, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the rule change in its entirety.³ The proposed rule change, as modified by Amendment No. 1, 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, as modified by Amendment No. 1, from interested persons.

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

The Exchange proposes to assume operational responsibility for certain enforcement functions currently performed by the Financial Industry Regulatory Authority ("FINRA") under the Exchange's authority and supervision. Specifically, the Exchange proposes to assume operational responsibility for litigating certain contested disciplinary proceedings arising out of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaces and supersedes in its entirety the proposal as originally filed. In Amendment No. 1, the Exchange makes clear in Item 8 of Form 19b-4 that the Staff for each of Phlx, ISE, GEMX, and MRX act in a similar manner to what the proposal seeks for BX Staff and that the Commission recently approved Nasdaq Staff to do the same with respect to Nasdaq. See note 17 infra.

BX Regulation-led investigation and enforcement activities. BX Rule General 2, Section 7⁴ requires Commission approval for this proposal.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqbx.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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 6 of the Act requires that national securities exchanges enforce their members' compliance with federal securities laws and rules as well as the exchanges' own rules.⁵ As a self-regulatory organization ("SRO"), BX must have a comprehensive regulatory program that includes investigation and prosecution of violative activity. Since its acquisition by The NASDAQ OMX Group, Inc., BX has contracted with FINRA through various regulatory services agreements ("RSAs") to perform certain of these regulatory functions on its behalf. However, as the Commission has made clear with respect to BX's affiliate, The Nasdaq Stock Market LLC ("Nasdaq"), "the Nasdaq Exchange bears the responsibility for self-regulatory

⁴ Formerly BX Rule 0150.

⁵ 15 U.S.C. 78(f).

conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange's behalf."⁶

In June 2019, BX received Commission approval to reallocate operational responsibility from FINRA to BX Regulation⁷ for certain investigation and enforcement activity,⁸ namely:

- investigation and enforcement responsibilities for conduct occurring on The BX Options Market,⁹ and
- investigation and enforcement responsibilities for conduct occurring on BX's equity market only, i.e., not also on non-Nasdaq-affiliated equities markets.¹⁰

Notwithstanding that approval, FINRA continues to perform certain functions pursuant to a RSA,¹¹ including, among other things, the handling of contested disciplinary proceedings arising out of BX Regulation-led investigation and enforcement activities.¹² BX now requests

⁶ Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, 3556 (January 23, 2006).

⁷ Under BX Rule 9120(t), the Exchange's Regulation Department includes the Exchange's Enforcement Department. The Exchange notes that the Staff that comprises the Exchange's Regulation Department is the same that comprises the Nasdaq Regulation Department.

⁸ Securities Exchange Act Release No. 86051 (June 6, 2019), 84 FR 27387 (June 12, 2019).

⁹ As appropriate, the Exchange's Regulation Department will coordinate with other SROs to the extent it is investigating activity occurring on non-Nasdaq-affiliated options markets to ensure no regulatory duplication occurs.

¹⁰ With respect to the operational responsibilities described in both bullet points, Nasdaq Regulation Staff currently performs these functions for the Nasdaq PHLX LLC ("Phlx"), Nasdaq ISE, LLC ("ISE"), Nasdaq GEMX, LLC ("GEMX"), and Nasdaq MRX, LLC ("MRX") because there is no comparable rule to General 2, Section 7 on those markets.

¹¹ In addition to work performed pursuant to a RSA, FINRA also performs work for matters covered by agreements to allocate regulatory responsibility under Rule 17d-2 of the Act.

¹² 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

Commission approval to reallocate operational responsibility from FINRA to BX Regulation for certain enforcement activity, namely the handling of certain contested disciplinary proceedings.¹³ Specifically, BX Regulation anticipates handling those contested disciplinary proceedings that FINRA is unable or unwilling to handle due to strained resources or other similar limitations.¹⁴ For those contested disciplinary proceedings over which BX Regulation does not assume operational responsibility, the Exchange will continue to use FINRA to litigate those matters.

In its prior request for Commission approval to reallocate operational responsibility from FINRA to BX Regulation for certain investigation and enforcement functions, the Exchange noted that its expertise in its own market structure coupled with its expertise in surveillance activities will enable it to conduct investigation and enforcement responsibilities for the Exchange effectively, efficiently and with immediacy.¹⁵ The Exchange believes that assuming responsibility for litigating certain contested disciplinary proceedings, as discussed above, will similarly ensure that matters are handled effectively, efficiently and with immediacy. The Exchange notes that this proposal would not change or alter in any way the disciplinary processes around how contested matters are handled. For example, the rules applicable to the disciplinary process remain the same and FINRA's Office of Hearing Officers will continue to

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.

