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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86203; File No. SR–BX–2019–021]

### Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Harmonize the Exchange's By-Law Provisions Regarding the Size of the Exchange's Board of Directors to Those of the Other Nasdaq, Inc.-Owned U.S. Exchanges

June 26, 2019.

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 June 17, 2019, Nasdaq BX, Inc. (“BX” or “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 harmonize the Exchange's By-Law provisions regarding the size of the Exchange's Board of Directors (“Board”) to those of the other Nasdaq, Inc.-owned U.S. exchanges, The Nasdaq Stock Market LLC (“Nasdaq”), Nasdaq PHLX LLC (“Phlx”), Nasdaq ISE, LLC (“ISE”), Nasdaq GEMX, LLC (“GEMX”), and Nasdaq MRX, LLC (“MRX”) (together, “Affiliated Exchanges”).

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

The Exchange proposes to amend its By-Laws at Article IV, Section 4.2<sup>3</sup> to conform its provisions regarding the size of the Exchange's Board to those of the Affiliated Exchanges.<sup>4</sup>

By-Law Article IV contains provisions regarding the powers and composition of the Board, which are generally aligned with similar provisions in the Limited Liability Company (“LLC”) Agreements and By-Laws of the Affiliated Exchanges. For instance, as is the case with the Affiliated Exchanges, the composition of the Exchange's Board is required to reflect a balance among Industry Directors,<sup>5</sup> Member

<sup>3</sup> In Exhibit 5, the references to “Corporation” mean the Exchange.

<sup>4</sup> See Nasdaq Second Amended Limited Liability Company Agreement (“Nasdaq LLC Agreement”), Section 9(a); Phlx Second Amended Limited Liability Company Agreement (“Phlx LLC Agreement”), Section 8(a); and ISE, GEMX, and MRX Limited Liability Company Agreements, Section 9(a).

<sup>5</sup> “Industry Director” means a Director (excluding any two officers of the Exchange, selected at the sole discretion of the Board, amongst those officers who may be serving as Directors (the “Staff Directors”), who (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute twenty percent or more of the professional revenues received by the Director or twenty percent or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or

Representative Directors,<sup>6</sup> and Non-Industry Directors,<sup>7</sup> including Public Directors<sup>8</sup> and Director representatives of issuers and investors (“issuer representatives”). Specifically, the number of Non-Industry Directors, including at least one Public Director and at least one issuer representative, shall equal or exceed the sum of the number of Industry Directors and Member Representative Directors. In addition, at least 20% of the Directors shall be Member Representative Directors.<sup>9</sup>

Furthermore, consistent with the Affiliated Exchanges, the Exchange's By-Laws presently allow the stockholders<sup>10</sup> to set the exact number of Directors.<sup>11</sup> Unlike the Affiliated

corporation that owns fifty percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute twenty percent or more of the professional revenues received by the Director or twenty percent or more of the gross revenues received by the Director's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange or any affiliate thereof or to FINRA or has had any such relationship or provided any such services at any time within the prior three years. See By-Law Article I(t).

<sup>6</sup> “Member Representative Director” means a Director who has been elected by the stockholders after having been nominated by the Member Nominating Committee or voted upon by Exchange Members pursuant to the By-Laws (or elected by the stockholders without such nomination or voting in the case of the Member Representative Directors elected pursuant to Section 4.3(b)). A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member. See By-Law Article I(x). Member Representative Directors are directors that meet the fair representation requirement in Section 6(b)(3) of the Act, which requires that the “rules of the Exchange assure a fair representation of its members in the selection of its directors and administration of its affairs. . . .”

<sup>7</sup> “Non-Industry Director” means a Director (excluding Staff Directors) who is (i) a Public Director; (ii) an officer or employee of an issuer of securities listed on the Exchange; or (iii) any other individual who would not be an Industry Director. See By-Law Article I(bb).

<sup>8</sup> “Public Director” means a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA. See By-Law Article I(gg).

