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**Required fields are shown with yellow backgrounds and asterisks.**

Page 1 of \* 226

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No.\* SR - 2018 - \* 59

Amendment No. (req. for Amendments \*)

Filing by Nasdaq ISE, LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pilot	Extension of Time Period for Commission Action *	Date Expires *	Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010			Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934		
Section 806(e)(1) *		Section 806(e)(2) *	Section 3C(b)(2) *		
<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>		

Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document



### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to align its existing investigatory and disciplinary processes and related rules with the investigatory and disciplinary processes and associated rules of Nasdaq BX, Inc.

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name *	Brett	Last Name *	Kitt
Title *	Senior Associate General Counsel		
E-mail *	Brett.Kitt@nasdaq.com		
Telephone *	(301) 978-8132	Fax	<input type="text"/>

### Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 07/12/2018

Executive Vice President and General Counsel

By Edward S. Knight

(Name \*)

edward.knight@nasdaq.com

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDDS website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document



Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document



Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Nasdaq ISE, LLC (“ISE” or “Exchange”), 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> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to align its existing investigatory and disciplinary processes and related rules with the investigatory and disciplinary processes and associated rules of Nasdaq BX, Inc. (“BX”).

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1 and the text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on February 1, 2017. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Brett M. Kitt  
Senior Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8132

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

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

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

The Exchange proposes to eliminate its existing processes for: (1) summarily suspending and limiting or prohibiting access to Exchange services by Exchange members (“Members”), persons associated with such Members (“Associated Persons”), (2) investigating and disciplining Exchange Members and Associated Persons, and (3) adjudicating actions brought by persons economically aggrieved by certain Exchange actions. The Exchange also seeks to eliminate Chapters 15, 16, and 17<sup>3</sup> of the Exchange’s Rules (with certain exceptions, discussed below), which set forth and govern such processes, respectively, and it proposes to eliminate the Exchange’s Business Conduct Committee (“BCC”), which is a body that exists to help to enforce the Exchange’s Rules. The Exchange further proposes to adopt, in place of the aforementioned Rules, the investigatory, disciplinary, and adjudicatory processes of the Exchange’s sister exchange, BX. It also proposes to replace the BCC with an Exchange Review Council that is similar to one that BX has in place. Specifically, the Exchange proposes to establish new Chapters 80 and 90 of its Rules<sup>4</sup> and incorporate by reference into those Chapters (again with certain exceptions, described below) the BX Rule 8000

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<sup>3</sup> As discussed below, the Exchange proposes to replace Chapter 17, which sets forth processes for persons aggrieved by Exchange actions, including adverse membership or association determinations, by adding to Exchange Rules 302 and 307 provisions adapted from BX Rules 1015 and 1016, which provide for similar adjudicative processes. Portions of proposed Chapter 90 also replace portions of Chapter 17, e.g., statutory disqualification in the 9520 Series.

<sup>4</sup> The Exchange proposes to add Chapters 23-79 and Chapters 81-89 to its Rules, but reserve such Chapters for future use.

and 9000 Series,<sup>5</sup> which set forth and govern the BX investigatory, disciplinary, and adjudicative processes.<sup>6</sup> The proposed changes, when coupled with certain changes to the Exchange’s other Rules, including Rules that govern appeals of the Exchange’s membership and other decisions, will render the Exchange’s investigative, disciplinary, and adjudicatory processes substantially the same as those, not only of BX, but also of other Nasdaq, Inc. family of exchanges (the “Nasdaq, Inc. Exchanges”).<sup>7</sup> The proposal change will also further harmonize the work that the Financial Industry Regulatory Authority (“FINRA”) conducts for all these exchanges.

### **Overview of the Exchange’s Existing Investigatory, Disciplinary, and Adjudicatory Processes and Rules**

The existing processes for investigating and disciplining Exchange Members<sup>8</sup> and Associated Persons,<sup>9</sup> for taking summary action against them, and for adjudicating

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<sup>5</sup> Citation herein to rules of the proposed Chapters 80 and 90 will be preceded by the term “BX Rule” to reflect incorporation of the BX Rule 8000 and 9000 Series. References to current rules will be preceded by the term “Existing Rule.”

<sup>6</sup> The Exchange proposes to separately request an exemption from the rule filing requirements of Section 19(b) of the Act for changes to Chapters 80 and 90 to the extent such rules are effected solely by virtue of a change to the BX Rule 8000 and 9000 Series.

<sup>7</sup> The Exchange notes that the BX Rule 8000 and 9000 Series are substantially similar to corresponding rules of The Nasdaq Stock Market, LLC (“Nasdaq”) and Nasdaq PHLX, LLC (“Phlx”). Moreover, the Exchange notes that Nasdaq MRX, LLC and Nasdaq GEMX, LLC will propose similar changes to their respective investigatory and disciplinary processes and associated rules that will render them substantially similar to those of BX.

<sup>8</sup> As defined in Existing Rule 100(a)(30).

<sup>9</sup> As defined in Existing Rule 100(a)(4).

Exchange actions that aggrieve them, are set forth in Existing Chapters 15-17 of the Exchange’s Rulebook.

With respect to investigations, Existing Rule 1602 authorizes the Exchange’s regulatory staff (hereinafter described in this filing, for consistency with the BX rules, as “Regulation Department” or “Exchange Regulation Department”)<sup>10</sup> to investigate Members and Associated Persons based on information it receives from a variety of sources, such as surveillance reviews, examinations, industry notifications, third party complaints, and referrals.<sup>11</sup> Alternatively, the Rule provides that the Exchange may, and it typically does, refer such investigatory matters to FINRA.

FINRA performs, among other things, investigatory and prosecutorial work for the Exchange pursuant to a Regulatory Services Agreement between the two parties (the “RSA”).<sup>12</sup> Under the RSA, FINRA is responsible<sup>13</sup> for the investigation of potential violations of the Exchange Rules and the Act, and for the prosecution of any such

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<sup>10</sup> The Exchange notes that the scope of its Regulation Department is the same as that of the BX Regulation Department.

<sup>11</sup> Existing Rule 1601 obligates each Member and Associated person to comply with investigatory requests by the Exchange (or FINRA, acting on its behalf) for testimony, or for written information or documentary materials.

<sup>12</sup> See RSA, dated June 10, 2013, as amended. The Exchange retains ultimate legal responsibility for the regulation of its Members, persons associated with its Members, and its market. See Existing Rule 1615 and its Supplementary Material.

<sup>13</sup> Although Existing Rule 1615 and its Supplementary Material authorizes the Exchange to contract with FINRA or another self-regulatory organization (“SRO”) to perform its disciplinary functions, the Existing Rule states that the Exchange retains ultimately legal responsibility for and control over such functions.

violations thereof, by Exchange Members and Associated Persons.<sup>14</sup> Upon completion of an investigation, FINRA analyzes the evidence and applicable law, and makes preliminary determinations, known as “Sufficiency of Evidence” reviews, as to whether or not violations have occurred.<sup>15</sup> The Sufficiency of Evidence review determines the nature of FINRA’s recommendation to the Exchange’s Chief Regulatory Officer (“CRO”) as to whether and how to proceed further with matters. If probable cause exists that a Member or Associated Person has violated the Exchange Rules or the Act, then the Regulation Department may file charges against the Member or Associated Person for adjudication before a Current Hearing Panel.<sup>16</sup> A Current Hearing Panel consists of a professional hearing officer and two members of the Exchange’s BCC.

Currently, the BCC is charged with enforcing the Rules of the Exchange with respect to Members and Associated Persons. The BCC is a committee, established by the Board,<sup>17</sup> whose enforcement jurisdiction includes the following: (1) ordering

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<sup>14</sup> Under the RSA, ISE’s Regulation Department may elect to exercise jurisdiction over a matter involving an ISE Member or an Associated Person, performing the investigation and any resulting prosecutorial work without FINRA’s involvement.

<sup>15</sup> See FINRA Regulatory Notice 09-17 (March 2009) (available at <http://www.finra.org/sites/default/files/NoticeDocument/p118171.pdf>).

<sup>16</sup> Both the Existing Rules and the BX Rules refer to their respective disciplinary adjudication panels as “Hearing Panels.” In the discussion that follows, the Exchange distinguishes between these two types of panels, which differ from one another substantively, by referring to the type of panel that exists under the Existing Rules as a “Current Hearing Panel” and the panel that the Exchange proposes to establish under the BX Rules as a “New Hearing Panel.” For purposes of the following discussion, the term New Hearing Panel shall also refer to an “Extended Hearing Panel,” as that term is defined in BX Rule 9120(l).

<sup>17</sup> See Resolution of the Board of Directors of the International Securities Exchange LLC Delegating Authority, dated May 11, 2000.

investigations of possible Rule violations; (2) considering letters of consent in expedited disciplinary actions; (3) making its members available to serve on Current Hearing Panels that adjudicate formal disciplinary proceedings; (4) imposing sanctions on Members or Associated Persons in disciplinary proceedings (“Respondents”); (5) reviewing Exchange actions involving minor rule violations; (6) appointing panels to conduct hearings and reviews of Exchange actions that deny membership or Member association privileges; and (7) generally overseeing all matters relating to the conduct of disciplinary hearings and hearings for review of Exchange decisions, and providing the Exchange with advice for improving disciplinary procedures.<sup>18</sup>

The Existing Rules provide several means by which the Exchange may pursue disciplinary actions.

