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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95896; File No. SR–BX–2022–017]

### Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Clearly Erroneous Rules

September 23, 2022.

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 September 20, 2022, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 a proposal to amend BX Equity 11, Rule 11890 (Clearly Erroneous Transactions).

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, 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

On September 1, 2022, the Commission approved the proposal of Cboe BZX Exchange, Inc. (“Cboe BZX”) to (1) adopt on a permanent basis the pilot program for clearly erroneous executions in Cboe BZX Rule 11.17 and (2) limit the circumstances where clearly erroneous review would continue to be available during regular trading hours (*i.e.*, Market Hours<sup>3</sup>) when the Limit Up-Limit Down (“LULD”) Plan to Address Extraordinary Market Volatility (the “LULD Plan”)<sup>4</sup> already provides similar protections for trades occurring at prices that may be deemed erroneous.<sup>5</sup>

The Exchange now proposes to adopt the same changes in Equity 11, Rule 11890 (Clearly Erroneous Transactions). The Exchange believes that these changes are appropriate as the LULD Plan has been approved by the Commission on a permanent basis,<sup>6</sup> and in light of amendments to the LULD Plan, including changes to the applicable Price Bands<sup>7</sup> around the open and close of trading.

##### Proposal To Make the Clearly Erroneous Pilot Permanent

On September 10, 2010, the Commission approved, on a pilot basis, changes to Equity 11, Rule 11890 that, among other things: (i) provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.<sup>8</sup>

<sup>3</sup> See Securities Exchange Act Release No. 95658 (September 1, 2022) (SR–CboeBZX–2022–037).

<sup>4</sup> See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

<sup>5</sup> The term “Market Hours” means the period of time beginning at 9:30 a.m. ET and ending at 4:00 p.m. ET (or such earlier time as may be designated by the Exchange on a day when the Exchange closes early). See Equity 1, Section 1(a)(13). The Exchange will make conforming changes throughout Rule 11890 to replace references to “Regular Trading Hours” and “Regular Market Session” with “Market Hours,” which is the correct defined term.

<sup>6</sup> See Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (“Notice”); 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631) (“Amendment Eighteen”).

<sup>7</sup> “Price Bands” refers to the term provided in Section V of the LULD Plan.

<sup>8</sup> See Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BX–2010–040).

In 2013, the Exchange adopted a provision designed to address the operation of the LULD Plan.<sup>9</sup> Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) a series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.<sup>10</sup> These changes are currently scheduled to operate for a pilot period that would end at the close of business on October 20, 2022.<sup>11</sup>

When it originally approved the clearly erroneous pilot, the Commission explained that the changes were “being implemented on a pilot basis so that the Commission and the Exchanges can monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.”<sup>12</sup> In the 12 years since that time, the Exchange and other national securities exchanges have gained considerable experience in the operation of the rule, as amended on a pilot basis. Based on that experience, the Exchange believes that the program should be allowed to continue on a permanent basis so that equities market participants and investors can benefit from the increased certainty provided by the amended rule.

The clearly erroneous pilot was implemented following a severe disruption in the U.S. equities markets on May 6, 2010 (“Flash Crash”) to “provide greater transparency and certainty to the process of breaking trades.”<sup>13</sup> Largely, the pilot reduced the

<sup>9</sup> See Securities Exchange Act Release No. 68818 (February 1, 2013), 78 FR 9100 (February 7, 2013) (SR–BX–2013–010).

<sup>10</sup> See Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BX–2014–021).

<sup>11</sup> See Securities Exchange Act Release No. 95332 (July 20, 2022), 87 FR 44471 (July 26, 2022) (SR–BX–2022–011).

<sup>12</sup> See Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BX–2010–040).

<sup>13</sup> *Id.*

<sup>36</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b–4.

discretion of the Exchange, other national securities exchanges, and Financial Industry Regulatory Authority (“FINRA”) to deviate from the objective standards in their respective rules when dealing with potentially erroneous transactions. The pilot has thus helped afford greater certainty to Members and investors about when trades will be deemed erroneous pursuant to self-regulatory organization (“SRO”) rules and has provided a more transparent process for conducting such reviews. The Exchange proposes to make the current pilot permanent so that market participants can continue to benefit from the increased certainty afforded by the current rule.

