

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89010; File No. SR-BX-2020-007)

June 4, 2020

Self-Regulatory Organizations; Nasdaq BX, Inc.; Order Granting 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 Exchange Authority and Supervision

I. Introduction

On April 16, 2020, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to assume operational responsibility for certain enforcement functions currently performed by the Financial Industry Regulatory Authority (“FINRA”) under the Exchange’s authority and supervision. On April 23, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on April 30, 2020.³ The Commission did not receive any comment letters on the proposed rule change. The Commission is approving the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal, as Modified by Amendment No. 1

According to the Exchange, since its acquisition by The NASDAQ OMX Group, Inc., the Exchange has contracted with FINRA through various regulatory services agreements (“RSAs”)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 88746 (April 24, 2020), 85 FR 24064 (“Release”).

to perform certain regulatory functions on its behalf.⁴ At the same time, the Exchange retained operational responsibility for a number of regulatory functions, including real-time surveillance, qualification of companies listed on the Exchange, and most surveillance related to its affiliated options markets.⁵ In June 2019, the Exchange reallocated operational responsibility from FINRA to BX Regulation for certain investigative and enforcement activity, including the investigation and enforcement responsibilities for conduct occurring on The BX Options Market,⁶ and investigation and enforcement responsibilities for conduct occurring on BX's equity market only, i.e., not also on non-Nasdaq-affiliated equities markets.⁷ According to the Exchange, notwithstanding the changes made in June 2019, FINRA continues to perform certain functions pursuant to an RSA,⁸ including the handling of contested disciplinary proceedings arising out of BX Regulation-led investigation and enforcement activities.

The Exchange now proposes to reallocate operational responsibility from FINRA to BX Regulation for certain enforcement activity, specifically, the handling of certain contested disciplinary proceedings.⁹ The Exchange states that it anticipates handling those contested

⁴ See Release, supra note 3, at 24065.

⁵ See id.

⁶ According to the Exchange, as appropriate, BX Regulation coordinates with other SROs to the extent it is investigating activity occurring on non-Nasdaq options markets to ensure no regulatory duplication occurs. See Release, supra note 3, at 24065 fn.9.

⁷ Securities Exchange Act Release No. 86051 (June 6, 2019), 84 FR 27387 (June 12, 2019).

⁸ 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. See Release, supra note 3, at 24065 fn.11.

⁹ See Release, supra note 3, at 24065. The Exchange states that BX Regulation's decision to assume operational responsibility for any given contested disciplinary proceeding will be made on a case by case basis. See Release, supra note 3, at 24065 fn.14. Furthermore, the Exchange states that for those contested disciplinary proceedings that BX Regulation

disciplinary proceedings that FINRA is unable or unwilling to handle due to strained resources or other similar limitations.¹⁰ Furthermore, the Exchange states that in all cases, the Exchange will continue to use FINRA's Office of Hearing Officers to administer the hearing process, and that the rules applicable to the disciplinary process will remain the same.¹¹

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 thereunder applicable to a national securities exchange¹² and, in particular, with Sections 6(b)(5) and 6(b)(7) of the Act.¹³ 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.¹⁴ BX General Rule 2, Section 7 requires that, unless BX obtains prior Commission approval, the regulatory functions subject to RSAs in effect at the time when BX executed the FINRA Regulatory Contract 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 certain contested disciplinary activities discussed above from FINRA to BX Regulation.¹⁵

does not assume operational responsibility for, the Exchange will continue to use FINRA to litigate those matters. See Release, supra note 3, at 24065.

¹⁰ See Release, supra note 3, at 24065.

¹¹ See Release, supra note 3, at 24065 fn.12.

¹² 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).

¹³ 15 U.S.C. 78f(b)(5), (7).

¹⁴ See supra note 4 and accompanying text.

¹⁵ See supra notes 9 and 10 and accompanying text.

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 to effectively, efficiently, and with immediacy, litigate certain contested disciplinary proceeds.¹⁶ The Commission also notes that, as discussed above, the proposal would not change or alter in any way the disciplinary process around how contested matters are handled, and FINRA's Office of Hearing Officers will continue to administer the hearing process for all contested disciplinary proceedings.¹⁷ Furthermore, as the Exchange states, by assuming operational responsibility for certain contested disciplinary proceedings, the Exchange may be able to deliver increased efficiencies in the regulation of its markets and to act promptly and provide more effective regulation by enabling timely and more efficient action.¹⁸ Accordingly, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

¹⁶ See Release, supra note 3, at 24065.

¹⁷ See id.

¹⁸ See id.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-BX-2020-007), as modified by Amendment No. 1 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ Id.

²⁰ 17 CFR 200.30-3(a)(12).