First, Existing Rule 1603 permits informal disposition of disciplinary matters through “letters of consent.” The Existing Rule states that disciplinary matters are disposable in this manner if: (1) the Parties agree to the terms of such a letter, including any sanctions imposed therein; (2) the CRO approves of the draft letter; and (3) the BCC subsequently approves of the draft letter. If the Parties to the letter cannot reach agreement to its terms, or if the CRO or BCC reject it, then the disciplinary matter proceeds through formal channels.

Second, Existing Rules 1604 -1613 provide for formal adjudication of disciplinary matters. These Existing Rules state that, whenever probable cause exists for finding that a Member or Associated Person has committed a violation within the disciplinary jurisdiction of the Exchange, regulatory staff may prepare a “statement of

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<sup>18</sup> See ISE Business Conduct Committee Charter, as amended, May 1, 2003.

charges,” subject to the approval of the CRO. The Existing Rules further provide for Current Hearing Panels to adjudicate disciplinary matters. Current Hearing Panels are composed of a professional hearing officer, who serves as the Current Hearing Panel Chair, and two members of the BCC. The Existing Rules provide for the Parties to a disciplinary proceeding to receive at least 28 calendar days’ notice prior to the occurrence of a hearing. They also provide for a pre-hearing conference to expedite disciplinary proceedings by, among other things, seeking the Parties’ agreement regarding undisputed facts. They permit non-Parties to proceedings to intervene, under certain circumstances, and they grant the Current Hearing Panel Chair broad discretion to determine the course of the proceedings, including with respect to timing, filing deadlines, if not specified in the Rules, and evidentiary matters. They generally prohibit interlocutory review of Current Hearing Panel decisions as well as ex parte communications among Members and Associated Persons and Panelists, the BCC, or the Board concerning the merits of a disciplinary matter. They require Current Hearing Panels to issue their decisions by majority vote and in writing.

Existing Rule 1608 permits Current Hearing Panels to engage in summary disciplinary proceedings, meaning that they may reach decisions and impose penalties without holding hearings as to violations that Respondents admit, do not dispute, or fail to answer. The Rule provides, in such instances, that Respondents have 10 calendar days following service of such summary decisions to request hearings as to matters not previously admitted or to contest the penalties imposed.

Existing Rule 1609 sets forth procedures for settlements of disciplinary matters. The Rule generally provides that a Party may submit up to two written “offers of

settlement” at any time period prior to 120 calendar days following service of the statement of charges. Settlements must be approved by the Current Hearing Panel (or the CRO if a Current Hearing Panel has yet to be appointed).

Pursuant to Existing Rule 1610, Respondents may appeal Current Hearing Panel decisions to the Board. The Rule also permits the Board to review Current Hearing Panel decisions upon its own initiative within 30 calendar days after service of such decisions. The Rule permits the Board to delegate responsibility for its review to a committee composed of at least three of its Directors whose decision must be ratified by the Board. The Board may affirm, reverse, or modify decisions of Current Hearing Panels, and such Board decisions are final.

Third, Existing Rule 1614 provides for the disposition of certain minor disciplinary violations through the summary assessment of fines.<sup>19</sup> This Rule comprises violations of the Rules listed in Rule 1614(d) and that are set forth in the Exchange’s Minor Rule Violation Plan (“MRVP”) approved by the Commission pursuant to SEC Rule 19d-1 (“MRVP violations”) as well as violations that are not included in the Exchange’s MRVP but may be considered “minor” in nature (“minor rule violations”) and thus possibly resolved outside of the formal disciplinary process.<sup>20</sup> Existing Rule

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<sup>19</sup> Generally, notice to the SEC of final disciplinary action by an SRO is required pursuant to Rule 19d-1 of the Act; however, uncontested fines of \$2,500 or less assessed for violations of MRVP rules are subject to abbreviated periodic SEC reporting. None of the fines assessed in lieu of formal disciplinary action exceed \$5,000.

<sup>20</sup> Determinations to issue a fine under Rule 1614 are made on a case-by-case basis, whereby the Exchange considers the individual facts and circumstances to determine whether a fine of more or less than the recommended amount is appropriate for the violation, or whether the violation requires formal disciplinary action.

1614(a) sets forth the Exchange's general authority to assess such fines in amounts no greater than \$5,000 (up to \$2,500 for MRVP violations, and up to \$5,000 for minor rule violations). Existing Rule 1614(b) sets forth the notice requirements for service upon the Member or person against which the fine is to be levied (a "Subject"). The Existing Rule requires the Exchange to serve notice upon the Subject, along with a written statement that describes the nature of the alleged violation and the basis for finding that the Subject committed the violation, the amount of the fine to be imposed for each violation, and a date, not less than 30 calendar days after service of the notice, by which such determination becomes final and such fine must be paid or contested.

Under Existing Rule 1614(c), a Subject may contest the fine by filing an answer to this written determination prior to the date when the fine is payable. Additionally, the Subject may request a hearing as part of the answer.<sup>21</sup> The Rule charges the BCC, or a subcommittee thereof, with adjudicating contested fines. The BCC may decide to overturn, affirm, or modify fines levied by the Exchange.<sup>22</sup> A Subject or the Exchange staff may appeal such determinations to the Board, and the Board may also call the matter for review on its own initiative.<sup>23</sup>

Existing Rule 1614(d) sets forth the list of violations and a corresponding schedule of fines that the Exchange may impose and disciplinary actions it may pursue for MRVP violations and minor rule violations.<sup>24</sup> They include the following:

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<sup>21</sup> Existing Rule 1614(c).

<sup>22</sup> See id.

<sup>23</sup> See id.

<sup>24</sup> See n.20, infra.

- Violations of Rule 412 pertaining to position limits (with fines ranging from \$500 for the first offense within any 24 month rolling period to \$5,000 for the fourth and subsequent offenses within the same period);
- Violation of Rule 1403 for failing to file focus reports (with sanctions ranging from a \$200 fine for delinquencies of up to 30 calendar days and formal disciplinary action for delinquencies of 90 or more calendar days);
- Failing to make timely responses to requests for trade data in violation of Rule 1404 (with sanctions for the first offense ranging from a \$200 fine for delinquencies of up to 9 business days to formal disciplinary action for delinquencies of 30 or more business days, and sanctions for subsequent offenses ranging from a \$500 fine for the second offense to formal disciplinary action beginning with the fifth offense);
- Violating Rule 717(d) and (e) regarding limits on orders entered by Electronic Access Members (with a letter of caution for the first five offenses within one calendar year, fines escalating from \$500 to \$2,000 for the sixth through the twentieth offenses within the same period, and formal disciplinary action thereafter);
- Violations of Rule 803 and 805(b)(1)(i) regarding pre- and post-opening quote spread parameters for market maker quotations (with a letter of caution for the first offense within any 24 month rolling period, fines escalating from \$1,000 to \$5,000 for the second through the fourth offenses within the same period, and formal disciplinary action thereafter);

- Violations of Rule 805, which requires market makers to execute in appointed options classes a minimum percentage of the total number of contracts executed during a quarter (with a letter of caution for the first offense within any 12 month rolling period, fines escalating from \$500 to \$2,500 for the second through the fourth offenses within the same period, and formal disciplinary action thereafter);
- Failure to conduct mandatory systems testing in violation of Rule 419 (with fines escalating from \$250 to \$2,000 for the first through the fourth offenses within one calendar year, and formal disciplinary action thereafter);
- Failure to timely submit information or instructions regarding the exercise or non-exercise of noncash-settled equity options in violation of Rule 1100 (with fines for member organizations<sup>25</sup> escalating from \$1,000 for the first offense within any 24 month rolling period to \$5,000 for the third and subsequent offenses within the same period, and for individuals, from \$500 for the first offense within any 24 month rolling period to \$2,500 for the third and subsequent offenses within the same period);
- Failure to accurately report positions and account information in violation of Rule 415 (with fines escalating from \$500 for the first offense within any 24 month rolling period to \$5,000 for the fourth and subsequent offenses within the same period); and

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<sup>25</sup> The Exchange notes that it proposes to amend the term “Member Organization” so that it merely reads “Member.” These terms are synonymous.

- Failure of a market maker to enter continuous quotations for the option classes to which it is appointed in violation of Rule 804(e) (with fines ranging from a letter of caution for the first offense within any 24 month rolling period, to fines ranging from \$1,000 to \$5,000 for the second through fourth offenses within the same period, and formal disciplinary actions beginning with the fifth offense).<sup>26</sup>

As explained below, the Exchange proposes to retain but renumber Existing Rule 1614(d) insofar as the Exchange's MRVP and schedule of minor violations are unique to it. The Exchange cannot and does not seek to simply incorporate by reference the BX MRVP.