#### Amendments to the Clearly Erroneous Rules

When the Participants to the LULD Plan filed to introduce the Limit Up-Limit Down (“LULD”) mechanism, itself a response to the Flash Crash, a handful of commenters noted the potential discordance between the clearly erroneous rules and the Price Bands used to limit the price at which trades would be permitted to be executed pursuant to the LULD Plan. For example, two commenters requested that the clearly erroneous rules be amended so the presumption would be that trades executed within the Price Bands would not be subject to review.<sup>14</sup> While the Participants acknowledged that the potential to prevent clearly erroneous executions would be a “key benefit” of the LULD Plan, the Participants decided not to amend the clearly erroneous rules at that time.<sup>15</sup> In the years since, industry feedback has continued to reflect a desire to eliminate the discordance between the LULD mechanism and the clearly erroneous rules so that market participants would have more certainty that trades executed with the Price Bands would stand. For example, the Equity Market Structure Advisory Committee (“EMSAC”) Market Quality Subcommittee included in its April 19, 2016 status report a preliminary recommendation that clearly erroneous rules be amended to conform to the Price Bands—*i.e.*, “any trade that takes place within the band would stand and not be broken and trades outside the LU/LD bands would be eligible for the consideration of the Clearly Erroneous rules.”<sup>16</sup>

The Exchange believes that it is important for there to be some mechanism to ensure that investors’ orders are either not executed at clearly erroneous prices or are subsequently busted as needed to maintain a fair and orderly market. At the same time, the Exchange believes that the LULD Plan, as amended, would provide sufficient protection for trades executed during Market Hours. Indeed, the LULD mechanism could be considered to offer superior protection as it prevents potentially erroneous trades from being executed in the first instance. After gaining experience with the LULD Plan, the Exchange now believes that it is appropriate to largely eliminate clearly erroneous review during Market Hours when Price Bands are in effect. Thus, as proposed, trades executed within the Price Bands would stand, barring one of a handful of identified scenarios where such review may still be necessary for the protection of investors. The Exchange believes that this change would be beneficial for the U.S. equities markets as it would ensure that trades executed within the Price Bands are subject to clearly erroneous review in only rare circumstances, resulting in greater certainty for Members and investors.

The current LULD mechanism for addressing extraordinary market volatility is available solely during Market Hours. Thus, trades during the Exchange’s Pre-Market<sup>17</sup> or Post-Market Hours<sup>18</sup> would not benefit from this protection and could ultimately be executed at prices that may be considered erroneous. For this reason, the Exchange proposes that transactions executed during Pre-Market or Post-Market Hours would continue to be reviewable as clearly erroneous. Continued availability of the clearly erroneous rule during Pre- and Post-Market Hours would therefore ensure that investors have appropriate recourse when erroneous trades are executed outside of the hours where similar protection can be provided by the LULD

<https://www.sec.gov/spotlight/emsac/emsac-recommendations-rulemaking-market-quality.pdf>.

<sup>17</sup> The term “Pre-Market Hours” means the period of time beginning at 7:00 a.m. ET and ending immediately prior to the commencement of Market Hours. See Equity 1, Section 1(a)(13). The Exchange will make conforming changes throughout Rule 11890 to replace references to “Pre-Opening Hours” or “Pre-Opening Hours Trading Session” with “Pre-Market Hours,” which is the correct defined term.

<sup>18</sup> The term “Post-Market Hours” means the period of time beginning immediately after the end of Market Hours and ending at 7:00 p.m. ET. See Equity 1, Section 1(a)(13). The Exchange will make conforming changes throughout Rule 11890 to replace references to “After Hours” or “After Hours Trading Session” with “Post-Market Hours,” which is the correct defined term.

Plan. Further, the proposal is designed to eliminate the potential discordance between clearly erroneous review and LULD Price Bands, which does not exist outside of Market Hours because the LULD Plan is not in effect. Thus, the Exchange believes that it is appropriate to continue to allow transactions to be eligible for clearly erroneous review if executed outside of Market Hours.