<sup>9</sup> See By-Law Article IV, Section 4.3. The Affiliated Exchanges have substantially similar board composition requirements, including the requirement that at least 20% of the directors be Member Representative Directors. In addition, the By-Laws of Nasdaq, ISE, GEMX, and MRX each have an additional board composition requirement of at least two issuer representatives if the board consists of ten or more directors. See Nasdaq LLC Agreement, Section 9(a) and Nasdaq By-Laws, Article III, Section 2(a); Phlx LLC Agreement, Section 8(a) and Phlx By-Laws, Article III, Section 3–2(a); and ISE, GEMX, and MRX LLC Agreements, Section 9(a) and ISE, GEMX, and MRX By-Laws, Article III, Section 2(a).

<sup>10</sup> Nasdaq, Inc. is the sole stockholder of the Exchange.

<sup>11</sup> See By-Law Article IV, Section 4.2. See *supra* note 4.

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

<sup>2</sup> 17 CFR 240.19b–4.

Exchanges, however, the Exchange's By-Laws require that the minimum Board size be fixed at ten Directors.<sup>12</sup> The Exchange now proposes to remove the minimum threshold of ten Directors contained in the By-Laws to align with the provisions in the LLC Agreements of the Affiliated Exchanges. The Exchange does not seek to amend the Board's authority or qualification requirements in the By-Laws other than to remove this minimum threshold. As such, the current requirements that the number of Non-Industry Directors (including at least one Public Director and at least one issuer representative) equal or exceed the sum of the number of Industry Directors and Member Representative Directors, and at least 20% of the Directors be Member Representative Directors, would continue to apply.

The practical effect of the proposed rule change is to enable the size of the Board to be set below ten members. The Exchange believes that a Board consisting of less than ten members is sufficiently large to effectively perform the Board's oversight responsibilities, and when combined with the current Board composition requirements discussed above, is consistent with the Act. Furthermore, as noted above, while the Affiliated Exchanges have substantially similar provisions in their respective LLC Agreements authorizing the sole member to determine the number of directors, these LLC Agreement provisions do not have a strict minimum threshold on Board size like BX.<sup>13</sup> As such, the proposed changes will further streamline the rules governing the organization and administration across BX and the Affiliated Exchanges.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(1) of the Act,<sup>15</sup> which requires that the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; Section 6(b)(3) of the Act,<sup>16</sup> which requires that the rules of

a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer; and Section 6(b)(5) of the Act,<sup>17</sup> 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 proposed changes will eliminate the requirement for a minimum of ten Directors on the Board currently in Article IV, Section 4.2 of the Exchange's By-Laws. As discussed above, the current Board composition requirements in the By-Laws remain unchanged under this proposal, and the requirements that the number of Non-Industry Directors (including at least one Public Director and at least one issuer representative) equal or exceed the sum of the number of Industry Directors and Member Representative Directors, and at least 20% of the Directors be Member Representative Directors, would continue to apply. Accordingly, the Exchange believes that the proposed removal of the minimum threshold will improve administrative efficiency and effectiveness by operating with a smaller number of directors while continuing to fulfill its statutory obligations regarding the fair representation of members of the Exchange. In addition, the proposed amendments will have the additional benefit of bringing the Exchange's requirements on Board size into greater conformity with those of the Affiliated Exchanges, which allow for discretion as to the size of their boards, thereby creating more consistent standards among the affiliated exchanges owned by Nasdaq, Inc.<sup>18</sup> As such, the Exchange believes that its proposal will bring greater consistency to its rules, which is beneficial to both investors and the public interest.

## 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 relates solely to the administration and governance of the Exchange and will have no effect on

the Exchange's business operations or competitive position.

## 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) of the Act<sup>19</sup> and Rule 19b-4(f)(6) thereunder.<sup>20</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>21</sup> normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>22</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that the annual meeting of the stockholder will take place in June 2019 to address the election of Directors as well as certain housekeeping items, which has historically included setting the size of the Board. The Exchange states that the waiver of the operative delay will allow the Exchange to harmonize its rules across the Affiliated Exchanges in a timely manner, thereby creating more consistent standards for the administration and governance across the Nasdaq, Inc.-owned affiliated exchanges. Accordingly, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the

<sup>12</sup> See By-Law Article IV, Section 4.2. Section 4.2 also provides that no decrease in the number of Directors shall shorten the term of any incumbent Director.

<sup>13</sup> See *supra* note 4.