Existing Rule 1615 and its Supplementary Material authorizes the Exchange to contract with FINRA or another SRO to perform its disciplinary functions, but the

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<sup>26</sup> As explained below, the Exchange also proposes to retain Existing Rule 1600, which sets forth the general jurisdiction of the Exchange with respect to disciplinary matters. Existing Rule 1600 states that a Member or Associated Person who is alleged to have violated or aided and abetted a violation of the Act, the rules and regulations promulgated thereunder, and the By-Laws or Rules of the Exchange, or any interpretation thereof are subject to the disciplinary jurisdiction of the Exchange and may be, after notice and opportunity for a hearing, appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a Member, or any other fitting sanction in accordance with the provisions of the disciplinary rules. It also permits the Exchange to charge a supervisor with a violation of a rule within the disciplinary jurisdiction of the Exchange committed by an employee under his supervision or by the Member as though such violations were his own. Finally, it extends the disciplinary jurisdiction of the Exchange to continue after deregistration of the Member from the Exchange or a person's termination of association with a Member as to matters that occurred prior to such termination or deregistration. The Exchange must serve written notice to the former Member within one year of receipt by the Exchange of notice of such termination or deregistration that the Exchange is making inquiry into a matter or matters.

Existing Rule states that the Exchange retains ultimately legal responsibility for and control over such functions.

Existing Rule 1616 authorizes and prescribes the process for adjudicating expedited client suspensions that may be imposed upon Members or Associated Persons that violate the prohibition in Existing Rule 403 on disruptive quoting and trading activity. Existing Rule 1616 states that the initiation of expedited suspension proceedings requires the prior written authorization of the CRO or his designees. It requires the Exchange to provide prior notice to the Respondent as well as to convene a Current Hearing Panel to adjudicate the matter. The Existing Rule provides that such hearings are to be administered generally in accordance with Existing Rule 1606. If a Respondent fails to appear at a hearing for which it receives proper notice, the Existing Rule states that the Current Hearing Panel may issue a suspension order without further proceedings, while the failure of the Exchange to appear may result in the dismissal of the suspension proceeding. Existing Rule 1616(d) requires a Current Hearing Panel to issue a written decision as to whether to order suspension not later than 10 days after receiving the hearing transcript. It further provides that a Panel may issue an order imposing suspension only if it finds, by a preponderance of the evidence, that the alleged violation specified in the notice occurred. At any time after a Respondent is served with a suspension order, a Party may apply to the Current Hearing Panel to modify, set aside, limit, or revoke the order, and the Current Hearing Panel must respond to the request within 10 days after receipt thereof, unless extended. Finally, Existing Rule 1616(f) provides for the right of a Respondent to seek Commission review of a suspension order.

Chapter 15 of the Existing Rules states that the Board, a committee thereof, or an Exchange Official designated by the Board may summarily suspend a Member or an Associated Person that has been expelled or suspended from any other SRO or has been barred or suspended from being associated with a member of another SRO, if the Board, a committee thereof, or a designated Exchange Official determines that their ongoing transaction of business on the Exchange would compromise the safety of investors, creditors, other Members of the Exchange, or the Exchange itself.<sup>27</sup> On the same grounds, the Board, a committee thereof, or a designated Exchange Official may summarily suspend a Member if it is experiencing operational or financial difficulties and cannot continue doing business as a member with safety to investors, creditors, other Members, or the Exchange.<sup>28</sup> Furthermore, the Board, committee, or Exchange Official may limit or prohibit any person's access to services offered by the Exchange for these same reasons or, as to a Member, they may take such actions if they determine that such Member does not meet the qualification requirements or other prerequisites for access with safety to investors, creditors, Members, or the Exchange.<sup>29</sup> Chapter 15 provides for the Exchange to notify the SEC upon imposing a summary suspension or when summarily limiting or prohibiting access to Exchange services.<sup>30</sup>

Chapter 15 provides that, following the imposition of a suspension or a limitation on or prohibition against accessing Exchange services, the Exchange will conduct an

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<sup>27</sup> See Existing Rule 1500.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

investigation of the affairs of the affected Member, Associated Person, or person.<sup>31</sup> A suspended, limited, or prohibited Member, Associated Person, or person must file with the Exchange a written statement covering all information that the Exchange may request in this regard, including a complete list of creditors and amounts owed to each as well as a complete list of positions in Exchange options contracts they maintain on their own behalf and that of their customers.<sup>32</sup>

Those subject to summary suspension or that are limited or prohibited with respect to access to Exchange services may petition for reinstatement within six months of their suspension, limitation, or prohibition, if they are suspended, limited, or prohibited due to operating difficulty, or within 30 days of suspension, limitation, or prohibition, if they are suspended, limited, or prohibited for reason of financial difficulty.<sup>33</sup> An applicant for reinstatement is afforded an opportunity for a hearing, in certain circumstances.<sup>34</sup> The Exchange may approve an application for reinstatement if it finds that the applicant is operationally and financially able to conduct their business with safety to investors, creditors, Members, and the Exchange.<sup>35</sup> The failure of a suspended, limited, or prohibited Member to obtain reinstatement will result in disposition of membership, unless the Member sells or leases their membership.<sup>36</sup> Finally, Existing

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<sup>31</sup> See Existing Rule 1501.

<sup>32</sup> See *id.*

<sup>33</sup> See Existing Rule 1502.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See Existing Rule 1503.

Rule 1504 provides that a Member suspended under Chapter 15 shall be deprived for all of the rights and privileges of being a Member of the Exchange during the period of suspension.

Lastly, Chapter 17 of the Existing Rules sets forth a procedure by which persons who are economically aggrieved by Exchange actions, including but not limited to those organizations whose applications for membership are denied, persons who are prohibited from becoming associated with a Member, and organizations and persons that are prohibited or limited with respect to the use of Exchange services or the services of Members, may seek review of such actions.<sup>37</sup>

Existing Rule 1701 provides that aggrieved persons must file written applications for hearing and review within 30 days of the occurrence of relevant Exchange actions, unless the Chair of the BCC grants, in writing, an extension of time to file an appeal.

Existing Rule 1702 provides for the BCC, or a panel comprised of at least three members thereof, to review applications. The BCC, or the panel, must set a hearing date and receive materials relevant to the proceeding at least 72 hours in advance of the hearing.

Existing Rule 1703 provides for intervention in a hearing by a third party under certain circumstances. Current Rule 1703 also authorizes the panel to determine all questions concerning the admissibility of evidence and to otherwise regulate the conduct of hearings. Finally, Existing Rule 1703 directs panels to render their decisions in writing and to include in such decisions the Panel's reasons for their conclusions.

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<sup>37</sup> See Existing Rule 1700.

Existing Rule 1704 states that panel decisions are subject to review by the Board (or a committee composed of at least three Directors thereof), either upon the Board's own motion (within 30 days of issuance of the decision), upon written request of the President of the Exchange (within 15 days after issuance of the decision), or upon written request by the applicant. The Board has discretion to grant requests for written or oral arguments before it. The Board may affirm, reverse, or modify the decision of the panel. A decision of the Board is a final Exchange Action.

Existing Rule 1705 governs the service of process for notices or other documents served pursuant to the proceedings set forth in Chapter 17 and the extension of time limits for the submission of answers, petitions, or other materials.

Existing Rule 1706 states that the Exchange may contract with another SRO to perform some or all of the functions specified in Chapter 17, provided that the Exchange shall retain ultimate legal responsibility for and control of such functions.

### **Overview of the Exchange Review Council and the BX Rule 8000 and 9000 Series**

The Exchange proposes to amend its By-Laws to replace the BCC with a new "Exchange Review Council." The Exchange also proposes, with limited exceptions described below, to delete in their entirety Chapters 15-17 of the Existing Rules, establish new Chapters 80 and 90 of the Exchange's Rulebook, and then incorporate by reference into Chapters 80 and 90 the BX Rule 8000 and 9000 Series, respectively. The principal purpose of these proposals is to harmonize the Exchange's disciplinary processes and Rules consistent with those of its sister exchanges, including not only BX, but also Nasdaq and Phlx.

Broadly speaking, the BX Rules and processes will be similar to the existing ones. Both provide processes for informal resolution and formal adjudication of disciplinary

matters. Both set forth procedures that are designed to provide due process to Members and Associated Persons, including fair notice of allegations and proceedings, opportunities to be heard and to present and rebut arguments and evidence before hearing panels, and opportunities to appeal adverse determinations made by such panels.