On the other hand, there would be much more limited potential to request that a transaction be reviewed as potentially erroneous during Market Hours. With the introduction of the LULD mechanism in 2013, clearly erroneous trades are largely prevented by the requirement that trades be executed within the Price Bands. In addition, in 2019, Amendment Eighteen to the LULD Plan eliminated double-wide Price Bands: (1) at the Open, and (2) at the Close for Tier 2 NMS Stocks 2 with a Reference Price above \$3.00.<sup>19</sup> Due to these changes, the Exchange believes that the Price Bands would provide sufficient protection to investor orders such that clearly erroneous review would no longer be necessary during Market Hours. As the Participants to the LULD Plan explained in Amendment Eighteen: “Broadly, the Limit Up-Limit Down mechanism prevents trades from happening at prices where one party to the trade would be considered ‘aggrieved,’ and thus could be viewed as an appropriate mechanism to supplant clearly erroneous rules.” While the Participants also expressed concern that the Price Bands might be too wide to afford meaningful protection around the open and close of trading, amendments to the LULD Plan adopted in Amendment Eighteen narrowed Price Bands at these times in a manner that the Exchange believes is sufficient to ensure that investors’ orders would be appropriately protected in the absence of clearly erroneous review. The Exchange therefore believes that it is appropriate to rely on the LULD mechanism as the primary means of preventing clearly erroneous trades during Market Hours.

At the same time, the Exchange is cognizant that there may be limited circumstances where clearly erroneous review may continue to be appropriate, even during Market Hours. Thus, the Exchange proposes to amend its clearly erroneous rules to enumerate the specific circumstances where such review would remain available during the course of Market Hours, as follows. All transactions that fall outside of these specific enumerated exceptions would

<sup>14</sup> See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4-631) (n. 33505).

<sup>15</sup> *Id.*

<sup>16</sup> See EMSAC Market Quality Subcommittee, Recommendations for Rulemaking on Issues of Market Quality (November 29, 2016), available at

<sup>19</sup> See Amendment Eighteen, *supra* note 6.

be ineligible for clearly erroneous review.

First, pursuant to proposed subparagraph (C)(1)(i) of Rule 11890(a)(2), a transaction executed during Market Hours would continue to be eligible for clearly erroneous review if the transaction is not subject to the LULD Plan. In such case, the Numerical Guidelines set forth in subparagraph (C)(2) of Rule 11890(a)(2) will be applicable to such NMS Stock. While the majority of securities traded on the Exchange would be subject to the LULD Plan, certain equity securities, such as rights and warrants, are explicitly excluded from the provisions of the LULD Plan and would therefore be eligible for clearly erroneous review instead.<sup>20</sup> Similarly, there are instances, such as the opening auction on the primary listing market,<sup>21</sup> where transactions are not ordinarily subject to the LULD Plan, or circumstances where a transaction that ordinarily would have been subject to the LULD Plan is not—due, for example, to some issue with processing the Price Bands. These transactions would continue to be eligible for clearly erroneous review, effectively ensuring that such review remains available as a backstop when the LULD Plan would not prevent executions from occurring at erroneous prices in the first instance.

Second, investors would also continue to be able to request review of transactions that resulted from certain systems issues pursuant to proposed subparagraph (C)(1)(ii). This limited exception would help to ensure that trades that should not have been executed would continue to be subject to clearly erroneous review. Specifically, as proposed, transactions executed during Market Hours would be eligible for clearly erroneous review pursuant to proposed subparagraph (C)(1)(ii) if the transaction is the result of an Exchange technology or systems issue that results in the transaction occurring outside of the applicable LULD Price Bands pursuant to Rule 11890(g), or is executed after the primary listing market for the security declares a regulatory trading halt, suspension, or pause pursuant to Rule 11890(i). A transaction subject to review pursuant to this paragraph shall be found to be clearly erroneous if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Reference Price,

described in subparagraph (D) of this Rule, by an amount that equals or exceeds the applicable Percentage Parameter defined in Appendix A to the LULD Plan (“Percentage Parameters”).

Third, the Exchange proposes to narrowly allow for the review of transactions during Market Hours when the Reference Price, described in proposed subparagraph (D), is determined to be erroneous by an Officer of the Exchange or senior level employee designee. Specifically, a transaction executed during Market Hours would be eligible for clearly erroneous review pursuant to proposed subparagraph (C)(1)(iii) of Rule 11890(a)(2) if the transaction involved, in the case of (1) a corporate action or new issue or (2) a security that enters a Trading Pause pursuant to the LULD Plan and resumes trading without an auction,<sup>22</sup> a Reference Price that is determined to be erroneous by an Officer of the Exchange or senior level employee designee because it clearly deviated from the theoretical value of the security. In such circumstances, the Exchange may use a different Reference Price pursuant to proposed subparagraph (D)(2) of this Rule. A transaction subject to review pursuant to this paragraph shall be found to be clearly erroneous if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the new Reference Price, described in subparagraph (D)(2) below, by an amount that equals or exceeds the applicable Numerical Guidelines or Percentage Parameters, as applicable depending on whether the security is subject to the LULD Plan. Specifically, the Percentage Parameters would apply to all transactions except those in an NMS Stock that is not subject to the LULD Plan, as described in subparagraph (C)(1)(i).