¹³ BX may determine to engage a third party, such as a law firm, to litigate the matter on its behalf. In all cases, the Exchange will continue to use FINRA's Office of Hearing Officers to administer the hearing process.

¹⁴ BX Regulation's decision to assume operation responsibility for any given contested disciplinary proceeding will be made on a case by case basis.

¹⁵ Securities Exchange Act Release No. 85691 (April 18, 2019), 84 FR 17219, 17220 (April 24, 2019).

administer the hearing process for all contested disciplinary proceedings. Therefore, regardless of whether FINRA or the Exchange is responsible for litigating the matter, FINRA's Office of Hearing Officers will administer the hearing process.¹⁶

BX Rule General 2, Section 7 requires that BX obtain Commission approval if regulatory functions subject to RSAs in effect at the time BX executed the agreement in 2008 are no longer performed by FINRA or an affiliate thereof, or by another independent self-regulatory organization. BX believes that assuming operational responsibility for certain contested disciplinary proceedings will further its regulatory program and benefit investors and the markets. Commission approval of the proposal would allow BX to deliver increased efficiencies in the regulation of its market and to act promptly and provide more effective regulation.¹⁷

Finally, BX notes that its proposal is consistent with work performed by other national securities exchanges. For example, in 2015, the SEC approved the New York Stock Exchange's ("NYSE") application whereby NYSE amended certain of its disciplinary rules to facilitate the reintegration of certain market surveillance, investigation and enforcement functions performed on behalf of NYSE by FINRA.¹⁸ That reintegration also included the handling of contested disciplinary proceedings.

¹⁶ FINRA's Office of Hearing Officers plays no role in uncontested disciplinary proceedings.

¹⁷ In a separate filing Nasdaq also proposed to reallocate operational responsibility from FINRA to Nasdaq Regulation for enforcement responsibilities for litigating certain contested disciplinary proceedings arising out of Nasdaq Regulation-led investigation and enforcement activities. See SR-Nasdaq-2020-007. The Commission approved that rule filing on March 30, 2020. See Securities Exchange Act Release No. 34-88516 (Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Assume Operational Responsibility for Certain Enforcement Functions Currently Performed by FINRA under the Exchanges Authority and Supervision).

¹⁸ See Securities Exchange Act Release No. 75721 (August 18, 2015), 80 FR 51334 (August 24, 2015) and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 3 and 5, Amending Exchange Disciplinary Rules to

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁰ 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. In addition, the Exchange believes that the proposal furthers the objectives of Section 6(b)(7) of the Act,²¹ in particular, in that these changes will continue to provide for fair procedures for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof.

The Exchange believes that this proposal is in keeping with those principles because it will ensure that certain contested matters retained by BX Regulation are handled effectively, efficiently and with immediacy. The ability to assume responsibility for the handling of certain contested matters will ensure that contested cases are handled promptly when, for example, FINRA's litigation resources are strained or when it is otherwise unable or unwilling to handle a particular matter. This will enable the Exchange to take timely action when appropriate to enforce its rules, hold bad actors accountable, and protect investors and market integrity. This

Facilitate the Reintegration of Certain Regulatory Functions from Financial Industry Regulatory Authority, Inc., Securities Exchange Act Release No. 76436 (November 13, 2015), 80 FR 72460 (November 19, 2015) (SR-NYSE-2015-35).

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

²¹ 15 U.S.C. 78f(b)(7).

proposal, however, would not change or alter in any way the disciplinary processes around how contested matters are handled. Rather, it will result in more effective regulation because it will facilitate timely and more efficient action. Internalizing the litigation function in certain contested matters will also facilitate effective regulation because the Exchange will continue to bring to bear its overall market and surveillance expertise throughout the disciplinary proceedings.

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 proposed rule change is not intended to address competitive issues but rather to enable the Exchange to have the option to litigate certain contested matters when FINRA is unable or unwilling to do so through the RSA.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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, as modified by 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. Please include File Number SR-BX-2020-007 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-2020-007. 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-2020-007 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.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).