However, in a number of respects, the new Rules and processes will differ from the existing ones. One key difference concerns the role that FINRA will play in the new regime. Not only will FINRA continue to assist the Exchange in investigating matters under the BX Rules, through FINRA's Department of Enforcement and Department of Market Regulation (collectively, the "Departments")<sup>38</sup> but it will also assist in the adjudication of matters. Specifically, the adjudicatory functions of the BCC and Current Hearing Panels will be administered by FINRA's Office of Disciplinary Affairs ("ODA") and Office of Hearing Officers ("OHO"), respectively.<sup>39</sup> The ODA and OHO are offices within FINRA that are independent of the FINRA enforcement function and not involved in investigating or litigating cases. The ODA will review each proposed complaint to determine the legal and evidentiary sufficiency of proposed charges as well as proposed settlements, in certain instances.<sup>40</sup> A recommendation proposed by the Departments or

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<sup>38</sup> The Departments are authorized to act on behalf of BX in investigating and administering disciplinary matters pursuant to the RSA, and will do the same for the Exchange upon adoption of the new process.

<sup>39</sup> See FINRA Rule 9211(a); see also BX Rule 9211(a). The Exchange notes, however, that the Board may direct the ODA to authorize a complaint when, on the basis of information and belief, it is of the opinion that a Member or Associated Person has committed a violation which the Exchange has jurisdiction to enforce. See BX Rule 9211(a)(2).

<sup>40</sup> Pursuant to BX Rule 9270, proposed settlements must be submitted to and accepted by the Exchange Review Council, except that proposed settlements involving an affiliate of the Exchange must be reviewed by the ODA. BX Rule

the Exchange's Regulation Department in a matter involving formal disciplinary action will require approval by the ODA. Going forward, the ODA will authorize (pursuant to a request by the Exchange's Regulation Department or the Departments) the issuance of a complaint.<sup>41</sup> The OHO, in turn, will be responsible for convening and administering New Hearing Panels in lieu of the Exchange's Current Hearing Panels.

Another key difference involves the replacement of the BCC with the Exchange Review Council. The Exchange Review Council, as the successor to the BCC, will play a more limited role in disciplinary matters than does the BCC presently. As to disciplinary matters, the Exchange Review Council will not be responsible for approving the issuance of complaints (formerly, statements of charges) or routinely approving<sup>42</sup> letters of acceptance, waiver, and consent or offers of settlement. Instead, the Exchange Review Council will function principally as an intermediate appellate body for decisions rendered by the New Hearing Panels. As to non-disciplinary matters, the Exchange

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9216(a) provides that proposed letters of acceptance, waiver, and consent must be submitted to and accepted by either the ODA, the Review Subcommittee, or the Exchange Review Council.

<sup>41</sup> BX Rule 9211(a) also provides that the Board has authority to direct the issuance of a complaint.

<sup>42</sup> Under BX Rule 9216(a), the ODA or a Review Subcommittee of the Exchange Review Council may accept or refer letters of acceptance, waiver, and consent to the Exchange Review Council for approval or rejection. The Review Subcommittee can also reject such letters. Similarly, under BX Rule 9270, a Review Subcommittee of the Exchange Review Council may accept, reject, or refer offers of settlement to the Exchange Review Council for approval or rejection (except where the offer of settlement involves an affiliate of the Exchange, in which case the ODA must decide whether to accept or reject the offer). As a practical matter and based upon the experiences of Nasdaq and BX, the Exchange expects such referrals to the Exchange Review Council to occur infrequently.

Review Council will assume regulatory responsibilities that currently rest with various panels, including reviews of staff determinations made as to obvious errors.

Other noteworthy differences between the Existing Rules and the BX Rules and processes include the following:

- The BX Rules generally include more comprehensive rights and detailed procedures for, among other things, discovery and service of process than do the Existing Rules.
- As to the assessment of fines for violations of the Exchange's MRVP or other minor rule violations, the BX Rules do not authorize the issuance of minor rule violation letters or the imposition of fines of more than \$2,500.<sup>43</sup> Should a Respondent fail to consent to the imposition of a fine or if the Review Subcommittee or the Exchange Review Council reject the terms of an MRVP or minor rule violation letter, then the matter will proceed through formal disciplinary channels. The BX Rules do not allow for a fine to be reversed, modified or affirmed, prior to formal disciplinary proceedings.

The following is a more detailed overview of each of the Exchange's proposals.

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<sup>43</sup> As the Exchange discusses below, the Exchange proposes to retain certain of its Existing Rules to preserve its existing authorities with respect to minor rule violations, the issuance of minor rule violation letters, and the imposition of fines for such minor rule violations of up to \$5,000.

### Overview of the Exchange Review Council

The Exchange proposes to retire the BCC<sup>44</sup> and to amend its By-Laws to establish in its place an Exchange Review Council. The amended By-Laws that the Exchange proposes to adopt in this regard are substantially the same as those that BX adopted to establish the BX Exchange Review Council.<sup>45</sup> Thus, the By-Laws provide for the Exchange Review Council to have the same general structure and powers as does the BX Exchange Review Council.<sup>46</sup> The proposed By-Laws will authorize the Exchange

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<sup>44</sup> In a May 11, 2000 resolution, the Exchange Board delegated its authority to the President of the Exchange to establish a BCC to, among other things, conduct disciplinary hearings under Chapter 16 of the Existing Rules and conduct other hearings and reviews as set forth in Chapter 17 of the Existing Rules. On February 1, 2017, the Board passed a resolution that both revoked the President's authority to establish a BCC and authorized the establishment of an Exchange Review Council, effective upon the date when this rule filing becomes operative.

<sup>45</sup> The BX by-laws differ from the proposed Exchange By-Laws because the BX by-laws have a different numbering convention from the Exchange's By-Laws and, in various places, the BX by-laws refer to a Listing and Hearing Review Council, which has no analogue with respect to the Exchange.

<sup>46</sup> The BX by-laws do not describe in detail the process of the proceedings over which the BX Exchange Review Council presides. However, Section 7.9 of the BX by-laws state that a quorum of three BX Exchange Review Council members is necessary to adjudicate appeals of determinations made under BX Rules 4612 (appeal of denial of registration as an Equities Market Maker), 4619 (review of denial of an excused withdrawal of Equities Market Maker quotation), 4620 (appeal of denial of reinstatement of Equities Market Maker that accidentally withdraws), 11890 (appeal of clearly erroneous transaction determination), and BX Options Chapter V, Section 6 (appeal of obvious error determination). See BX by-laws, Article VII, Section 9. The Exchange's Rules do not have analogues to BX Rules 4612, 4620, and 11890 and, as such, the corresponding provision of the Exchange's proposed By-Laws (Article VII, Section 9) provides only that a quorum of three Exchange Review Council members is necessary for it to adjudicate appeals involving determinations made under Rules 720 (appeal of obvious error determination), 720A (appeal of determinations of erroneous trades due to system malfunctions and disruptions), and 804 (review of denial of an excused withdrawal of market maker quotation).

Review Council to adjudicate disciplinary actions and approve settlements thereof as well as make recommendations to the Board on certain policy matters and rule changes. Such policy functions of the Exchange Review Council render its jurisdiction broader than that of the BCC.

Specifically, proposed Article VI, Section 1 of the proposed By-Laws provides that the Exchange Review Council may be authorized to act for the Board with respect to: an appeal or review of a disciplinary proceeding, a statutory disqualification proceeding, or a membership proceeding; a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; the exercise of exemptive authority; and such other proceedings or actions as may be authorized by the Exchange rules. The Exchange Review Council also may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and Associated Persons and enforcement policies, including policies with respect to fines and other sanctions. It may advise the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices and it may advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Exchange Members' conduct and trading activities in the Exchange.

Proposed Article VI, Section 2 states that the Exchange Review Council would consist of no fewer than eight and no more than 12 members. The Exchange Review Council must include a number of Member Representative members<sup>47</sup> that is equal to at least 20% of the total number of members of the Exchange Review Council. The number

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<sup>47</sup> See n.52, infra.

of Non-Industry members,<sup>48</sup> including at least three Public members,<sup>49</sup> shall equal or exceed the sum of the number of Industry members<sup>50</sup> and Member Representative members. As soon as practicable, following the appointment of members, the Exchange Review Council shall elect a Chair from among its members. The Chair shall have such powers and duties as may be determined from time to time by the Exchange Review Council. The Board, by resolution adopted by a majority of Directors then in office, may remove the Chair from such position at any time for refusal, failure, neglect, or inability to discharge the duties of Chair. No more than 50% of the members of the Exchange Review Council shall be engaged in market making activity or employed by an Exchange Member firm whose revenues from market making activity exceed 10 percent of its total revenues.

Proposed Article VI, Section 3 requires the Exchange’s Secretary to collect from each nominee for the office of member of the Exchange Review Council such information as is reasonably necessary to serve as the basis for a determination of the nominee’s qualifications and classification as an Industry, Member Representative, Non-Industry, or Public member. The Secretary must also certify to the Nominating Committee or the Member Nominating Committee<sup>51</sup> (as applicable) each nominee’s qualifications and classification. After appointment to the Exchange Review Council,

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<sup>48</sup> See id.

<sup>49</sup> See id.

<sup>50</sup> See id.

<sup>51</sup> The terms “Nominating Committee” and “Member Nominating Committee” are defined in Exchange By-Laws, Article I.

each member must update such information at least annually and upon request of the Exchange's Secretary, and must report immediately to the Secretary any change in such information.