In the context of a corporate action or a new issue, there may be instances where the security’s Reference Price is later determined by the Exchange to be erroneous (*e.g.*, because of a bad first trade for a new issue), and subsequent LULD Price Bands are calculated from that incorrect Reference Price. In determining whether the Reference Price is erroneous in such instances, the Exchange would generally look to see if such Reference Price clearly deviated from the theoretical value of the security. In such cases, the Exchange would consider a number of factors to determine a new Reference Price that is

based on the theoretical value of the security, including but not limited to, the offering price of the new issue, the ratio of the stock split applied to the prior day’s closing price, the theoretical price derived from the numerical terms of the corporate action transaction such as the exchange ratio and spin-off terms, and the prior day’s closing price on the OTC market for an OTC up-listing.<sup>23</sup> In the foregoing instances, the theoretical value of the security would be used as the new Reference Price when applying the Percentage Parameters under the LULD Plan (or Numerical Guidelines if the transaction is in an NMS Stock that is not subject to the LULD Plan) to determine whether executions would be cancelled as clearly erroneous.

The following illustrate the proposed application of the rule in the context of a corporate action or new issue:

#### Example 1

1. ABCD is subject to a corporate action, 1 for 10 reverse split, and the previous day close was \$5, but the new theoretical price based on the terms of the corporate action is \$50
2. The security opens at \$5, with LULD bands at  $\$4.50 \times \$5.50$
3. The bands will be calculated correctly but the security is trading at an erroneous price based on the valuation of the remaining outstanding shares
4. The theoretical price of \$50 would be used as the new Reference Price when applying LULD bands to determine if executions would be cancelled as clearly erroneous

#### Example 2

1. ABCD is subject to a corporate action, the company is doing a spin off where a new issue will be listed, BCDE. ABCD trades at \$50, and the spinoff company is worth  $\frac{1}{5}$  of ABCD
2. BCDE opens at \$50 in the belief it is the same company as ABCD
3. The theoretical values of the two companies are ABCD \$40 and BCDE \$10
4. BCDE would be deemed to have had an incorrect Reference Price and the theoretical value of \$10 would be used as the new Reference Price when applying the LULD Bands to determine if executions would be cancelled as clearly erroneous

<sup>20</sup> See Appendix A of the LULD Plan.

<sup>21</sup> The initial Reference Price used to calculate Price Bands is typically set by the Opening Price on the primary listing market. See Section V(B) of the LULD Plan.

<sup>22</sup> The Exchange notes that the “resumption of trading without an auction” provision of the proposed rule text applies only to securities that enter a Trading Pause pursuant to LULD and does not apply to a corporate action or new issue.

<sup>23</sup> Using transaction data reported to the FINRA OTC Reporting Facility, FINRA disseminates via the Trade Data Dissemination Service a final closing report for OTC equity securities for each business day that includes, among other things, each security’s closing last sale price.

## Example 3

1. ABCD is an uplift from the OTC market, the prior days close on the OTC market was \$20
2. ABCD opens trading on the new listing exchange at \$0.20 due to an erroneous order entry
3. The new Reference Price to determine clearly erroneous executions would be \$20, the theoretical value of the stock from where it was last traded

In the context of the rare situation in which a security that enters a LULD Trading Pause and resumes trading without an auction (*i.e.*, reopens with quotations), the LULD Plan requires that the new Reference Price in this instance be established by using the mid-point of the best bid and offer (“BBO”) on the primary listing exchange at the reopening time.<sup>24</sup> This can result in a Reference Price and subsequent LULD Price Band calculation that is significantly away from the security’s last traded or more relevant price, especially in less liquid names. In such rare instances, the Exchange is proposing to use a different Reference Price that is based on the prior LULD Band that triggered the Trading Pause, rather than the midpoint of the BBO.