<sup>14</sup> 15 U.S.C. 78f(b).

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

<sup>16</sup> 15 U.S.C. 78f(b)(3).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> See *supra* note 4.

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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.

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

proposed rule change as operative upon filing.<sup>23</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 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 change 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2019-021 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-2019-021. This file number should be included on the subject line if email 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

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2019-021 and should be submitted on or before July 23, 2019.

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

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-86204; File No. SR-BYX-2012-019]

### Self-Regulatory Organization; Cboe BYX Exchange, Inc.; Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program

June 26, 2019.

On November 27, 2012, the Securities and Exchange Commission ("Commission") issued an order pursuant to its authority under Rule 612(c) of Regulation NMS ("Sub-Penny Rule")<sup>1</sup> that granted the BATS BYX-Exchange, Inc. (k/n/a "Cboe BYX" or the "Exchange") a limited exemption from the Sub-Penny Rule in connection with the operation of the Exchange's Retail Price Improvement ("RPI") Program (the "Program"). The limited exemption was granted concurrently with the Commission's approval of the Exchange's proposal to adopt the Program for a one-year pilot term.<sup>2</sup> The exemption was granted coterminous with the effectiveness of the pilot Program and has been extended seven times;<sup>3</sup> both the pilot Program and

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

<sup>1</sup> 17 CFR 242.612(c).

<sup>2</sup> See Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) ("RPI Approval Order") (SR-BXY-2012-019).

<sup>3</sup> See Securities Exchange Act Release Nos. 71249 (January 7, 2014), 79 FR 2229 (January 13, 2012) (SR-BYX-2014-001) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 71250 (January 7, 2014), 79 FR 2234 (January 13, 2012) (Order Granting an Extension to Limited Exemption

exemption are scheduled to expire on December 31, 2018.

The Exchange now seeks to extend the exemption until September 30, 2019.<sup>4</sup> The Exchange's request was made in conjunction with an immediately effective filing that extends the operation of the Program until September 30, 2019.<sup>5</sup> In its request to extend the exemption, the Exchange notes that the Program was implemented gradually over time. Accordingly, the Exchange has asked for additional time to allow itself and the Commission to analyze data concerning the Program, which the Exchange committed to provide to the

From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 74111 (January 22, 2015), 80 FR 4598 (January 28, 2015) (SR-BYX-2015-05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); and 74115 (January 22, 2015), 80 FR 4324 (January 27, 2015) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 76965 (January 22, 2016), 81 FR 4682 (January 27, 2016) (SR-BYX-2016-01) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 76953 (January 21, 2016), 81 FR 4728 (January 27, 2016) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 78180 (June 28, 2016), 81 FR 43306 (July 1, 2016) (SR-BYX-2016-15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 78178 (July 5, 2016), 81 FR 43689 (July 5, 2016) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 81368 (August 10, 2017), 82 FR 38960 (August 16, 2017) (SR-BatsBYX-2017-18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 81364 (August 8, 2018), 82 FR 38733 (August 15, 2017) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 83758 (August 1, 2018), 83 FR 38757 (August 7, 2018) (SR-CboeBYX-2018-015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 83756 (August 1, 2018), 83 FR 38748 (August 7, 2018) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program); 84830 (December 17, 2018) 83 FR 65769 (December 21, 2018) (SR-CboeBYX-2018-025) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Period for the RPI); 84845 (December 18, 2018), 83 FR 66329 (December 26, 2018) (Order Granting an Extension to Limited Exemption From Rule 612(c) of Regulation NMS in Connection With the Exchange's Retail Price Improvement Program). The Exchange filed to make the pilot program permanent, but subsequently withdrew that filing. See Securities Exchange Act Release No. 83831 (August 13, 2018), 83 FR 41128 (August 17, 2018) (SR-CboeBYX-2018-014); 85586 (April 10, 2019), 84 FR 15657 (April 16, 2019) (SR-CBOE-2018-014).

<sup>4</sup> See letter from Adrian Griffiths, Assistant General Counsel, Cboe BYX, to Vanessa Countryman, Secretary, Commission, dated June 25, 2019.

<sup>5</sup> See SR-CboeBYX-2019-010.