Proposed Article VI, Section 4 provides that Exchange Review Council members shall serve three-year terms, or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason by death, resignation, removal, disqualification, or other reason. Members are term limited out after two consecutive terms. Proposed Article VI, Section 5 sets forth the procedures for resigning as a member of the Exchange Review Council and provides that an Exchange Review Council member may resign at any time upon written notice to the Board. Under proposed Article VI, Section 6, any member of the Exchange Review Council may be removed from office at any time for refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the Board.

Under proposed Article VI, Section 7, an Exchange Review Council member would be disqualified and removed immediately upon a determination by the Board, by a majority vote, that: (a) the member no longer satisfies the classification (Industry, Member Representative, Non-Industry, or Public) for which the member was elected; and (b) the member's continued service as such would violate the compositional requirements of the Exchange Review Council set forth in Article VI, Section 2. If the term of office of an Exchange Review Council member terminates under this Section, and the remaining term of office of such member at the time of termination is not more than six months, during the period of vacancy the Exchange Review Council shall not be deemed to be in violation of Article VI, Section 2 by virtue of such vacancy. Proposed Article

VI, Section 8 contains provisions for the filling of vacancies on the Exchange Review Council and states that if a position on the Exchange Review Council becomes vacant, the Nominating Committee or the Member Nominating Committee (as applicable) shall nominate, and the Board shall appoint a person satisfying the qualifications for the position as provided in Article VI, Section 2 to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

Proposed Article VI, Section 9 provides that a quorum of the Exchange Review Council will consist of a majority of its members, including not less than 50% of its Non-Industry members and one Member Representative member. Proposed Article VI, Section 10 contains provisions related to the meetings of the Exchange Review Council.

Under proposed Article VI, Section 11, the Exchange Review Council is required to establish a Review Subcommittee to determine whether disciplinary and membership proceedings decisions should be called for review by the Exchange Review Council under the disciplinary and membership rules to be proposed for the Exchange. The Review Subcommittee shall be composed of no fewer than two and no more than four members of the Exchange Review Council. The number of Non-Industry members of the Review Subcommittee shall equal or exceed the sum of the number of Industry members and Member Representative members of the Review Subcommittee, and the subcommittee must include at least one Member Representative member. At all meetings of the Review Subcommittee, a quorum for the transaction of business shall consist of not less than 50 percent of the members of the Review Subcommittee, including not less than 50 percent of the Non-Industry members of the Review Subcommittee and one Member

Representative member of the Review Subcommittee.<sup>52</sup>

The BX Rules implement the foregoing responsibilities of the Exchange Review Council by establishing various procedures, described below, to govern its reviews. As the Exchange also describes in further detail below, the Exchange proposes to transfer to the Exchange Review Council (or panels thereof) certain responsibilities currently vested in other Exchange committees or the Board. For example, pursuant to Existing Rule 720, an Obvious Error Panel (“OEP”) is presently responsible for reviewing determinations regarding obvious and catastrophic errors. Pursuant to Existing Rule 720A, a “Review Panel” is responsible for reviewing determinations to nullify or adjust transactions that arise from system disruptions and malfunctions. The Exchange is proposing to eliminate the OEP and the Review Panel and to transfer their responsibilities to a panel of the new Exchange Review Council, which corresponds to the practice of BX. Subject to Chapter 90, the Exchange also proposes to transfer responsibility to the Exchange Review Council to review denials or conditions imposed upon those that seek to become or

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<sup>52</sup> In addition to adding Article VI to the By-Laws, the Exchange proposes to make changes to other articles of the By-Laws to accommodate the existence of the Exchange Review Council. For example, the Exchange proposes to amend Article I, which defines the terms that the Exchange uses in the By-Laws, to provide that the terms “Industry member,” “Member representative member,” “Non-industry member,” and “Public member” mean, in part, members of the Exchange Review Council. The Exchange also proposes to amend Article III, Section 6, to add a new subsection (a) that directs the Board to appoint an Exchange Review Council, as provided in Article VI. It also proposes to amend Article III, Section 6(b) to state that the Nominating Committee and the Member Nominating Committee of the Board shall have responsibility for nominating members of the Exchange Review Council. Finally, the Exchange proposes to amend Sections 7 and 8 of Article III, which deal with Director conflicts-of-interest/self-interested transactions and Director compensation, respectively, to ensure that the restrictions and benefits that these provisions provide apply to Exchange Review Council members.

remain a Member of the Exchange or become or remain associated with a Member of the Exchange, as set forth in Existing Rule 302. Similarly, the Exchange proposes to transfer responsibility to the Exchange Review Council to review denials or conditions imposed upon Members that seek to transfer or sell market maker rights, as set forth in the Supplementary Material to Existing Rule 307.<sup>53</sup> In addition, the Exchange proposes to amend Existing Rule 804 to provide for the Exchange Review Council to review determinations regarding temporary withdrawals of quotations, which are not reviewable under the Existing Rules. The Exchange notes that BX vests in its Exchange Review Council responsibility for reviewing similar types of matters.<sup>54</sup>

#### The BX Rule 8000 Series

The Exchange proposes to incorporate by reference into a new Chapter 80 of its Rulebook the BX Rule 8000 Series. The BX Rule 8000 Series is entitled “Investigation and Sanctions,” and it governs the investigative process, including FINRA’s authority under the RSA to conduct investigations of Members and Associated Persons on behalf of the Exchange.

BX Rule 8001 states that the Exchange and FINRA are parties to the RSA, pursuant to which FINRA has agreed to perform certain functions on behalf of the

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<sup>53</sup> The Exchange notes that it proposes to establish procedures in Existing Rule 302 and Rule 307 to govern the review by the Exchange Review Council of adverse membership, association, or market maker sale or transfer determinations. The Exchange proposes to base these procedures upon those set forth BX Rules 1015 and 1016.

<sup>54</sup> See Securities Exchange Act Release No. 72149 (May 12, 2014), 79 FR 28564 (May 16, 2014) (SR-BX-2014-024).

Exchange. It also specifies, however, that the Exchange retains ultimate legal responsibility for, and control over the functions that FINRA performs on its behalf.<sup>55</sup>

BX Rule 8110 requires Members to keep and maintain copies of the NASD (now known as FINRA) and Exchange Manuals in readily accessible places and make them available for examination by customers upon request.

BX Rule 8120 sets forth definitions for the BX Rule 8000 Series.

BX Rule 8210 generally authorizes the Exchange's Regulation Department and FINRA, acting on the Exchange's behalf to require a Member, an Associated Person, or another person subject to the Exchange's jurisdiction to provide information orally, in writing or electronically, to provide testimony under oath, or to allow for the inspection of their books, records, and accounts, with respect to any matter associated with an investigation, complaint, examination, or proceeding of the Exchange or of other Self-Regulatory Organizations or regulators.

BX Rule 8211 requires a Member to submit certain specified trade data in an automated form, as the Regulation Department or FINRA may require or request.

BX Rule 8310 sets forth the Exchange's authority to sanction a Member or an Associated Person for violations of the federal securities laws, rules, or regulations thereunder, or the Exchange's Rules, as well as for neglect or refusal to comply with an order, direction, or decision issued under the Exchange Rules.<sup>56</sup> BX Rule 8310(a)

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<sup>55</sup> BX Rule 9001 also states that the Exchange has contracted with FINRA to perform some or all of the Exchange's disciplinary functions, while noting that the Exchange retains ultimate legal responsibility for and control of such functions.

<sup>56</sup> The Exchange proposes to retain Existing Rule 1600, which provides a more general statement of the Exchange's disciplinary authority than that which exists

provides for sanction that include censure, fine, suspension of membership or registration of a person associated with a Member, expulsion or cancellation of membership or association, suspension or bar from association with all Members, temporary or permanent cease and desist order, or any other fitting sanction. BX IM-8310-1 precludes Members from allowing Associated Persons from remaining associated with them, even in a clerical or ministerial capacity, upon issuance of orders suspending, revoking, or cancelling the registration of such Associated Persons and it prohibits payment of any salary, commission, profit, or other remuneration such Associated Persons might have earned during their periods of suspension. BX IM-8310-3 states, in part, that the Exchange's Regulation Department shall release certain information to the public regarding disciplinary complaints and decisions and release, upon request, a copy of any complaint or disciplinary decision issued by the Exchange or any committee thereof.

BX Rule 8320 states that fines and other monetary sanctions shall be paid to the Treasurer of the Exchange. It authorizes the Exchange, after seven days written notice, to

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in BX Rule 8310. Existing Rule 1600 states that a Member or Associated Person who is alleged to have violated or aided and abetted a violation of the Act, the rules and regulations promulgated thereunder, and the By-Laws or Rules of the Exchange, or any interpretation thereof are subject to the disciplinary jurisdiction of the Exchange and may be, after notice and opportunity for a hearing, appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a Member, or any other fitting sanction in accordance with the provisions of the disciplinary rules. It also permits the Exchange to charge a supervisor with a violation of a rule within the disciplinary jurisdiction of the Exchange committed by an employee under his supervision or by the Member as though such violations were his own. Finally, it extends the disciplinary jurisdiction of the Exchange to continue after termination of the Member from the Exchange or a person's termination of association with a Member as to matters that occurred prior to such termination. Staff must serve written notice to the former Member or Associated Persons within one year of receipt by the Exchange of notice of such termination that the Exchange is making inquiry into a matter or matters.

in part summarily suspend or expel Members if they are delinquent in paying sanctions or fines.