The following example illustrates the proposed application of the rule in the context of a security that reopens without an auction:

## Example 4

1. ABCD stock is trading at \$20, with LULD Bands at  $\$18 \times \$22$
2. An incoming buy order causes the stock to enter a Limit State Trading Pause and then a Trading Pause at \$22
3. During the Trading Pause, the buy order causing the Trading Pause is cancelled
4. At the end of the 5-minute halt, there is no crossed interest for an auction to occur, thus trading would resume on a quote
5. Upon resumption, a quote that was available prior to the Trading Pause (*e.g.*, a quote was resting on the book prior to the Trading Pause), is widely set at  $\$10 \times \$90$
6. The Reference Price upon resumption is \$50 (mid-point of BBO)
7. The SIP will use this Reference Price and publish LULD Bands of  $\$45 \times \$55$  (*i.e.*, far away from BBO prior to the halt)
8. The bands will be calculated correctly, but the \$50 Reference Price is subsequently determined to be incorrect as the price clearly deviated from where it previously traded prior to the Trading Pause

9. The new Reference Price would be \$22 (*i.e.*, the last effective Price Band that was in a limit state before the Trading Pause), and the LULD Bands would be applied to determine if the executions should be cancelled as clearly erroneous

In all of the foregoing situations, investors would be left with no remedy to request clearly erroneous review without the proposed carveouts in subparagraph (C)(1)(iii) because the trades occurred within the LULD Price Bands (albeit LULD Price Bands that were calculated from an erroneous Reference Price). The Exchange believes that removing the current ability for the Exchange to review in these narrow circumstances would lessen investor protections.

## Numerical Guidelines

Today, subparagraph (C)(1) defines the Numerical Guidelines that are used to determine if a transaction is deemed clearly erroneous during Market Hours, or during the Pre-Market and Post-Market Hours. With respect to Market Hours, trades are generally deemed clearly erroneous if the execution price differs from the Reference Price (*i.e.*, last sale) by 10% if the Reference Price is greater than \$0.00 up to and including \$25.00; 5% if the Reference Price is greater than \$25.00 up to and including \$50.00; and 3% if the Reference Price is greater than \$50.00. Wider parameters are also used for reviews for Multi-Stock Events, as described in subparagraph (C)(2). With respect to transactions in Leveraged ETF/ETN securities executed during Market Hours, Pre-Market and Post-Market Hours, trades are deemed clearly erroneous if the execution price exceeds the Market Hours Numerical Guidelines multiplied by the leverage multiplier.

Given the changes described in this proposed rule change, the Exchange proposes to amend the way that the Numerical Guidelines are applied during Market Hours in the handful of instances where clearly erroneous review would continue to be available. Specifically during Market Hours, the Exchange would continue to apply the Numerical Guidelines, which would be relocated from subparagraph (C)(1) to (C)(2)(i) under this proposal, to transactions eligible for review pursuant proposed subparagraph (C)(1)(i) (*i.e.*, transactions in NMS Stocks that are not subject to the LULD Plan). In addition, as applied to the circumstances described in proposed subparagraphs (C)(1)(ii) and (iii), the Exchange would not apply the Numerical Guidelines in proposed subparagraph (C)(2)(i) during

Market Hours, and would instead apply the Percentage Parameters used to calculate Price Bands, as set forth in Appendix A to the LULD Plan. Without this change, a transaction that would otherwise stand if Price Bands were properly applied to the transaction may end up being subject to review and deemed clearly erroneous solely due to the fact that the Price Bands were not available due to a systems or other issue. The Exchange believes that it makes more sense to instead base the Price Bands on the same parameters as would otherwise determine whether the trade would have been allowed to execute within the Price Bands. The Exchange also proposes to modify the Numerical Guidelines applicable to leveraged ETF/ETN securities during Market Hours. As noted above, the Numerical Guidelines will only be applicable to transactions eligible for review pursuant subparagraph (C)(1)(i) (*i.e.*, to NMS Stocks that are not subject to the LULD Plan). As leveraged ETF/ETN securities are subject to LULD and thus the Percentage Parameters will be applicable during Market Hours, the Exchange proposes to eliminate the Numerical Guidelines for leveraged ETF/ETN securities traded during Market Hours. However, as no Price Bands are available outside of Market Hours, the Exchange proposes to keep the existing Numerical Guidelines in place for transactions in leveraged ETF/ETN securities that occur during Pre-Market and Post-Market Hours.

The Exchange also proposes to move existing subparagraphs (C)(2) (Multi-Stock Events Involving Twenty or More Securities) and (C)(3) (Additional Factors) as proposed subparagraphs (C)(2)(ii) and (C)(2)(iii), respectively, and also proposes to make clear that Multi-Stock Events and Additional Factors will only be subject to clearly erroneous review if those NMS Stocks are not subject to the LULD Plan or occur during the Pre-Market or Post-Market Hours. The Exchange proposes to make similar changes to existing subparagraph (A)(iii) (Outlier Transactions) to make clear that such transactions will only be subject to clearly erroneous review if those NMS Stocks are not subject to the LULD Plan or occur during Pre-Market or Post-Market Hours. Further, given the proposal to move existing subparagraphs (C)(2) and (C)(3) to subparagraphs (C)(2)(ii) and (C)(2)(iii), respectively, the Exchange also proposes to amend applicable rule references throughout subparagraph (C)(2)(i). Further, the Exchange proposes to update applicable rule references in

<sup>24</sup> See LULD Plan, Section I(U) and V(C)(1).

subparagraph (A)(iii) based on the above-described structural changes to the Rule.

#### Reference Price

As proposed, the Reference Price used would continue to be based on last sale and would be memorialized in proposed subparagraph (D). Continuing to use the last sale as the Reference Price is necessary for operational efficiency as it may not be possible to perform a timely clearly erroneous review if doing so required computing the arithmetic mean price of eligible reported transactions over the past five minutes, as contemplated by the LULD Plan. While this means that there would still be some differences between the Price Bands and the clearly erroneous parameters, the Exchange believes that this difference is reasonable in light of the need to ensure timely review if clearly erroneous rules are invoked. The Exchange also proposes to allow for an alternate Reference Price to be used as prescribed in proposed subparagraphs (D)(1), (2), and (3). Specifically, the Reference Price may be a value other than the consolidated last sale immediately prior to the execution(s) under review (1) in the case of Multi-Stock Events involving twenty or more securities, as described in subparagraph (C)(2)(ii) above, (2) in the case of an erroneous Reference Price, as described in subparagraph (C)(1)(iii) above,<sup>25</sup> or (3) in other circumstances, such as, for example, relevant news impacting a security or securities, periods of extreme market volatility, sustained illiquidity, or widespread system issues, where use of a different Reference Price is necessary for the maintenance of a fair and orderly market and the protection of investors and the public interest, provided that such circumstances occurred during Pre-Market or Post-Market Hours or are eligible for review pursuant to subparagraph (C)(1)(i).

#### System Disruption or Malfunction

To conform with the structural changes described above, the Exchange now proposes to remove paragraph (b)(i), System Disruption or Malfunctions, and renumber existing

paragraph (b)(ii) as (b)(i). Additionally, the Exchange proposes to add rule text in renumbered (b)(i) (Senior Official Acting on Own Motion) to specify that a Senior Official, acting on his or her own motion, may review potentially erroneous transactions that occur only during Pre-Market or Post-Market Hours or that are eligible for review pursuant to proposed paragraph (a)(2)(C)(1).

The Exchange also proposes new subparagraph (C)(1)(ii) of Rule 11890(a)(2). Specifically, as described in subparagraph (C)(1)(ii), transactions occurring during Market Hours that are executed outside of the LULD Price Bands due to an Exchange technology or system issue, may be subject to clearly erroneous review pursuant to proposed paragraph (g) of Rule 11890. Proposed subparagraph (C)(1)(ii) further provides that a transaction subject to review pursuant to this paragraph shall be found to be clearly erroneous if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Reference Price, described in subparagraph (D), by an amount that equals or exceeds the applicable Percentage Parameter defined in Appendix A to the LULD Plan.

#### Securities Subject to Limit Up-Limit Down Plan

The Exchange proposes to rename paragraph (g) (Securities Subject to LULD Plan) as “Transactions Occurring Outside of LULD Price Bands.” Given that proposed subparagraph (C)(1) of Rule 11890(a)(2) defines the LULD Plan, the Exchange also proposes to eliminate redundant language from paragraph (g). Finally, the Exchange also proposes to update references to the LULD Plan and Price Bands so that they are uniform throughout the Rule and to update rule references throughout the paragraph to conform to the structural changes to the Rule described above.