BX Rule 8330 states that a Member or an Associated Person disciplined pursuant to Rule 8310 shall bear the costs of disciplinary proceedings as the New Hearing Panels or the Board deem appropriate under the circumstances.

#### The BX Rule 9000 Series

The Exchange proposes to incorporate by reference into a new Chapter 90 of its Rulebook the BX Rule 9000 Series. The BX Rule 9000 Series is entitled “Code of Procedure,” and it governs proceedings for disciplining Members and Associated Persons, proceedings for regulating Members experiencing financial or operational difficulties, proceedings for summary or non-summary suspensions, cancellations, bars, prohibitions, or limitations, and proceedings for obtaining relief from the eligibility requirements of the Exchange By-Laws and the Exchange Rules.

#### *BX Rule 9100 Series*

The BX Rule 9100 Series describes the application and purpose of the BX Rule 9000 Series, including the types of proceedings covered by the BX Rules,<sup>57</sup> the rights, duties, and obligations of Members and Associated Persons,<sup>58</sup> defined terms,<sup>59</sup> and rules concerning the filing and service of papers.<sup>60</sup> The BX Rule 9100 Series also provides

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<sup>57</sup> See BX Rule 9110.

<sup>58</sup> Id.

<sup>59</sup> See BX Rule 9120.

<sup>60</sup> See BX Rules 9131 – 9138.

rules concerning proceedings, including appearance and practice,<sup>61</sup> withdrawal by attorney or representative,<sup>62</sup> ex parte communications,<sup>63</sup> separation of functions among adjudicators and interested staff,<sup>64</sup> rules of evidence and official notice,<sup>65</sup> motions,<sup>66</sup> rulings on procedural matters,<sup>67</sup> and interlocutory review.<sup>68</sup>

Specifically, BX Rule 9110 sets forth the general rights, duties, and obligations of Members and Associated Persons under the Code of Procedure, including the rights, in any disciplinary matter thereunder, to be presented with specific charges, to have a hearing, to have due notice thereof, to present a defense and relevant supporting material, to be represented by counsel, to have a record kept of proceedings, and to receive a written determination that sets forth the basis therefor.

BX Rule 9120 sets forth definitions of various terms used throughout the Rule 9000 Series.

The BX Rule 9130 Series governs the requirements for service of complaints and other written documents in connection with disciplinary proceedings. The BX Rule 9130 Series prescribes the timing and form of required service based on the type of the notice.

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<sup>61</sup> See BX Rule 9141.

<sup>62</sup> See BX Rule 9142.

<sup>63</sup> See BX Rule 9143.

<sup>64</sup> See BX Rule 9144.

<sup>65</sup> See BX Rule 9145.

<sup>66</sup> See BX Rule 9146.

<sup>67</sup> See BX Rule 9147.

<sup>68</sup> See BX Rule 9148.

BX Rule 9134 concerns the permissible methods of service and the procedures for service. BX Rule 9134 permits personal service, service by U.S. Postal Service, or service by courier. BX Rules 9135 through 9138 set forth the form, format, and procedures for filing papers with adjudicators as well as the effect for a Party or its counsel or representative for affixing or failing to affix their signatures to such papers.

Other BX Rules govern service of notices and other documents in particular situations.<sup>69</sup>

BX Rule 9141 concerns appearances before adjudications in proceedings, both by Parties and by their attorneys and representatives. BX Rule 9141 permits a person to represent themselves in any proceeding as well as to be represented by others (pursuant to a notice of appearance), including a licensed attorney,<sup>70</sup> a member of a partnership (to represent a partnership), and a bona fide officer of a corporation, trust or association (to represent a corporation, trust or association).

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<sup>69</sup> See, e.g. BX Rule 9360 (effective dates of bars, expulsions, and permanent cease and desist orders); BX Rule 9400 (various service requirements pertaining to expedited client suspension proceedings); BX Rule 9550 Series (various service requirements pertaining to: (1) suspensions for failures to provide information or keep information current; (2) suspensions and cancellations for failures to pay Exchange dues, fees, or other charges; (3) suspensions or cancellations for failures to comply with arbitration awards, settlements, or restitution orders or settlements; (4) suspensions, cancellations, or bars from membership or suspensions or bars from association with Members, or limitations or prohibitions of access to Exchange services; (5) suspensions, cancellations, and bars for failure to comply with cease and desist orders; (6) restrictions on Members' activities due to financial or operational difficulties; and (7) suspensions for actions authorized by Section 6(d)(3) of the Act).

<sup>70</sup> Pursuant to BX Rule 9142, an attorney or representative may withdraw from a proceeding for good cause, pursuant to written notice and at least 30 days prior notice.

BX Rule 9143(a) prohibits Parties, their representatives, or Interested Staff<sup>71</sup> from having ex parte communications with adjudicators or with Exchange staff who are participating in or advising on a proceeding about the merits of the proceeding.<sup>72</sup> BX Rule 9143(b) also requires adjudicators participating in a proceeding to disclose and place in the record any written ex parte communications (or memoranda summarizing any oral ex parte communications) concerning the merits of the proceeding. BX Rule 9143(c) furthermore permits the Exchange Regulation Department or an adjudicator (consistent with the interests of justice, the policies, underlying the Act, and the Rules of the Exchange) to order any Party that violates the ex parte prohibition to show cause why the Party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such ex parte communication. BX Rule 9143(d) generally specifies that the ex parte prohibition applies beginning with the authorization of a complaint. Finally, BX Rule 9143(e) specifies circumstances in which a Party's claim as to a violation of the ex parte rules are waived, including when a

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<sup>71</sup> BX Rule 9120(t) defines "Interested Staff" to include certain enumerated Exchange or FINRA employees. The applicable employees who constitute "Interested Staff" under this BX Rule vary depending upon the type of disciplinary proceeding at issue.

<sup>72</sup> BX Rule 9144(a) generally prohibits Interested Staff from advising adjudicators, and adjudicators from advising Interested Staff, with respect decisions of the other, including as to whether to file complaints, appeals or cross appeals. BX Rule 9144(b) also prohibits Hearing Officers and Panelists, absent waivers in certain circumstances, from participating in decisions as to whether to issue complaints, appeal or cross-appeal disciplinary proceedings to the Exchange Review Council, or call decisions for review.

Respondent submits an offer of settlement, an executed letter of acceptance, waiver, and consent, or an MRVP letter.<sup>73</sup>

BX Rule 9145 states that formal rules of evidence do not apply to proceedings brought under the BX Rule 9000 Series. It also permits adjudicators, after providing notice and an opportunity for a Party to comment or oppose, to take official notice of matters that may be judicially noticed by courts or of other matters within the specialized knowledge of the Exchange.

BX Rules 9146 through 9148 govern motion practice before adjudicators. BX Rule 9146 provides that the filing of a motion does not stay a proceeding, unless an adjudicator orders otherwise. It also provides that, unless otherwise ordered by an adjudicator, a Party may file an opposition or response to a written motion within 14 days after service of the motion and that, if the Party fails to do so, it shall be deemed to have waived its objection to the motion. However, BX Rule 9146 states that a moving Party is not entitled to file a reply to such an opposition or response, except at the discretion of the adjudicator. BX Rule 9146 also authorizes an adjudicator to permit oral arguments on motions and to summarily deny frivolous motions. It specifically provides for motions for protective orders. Finally, along with BX Rule 9147, BX Rule 9146 designates adjudicators for procedural and summary disposition motions at both the Hearing Panel and appellate levels. BX Rule 9148 specifies that there are no interlocutory reviews of rulings on motions or orders.

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<sup>73</sup> In the proposed introduction to Chapter 90, the Exchange states that the Exchange's procedure for handling MRVP letters, including as set forth in BX Rule 9143(e)(3), shall also apply to minor rule violation letters.

BX Rule 9150 authorizes an adjudicator to exclude from disciplinary proceedings an attorney for a Party or any other person authorized to represent a Party to the extent that the adjudicator deems said attorney or persons to be engaging in contemptuous conduct, under BX Rule 9280, or unethical or improper professional conduct. The BX Rule authorizes an attorney or person so excluded to seek review of their exclusion from the Exchange Review Council. Moreover, BX Rule 9150(b) states that even if it prohibits an attorney or other person authorized to represent others from practicing or appearing in an Exchange proceeding, such action by the Exchange shall not preclude it from initiating other proceedings against such person.