#### Conforming Changes

In connection with the changes proposed above, the Exchange proposes to make a conforming change in paragraph (a)(2) to replace the reference to “Numerical Guidelines” to “guidelines” as clearly erroneous review will now be based on both the existing Numerical Guidelines and the Percentage Parameters in the manner specified above. In addition, the Exchange proposes to modify the text of paragraphs (e) (Fees), (h) (Multi-Day Event), and (i) (Trading Halts) to reference the Percentage Parameters as well as the Numerical Guidelines, and to update rule references therein to conform to the structural changes to the Rule described above. Specifically, the

existing text of paragraph (e) provides that adjustments or voluntary breaks negotiated by the Exchange to trades executed at prices that meet the Numerical Guidelines set forth in (a)(2)(C)(1) count as breaks by the Exchange for purposes of this paragraph. The Exchange now proposes to amend the rule text to state that adjustments or voluntary breaks negotiated by the Exchange to trades executed at prices that meet the Percentage Parameters or Numerical Guidelines set forth in (a)(2)(C)(2) count as breaks by the Exchange for purposes of this paragraph.

In addition, the existing text of paragraphs (h) and (i) provides that any action taken in connection with this paragraph will be taken without regard to the Numerical Guidelines set forth in this Rule. The Exchange proposes to amend the rule text to provide that any action taken in connection with this paragraph will be taken without regard to the Percentage Parameters or Numerical Guidelines set forth in this Rule, with the Percentage Parameters being applicable to an NMS Stock subject to the LULD Plan and the Numerical Guidelines being applicable to an NMS Stock not subject to the LULD Plan.

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,<sup>26</sup> in general, and Section 6(b)(5) of the Act,<sup>27</sup> in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

As explained in the purpose section of this proposed rule change, the current pilot was implemented following the Flash Crash to bring greater transparency to the process for conducting clearly erroneous reviews, and to help assure that the review process is based on clear, objective, and consistent rules across the U.S. equities markets. The Exchange believes that the amended clearly erroneous rules have been successful in that regard and have thus furthered fair and orderly markets. Specifically, the Exchange believes that the pilot has successfully ensured that such reviews are conducted based on objective and consistent standards

<sup>25</sup> As discussed above, in the case of (C)(1)(iii)(1), the Exchange would consider a number of factors to determine a new Reference Price that is based on the theoretical value of the security, including but not limited to, the offering price of the new issue, the ratio of the stock split applied to the prior day's closing price, the theoretical price derived from the numerical terms of the corporate action transaction such as the exchange ratio and spin-off terms, and the prior day's closing price on the OTC market for an OTC up-listing. In the case of (C)(1)(iii)(2), the Reference Price will be the last effective Price Band that was in a limit state before the Trading Pause.

<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(5).

across SROs and has therefore afforded greater certainty to Members and investors. The Exchange therefore believes that making the current pilot a permanent program is appropriate so that equities market participants can continue to reap the benefits of a clear, objective, and transparent process for conducting clearly erroneous reviews. In addition, the Exchange understands that the other U.S. equities exchanges and FINRA will also file largely identical proposals to make their respective clearly erroneous pilots permanent. The Exchange therefore believes that the proposed rule change would promote transparency and uniformity across markets concerning review of transactions as clearly erroneous and would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors, and the public interest.

Similarly, the Exchange believes that it is consistent with just and equitable principles of trade to limit the availability of clearly erroneous review during Market Hours. The LULD Plan was approved by the Commission to operate on a permanent rather than pilot basis. As a number of market participants have noted, the LULD Plan provides protections that ensure that investors' orders are not executed at prices that may be considered clearly erroneous. Further, amendments to the LULD Plan approved in Amendment Eighteen serve to ensure that the Price Bands established by the LULD Plan are "appropriately tailored to prevent trades that are so far from current market prices that they would be viewed as having been executed in error."<sup>28</sup> Thus, the Exchange believes that clearly erroneous review should only be necessary in very limited circumstances during Market Hours. Specifically, such review would only be necessary in instances where a transaction was not subject to the LULD Plan, or was the result of some form of systems issue, as detailed in the purpose section of this proposed rule change. Additionally, in narrow circumstances where the transaction was subject to the LULD Plan, a clearly erroneous review would be available in the case of (1) a corporate action or new issue or (2) a security that enters a Trading Pause pursuant to LULD and resumes trading without an auction, where the Reference Price is determined to be erroneously by an Officer of the Exchange or senior level employee designee because it clearly deviated from the theoretical value of

the security. Thus, eliminating clearly erroneous review in all other instances will serve to increase certainty for Members and investors that trades executed during Market Hours would typically stand and would not be subject to review.