BX Rule 9160 sets forth conditions for the recusal or disqualification of an adjudicator. Such conditions include a conflict of interest, bias, or other circumstances in which the adjudicator's fairness might reasonably be questioned. The Rule also designates those who are authorized to order the disqualification of Board Directors, members of the Exchange Review Council or committees thereof, or New Hearing Panels.

#### *The BX Rule 9200 Series*

The BX Rule 9200 Series sets forth the disciplinary process, providing rules concerning the issuance of a complaint, the briefing and hearings process, issuance of a decision and the settlement process. The BX Rule 9200 Series also governs permanent cease and desist orders.

BX Rule 9211(a)(1) states that if the Departments believe that a Member or an Associated Person has violated any law, rule, or regulation over which the Exchange has jurisdiction, then the Regulation Department or the Departments may request authorization from the ODA to issue a complaint. Likewise, BX Rule 9211(a)(2) states

that the Board may direct the ODA to authorize and the Departments to issue a complaint when the Board is of the opinion that any Member or Associated Person has violated any law, rule, or regulation within the Exchange’s jurisdiction. Unlike the Existing Rule, the BX Rules do not specify that “probable cause” or any other legal standard must be satisfied for the ODA to authorize issuance of a complaint.

BX Rule 9212 sets forth the requirements for the issuance of complaints. It states that if a complaint is authorized, the Departments shall issue it.<sup>74</sup> It furthermore states that complaints must be in writing and specify, in reasonable detail, the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision allegedly violated by such conduct.<sup>75</sup> The BX Rule provides that complaints must be signed by the Department of Enforcement or of Market Regulation and served by the Departments on the Parties in accordance with the Rules.<sup>76</sup> The BX Rules permit amendments to and withdrawals of complaints. As to amendments, BX Rule 9212(b) provides that the Departments may amend a complaint once, as a matter of course, at any time before the Respondent answers the complaint, and otherwise, upon a motion to the Hearing Officer, a showing of good cause, and a determination that the Respondent will suffer no unfair prejudice as a result of the amendment. As to withdrawals, BX Rule 9212(c) states that the Departments may withdraw a complaint with prior leave of the Hearing Officer. BX Rule 9212(d) provides for the docketing of complaints.

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<sup>74</sup> See BX Rule 9212(a)(1).

<sup>75</sup> See id.

<sup>76</sup> See id.

BX Rule 9214 governs the consolidation and severance of disciplinary proceedings. Unlike Existing Rule 1606(d), BX Rule 9214 does not permit a non-Party to intervene in disciplinary proceedings, but it does permit the consolidation of proceedings. Under the BX Rule, either the Hearing Officer may order or a Party may request consolidation of two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, or if the subject complaints involve common questions of law or fact or one or more of the same Respondents. When determining whether to order the consolidation of such disciplinary proceedings, BX Rule 9214(a) requires the Chief Hearing Officer to consider whether the same or similar evidence reasonably would be expected to be offered at each of the hearings, whether the proposed consolidation would conserve the time and resources of the Parties, and whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation. If consolidation is ordered, BX Rule 9214(c) provides that the Chief Hearing Officer shall issue an order specifying which New Hearing Panel will preside over the consolidated proceedings or the Chief Hearing Panel shall appoint another New Hearing Panel to do so.

BX Rule 9215 requires a Respondent to file an answer to a complaint with the OHO within 25 days after service of the complaint (unless the Hearing Officer extends that deadline for good cause) and to state in such answer whether they admit, deny, or lack sufficient information to admit or deny each allegation made in the complaint. However, the BX Rule differs in certain respects from Existing Rule 1605, which governs answers to statements of charges. For example, it specifically authorizes a Respondent to file a motion for a more definite statement of the allegations set forth in

the complaint as well as to amend the answer.<sup>77</sup> Although the BX Rule, similar to Existing Rule 1605, permits extensions of time to respond to an amended complaint, the BX Rule provides for the greater of the original remaining answer period or 14 days to do so, rather than 25 days.<sup>78</sup> Finally, instead of simply providing that a failure to file an answer shall be deemed to be an admission of the matters alleged, BX Rule 9215(f) requires the Departments to send a second notice to Respondents before they may impose sanctions, which may include, not only the admission of unanswered allegations, but also the issuance of default decisions pursuant to BX Rule 9269.

BX Rule 9216 sets forth procedures to informally dispose of matters, where appropriate. Specifically, BX Rule 9216 provides that the Departments may prepare and request that a Member or Associated Person execute a letter of acceptance, waiver, and consent (“AWC”) accepting a finding of a violation and consenting to the imposition of sanctions. Unlike Existing Rule 1603, which governs analogous “letters of consent,” the BX Rule provides that in executing an AWS letter, a Member or Associated Person is deemed to waive their rights to a hearing, to appeal, to otherwise challenge the terms of a letter, to claim bias or pre-judgment, or to claim violation of the ex parte prohibitions of BX Rule 9143. The BX Rule states that executed AWC letters are subject to approval by the ODA, the Exchange Review Council, or the Review Subcommittee and, if rejected, they may not be introduced into evidence in connection with any subsequent disciplinary hearing that occurs.

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<sup>77</sup> See BX Rule 9215(c) and (d).

<sup>78</sup> If the Respondent files an answer before the complaint is amended, the Respondent receives 14 days to respond to the amended complaint. See BX Rule 9215(e).

BX Rule 9216(b) concerns the process for assessing fines for MRVP violations.<sup>79</sup> Under BX Rule 9216(b), if the Departments have reason to believe that a Member or an Associated Person has violated certain specified Rules, then they may prepare an MRVP letter (for fines of up to \$2,500 for violations subject to the Exchange's MRVP plan) and request that the Member or Associated Person accept the letter and the fine set forth in it.<sup>80</sup> BX Rule 9216(b) provides that executed MRVP letters are to be submitted for approval to the Exchange Review Council. The Review Subcommittee or the ODA may accept such letters or refer them to the Exchange Review Council for acceptance or rejection. The Review Subcommittee may also reject such letters or refer them to the Exchange Review Council. If the letter is accepted, then it is deemed to be a final decision of the Exchange. If a Member or an Associated Person chooses not to consent to the issuance of an MRVP letter, or the Review Subcommittee or the Exchange Review Council rejects the letter, then the matter becomes subject to formal disciplinary adjudication.<sup>81</sup>

BX Rule 9216(b) will replace Existing Rule 1614, with three exceptions. First, the Exchange proposes to retain Existing Rule 1614(a), which sets forth its authority to

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<sup>79</sup> As discussed previously, the Exchange proposes to retain its existing MRVP fine schedule.

<sup>80</sup> Pursuant to BX Rule 9216(b), if a Member or Associated Person agrees to execute an MRVP or a violation letter, they also agree to waive certain of their rights with respect to the alleged violations, including their rights to dispute the allegations or the validity of the letter, as well as to make claims of bias or pre-judgment, and to raise violations of the ex parte and separation of functions rules.

<sup>81</sup> Because the minor rule violation process proceeds only to the extent that a Member or Associated Person assents to the letter and its terms, there is no provision under the BX Rules, as there is under the Existing Rules, for a Member or Associated Person to contest a minor rule violation fine.

impose fines of up to \$2,500 for MRVP violations and up to \$5,000 for minor rule violations (other than those subject to an MRVP), because BX Rule 9216(b) does not authorize the imposition of fines of up to \$5,000 for minor rule violations. Existing Rule 1614(a) also includes a sentence (that the BX Rules lack) clarifying that the Exchange has discretion to decide, on a case-by-case basis, whether to impose a fine for an MRVP violation or a minor rule violation or whether instead to proceed with a formal disciplinary action under proposed Chapter 90. Second and relatedly, the Exchange proposes to include in its introduction to Chapter 90 a statement that the procedures set forth in BX Rule 9216(b) for handling MRVP violations and MRVP violation letters also apply to the handling of minor rule violations and minor rule violation letters, except that the Exchange will promptly report to the Commission any final Exchange action, in accordance with SEC Rule 19d-1(c)(1). Third, the Exchange proposes to retain Existing Rule 1614(d) (renumbered as Rule 1614(b)), which presently sets forth the Exchange's schedule of MRVP violations and minor rule violations and their associated fines. This schedule is particular to the Exchange and cannot be replaced summarily with the corresponding BX schedule, which is set forth in BX IM-9216. The Exchange will not incorporate by reference BX IM-9216.

The BX Rule 9200 Series sets forth the procedures of the Exchange for holding disciplinary hearings. Although the BX hearing rules are broadly similar to the Existing Rules, the BX Rules are more comprehensive and robust. One noteworthy difference between them is that under the Existing Rule 1606, a Respondent is entitled to a hearing as a matter of course, whereas under BX Rule 9221, a Respondent must affirmatively request a hearing in their answer or else, in absence of good cause shown, they are

deemed to waive their right to one.<sup>82</sup> A Hearing Officer or the Hearing Panel may also call a hearing on their own initiative or the Hearing Panel may issue its decision on the record.<sup>83</sup> BX Rule 9221(d) provides for notice of a hearing to be given to the Parties at least 28 days beforehand, but the BX Rule provides an exception if the Hearing Officer determines that extraordinary circumstances require a shorter notice period or the Parties waive the notice period.