Given the fact that clearly erroneous review would largely be limited to transactions that were not subject to the LULD Plan, the Exchange also believes that it is necessary to change the parameters used to determine whether a trade is clearly erroneous. Specifically, due to the different parameters currently used for clearly erroneous review and for determining Price Bands, it is possible that a trade that would have been permitted to execute within the Price Bands would later be deemed clearly erroneous, if, for example, a systems issue prevented the dissemination of the Price Bands. The Exchange believes that this result is contrary to the principle that trades within the Price Bands should stand, and has the potential to cause investor confusion if trades that are properly executed within the applicable parameters described in the LULD Plan are later deemed erroneous. By using consistent parameters for clearly erroneous reviews conducted during Market Hours and the calculation of the Price Bands, the Exchange believes that this change would also serve to promote greater certainty with regards to when trades may be deemed erroneous.

Finally, the proposed rule changes make organizational updates to Rule 11890 as well as minor updates and corrections to the Rule to improve readability and clarity.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while also amending those rules to provide greater certainty to Members and investors that trades will stand if executed during Market Hours where the LULD Plan provides adequate protection against trading at erroneous prices. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals, the substance of which are identical to this proposal. Thus, the proposed rule change will help to ensure consistency across SROs without implicating any competitive issues.

#### *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)(iii) of the Act<sup>29</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>30</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>31</sup> normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>32</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 so that the proposed rule change may become operative on October 1, 2022. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Exchange to coordinate its implementation of the revised clearly erroneous execution rules with the other national securities exchanges and FINRA, and will help ensure consistency across the SROs.<sup>33</sup> For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.<sup>34</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

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>30</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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>31</sup> 17 CFR 240.19b-4(f)(6).

<sup>32</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>33</sup> See SR-CboeBZX-2022-37 (July 8, 2022).

<sup>34</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).

<sup>28</sup> See Amendment Eighteen, *supra* note 6.

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 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-2022-017 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-2022-017. 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 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. 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-2022-017 and should be submitted on or before October 20, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

[FR Doc. 2022-21065 Filed 9-28-22; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95903; File No. SR-MEMX-2022-27]

### Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Update Exchange Rule 13.4(a) Regarding the Exchange's Usage of Data Feeds

September 23, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 19, 2022, MEMX LLC ("MEMX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 is filing with the Commission a proposed rule change to update Exchange Rule 13.4(a) regarding the sources of data that the Exchange utilizes for the handling, execution and routing of orders, as well as for surveillance necessary to monitor compliance with applicable securities laws and Exchange rules, with respect to certain market centers. The text of the proposed rule change is provided in Exhibit 5.

<sup>35</sup> 17 CFR 200.30-3(a)(12).

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

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

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

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

#### 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 update Exchange Rule 13.4(a) regarding the sources of data that the Exchange utilizes for the handling, execution and routing of orders, as well as for surveillance necessary to monitor compliance with applicable securities laws and Exchange rules, with respect to certain market centers. Specifically, the Exchange proposes to amend Exchange Rule 13.4(a) to reflect that it no longer utilizes direct data feeds and instead will utilize market data from the Consolidated Quotation System ("CQS")/UTP Quotation Data Feed ("UQDF") for such purposes with respect to the following markets centers: Cboe BYX, Cboe EDGA, Nasdaq BX, Nasdaq PSX, NYSE American, NYSE Chicago, and NYSE National.<sup>5</sup> The Exchange does not have a secondary source for data for these market centers.

By making the changes set forth above, the Exchange anticipates saving approximately \$30,000 per month, or \$360,000 annually, by discontinuing receipt of direct data feeds from the markets listed above. The Exchange determined the list of markets from which to discontinue direct data feeds because such markets represent the U.S. national securities exchanges that charge for market data but have less

<sup>5</sup> The Exchange previously filed the proposal, which was effective on filing prior to August 1, 2022, the date that the Exchange transitioned over to use CQS/UQDF for the market centers listed above. See Securities Exchange Act Release No. 95395 (July 29, 2022), 87 FR 47799 (August 4, 2022) (SR-MEMX-2022-20) (the "Original Proposal"). The Exchange withdrew the Original Proposal and re-filed this proposal in order to provide additional transparency and respond to a comment letter received on the Original Proposal. See Letter from Christopher Nagy, Research Director, Healthy Markets Association, to Vanessa Countryman, Secretary, Securities and Exchange Commission dated August 16, 2022.