BX Rule 9231(a) states that the Chief Hearing Officer of the OHO shall appoint a New Hearing Panel or an Extended New Hearing Panel<sup>84</sup> to conduct formal disciplinary procedures. BX Rule 9231(b) specifies that a New Hearing Panel, in most instances, is to be composed of a Hearing Officer and two Panelists,<sup>85</sup> that the Hearing Officer shall preside over the hearings, and that the Chief Hearing Officer is responsible for selecting the Panelists, who must be associated with a Members or retired therefrom.<sup>86</sup> BX Rule

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<sup>82</sup> BX Rule 9221(a) provides that any request by a Respondent for a hearing shall be granted.

<sup>83</sup> See BX Rule 9221(b)-(c).

<sup>84</sup> Like Extended New Hearing Panels, Extended Proceeding Committees are established for proceedings that involve unusually complex issues or will require an extended period of time to hear. Pursuant to BX Rule 9331(a)(2), members of Extended Proceeding Committees may be entitled to compensation at the rates then in effect for arbitrators appointed under the FINRA Rule 10000 Series.

<sup>85</sup> BX Rule 9120(z) defines the term “Panelist” as used in the Rule 9200 Series, the Rule 9550 Series, and the Rule 9800 Series, to mean a “member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer.” As used in the Rule 9300 Series, the term means a “current or former member of the Exchange Review Council or a former Director who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.” The Exchange will select Panelists in accordance the requirements set forth in BX Rules 9120(z) and 9231.

<sup>86</sup> BX Rule 9232 sets forth other criteria for the Chief Hearing Officer to use when selecting New Hearing Panels, including their level of expertise, the absence of

9231(e) states that the Chief Hearing Officer may appoint a replacement Hearing Officer if the Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed.<sup>87</sup> Meanwhile, BX Rule 9234 authorizes the Chief Hearing Officer to appoint new Hearing Panelists under similar circumstances. Like Existing Rule 1606(a)(3), BX Rules 9233 and 9234 provide for the recusal or withdrawal of Hearing Officers and Panelists with conflicts of interest or biases and their replacement by the Chief Hearing Officer. Unlike the Existing Rule, however, BX Rules 9233 and 9234 authorize a Party to file a request that Hearing Officers or Panelists be disqualified for such reasons.<sup>88</sup>

BX Rule 9241 governs pre-hearing conferences. BX Rule 9241(a) states that such conferences may be held to expedite proceedings, establish efficient procedures to manage proceedings, or to improve the quality of hearings through preparation. BX Rule 9241(b) states that pre-hearing conferences may be held upon the motion of the Hearing

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any conflicts of interest or bias and any appearance thereof, their availability for service, and the frequency of their prior service on New Hearing Panels (with a preference towards providing opportunities for new or infrequently-serving individuals).

<sup>87</sup> BX Rule 9235(b) also authorizes the Chief Hearing Officer or his or her Deputy to exercise the authority of a Hearing Officer in his or her temporary absence.

<sup>88</sup> BX Rule 9233(b) permits a Party to move for the disqualification of a Hearing Officer not later than 15 days after the later of: (1) when the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Officer. Similarly, BX Rule 9234(b) permits a Party to move for the disqualification of a Hearing Panelist within 15 days after the later of: (1) when the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Panelist. BX Rule 9233(c) provides that the Chief Hearing Officer shall promptly investigate whether disqualification is required and issue a written ruling on the motion. BX Rule 9234 provides for a similar process for motions and decisions on motions to disqualify Hearing Panelists.

Officer or at the request of a Party. BX Rule 9241(c) provides that subjects for discussion at pre-hearing conferences may include, not only the simplification of issues for adjudication and the expedition of proceedings, but also the exchange of witness and exhibit lists and exhibits, the stipulation of the authenticity and admissibility of evidence, taking official notice of facts, the scheduling of pre-hearing motions or briefs, the method of service, the scheduling of hearing dates, any amendments to the complaint or answers, and the production of documents. Generally, under BX Rule 9241(d), initial pre-hearing conferences, unless determined by a Hearing Officer to be unnecessary or premature, shall be held within 21 days after the filing of an answer. BX Rule 9241(e) provides for agreements and procedural determination made during pre-hearing conferences to be recorded in orders issued by the Hearing Officer. Under BX Rule 9241(f), a Hearing Officer may issue a default decision against a Party that fails to appear at a pre-hearing conference, if the Party was provided due notice.

Additionally, prior to a hearing, BX Rule 9242 authorizes a Hearing Officer to order a Party to furnish information to all other Parties and to the New Hearing Panel that may include an outline or narrative summary of the Party's case or defense, the legal theories upon which a Party will rely, a list and copies of documents that the Party intends to introduce at the hearing, a list of witnesses that the Party intends to call to testify on their behalf and a summary of the expected testimony, and if a witness is to be called as an expert witness, a statement of the witness' expertise.

The BX Rule 9250 Series governs discovery during disciplinary proceedings. The BX Rule 9250 Series provides for more extensive discovery than that which exists under the Existing Rules. BX Rule 9251(a) generally provides that the Departments must

make available to Respondents information and documents obtained in connection with the investigations that led to the institution of disciplinary proceedings, such as requests for information and documents, responses thereto, and all transcripts and exhibits. BX Rule 9251(b) permits the Departments to withhold certain documents from Respondents under certain circumstances, including to the extent that they are privileged, contain attorney work product, constitute internal memoranda or examination reports, reveal examination or investigatory methods, the identities of confidential sources, or the existence of other prospective investigations or enforcement actions, or if the Hearing Officer grants leave to withhold a document.<sup>89</sup> The BX Rule does not permit the Departments to withhold from Respondents exculpatory evidence. The Hearing Officer may require the Departments to submit a list of withheld documents.<sup>90</sup> However, the Rule states that unless the Hearing Officer orders otherwise, the Departments generally must make documents available to a Respondent not later than 21 days after service of the Respondent's answer.<sup>91</sup> If the Departments fail to make documents or witness statements available to Respondents as required under BX Rule 9251, no rehearing or

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<sup>89</sup> BX Rule 9253 provides in part that, notwithstanding BX Rule 9251(b), a Respondent may file a motion requesting that the Departments produce witness statements or witness deposition transcripts. It provides that the failure to produce such materials shall not result in rehearing or an amended decision unless the Respondent establishes that the failure was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to provide any statement was not harmless error.

<sup>90</sup> See BX Rule 9251(c).

<sup>91</sup> See BX Rule 9251(d).

amended decision may be in order, unless the Hearing Officer determines that the failure was not harmless error.<sup>92</sup>

BX Rule 9252 provides for a process by which a Respondent may request that the Exchange invoke BX Rule 8210 to compel the production of documents or testimony at the hearing. Pursuant to BX Rule 9252(a), such a request must be submitted to the Hearing Officer no later than 21 days before the hearing date. The request may be granted upon a showing that the information sought is relevant, material, and non-cumulative, that the requesting Party has been unsuccessful in obtaining the requested documents or testimony despite good faith attempts to do so, and that each of the persons for whom the documents and testimony are sought is subject to the Exchange's jurisdiction.<sup>93</sup> The Hearing Officer shall also consider whether the request is unreasonable, oppressive, excessive, in scope, or unduly burdensome, or whether it should be denied, limited, or modified.<sup>94</sup> If the Hearing Officer determines that a request is unreasonable, excessive, or unduly burdensome, he or she may deny the request or grant it only upon such conditions as fairness requires.<sup>95</sup> If the Hearing Officer grants the request, the Hearing Officer shall order that requested documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose

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<sup>92</sup> See BX Rule 9251(g). The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to make the document available was not harmless error. See id.

<sup>93</sup> See BX Rule 9252(b).

<sup>94</sup> See id.

<sup>95</sup> See BX Rule 9252(c).

testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the documents or testimony shall be produced immediately to all Parties.<sup>96</sup>

Several BX Rules govern the hearing process. Broadly speaking, these Rules are similar to, albeit more comprehensive than, the hearings process that exists under Existing Rule 1606(e). BX Rule 9261(a) requires a Party to submit to all other Parties and to the Hearing Officer, no later than 10 days before a hearing, or at such earlier date as may be specified by the Hearing Officer, copies of documentary evidence and the names of the witnesses that it intends to present at the hearing. BX Rule 9261(b) states that a Party is entitled to appear at a hearing in person, by counsel, or by their representative. BX Rule 9262 requires sworn testimony at hearings. BX Rule 9263(a) grants the Hearing Officer authority to receive relevant evidence and to exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. BX Rule 9145(a) provides that the formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series. BX Rule 9265 requires hearings and (unless otherwise ordered by a Hearing Officer) pre-hearing conferences to be recorded by a court reporter and for transcripts to be available for correction and purchase. BX Rule 9266 states that the Hearing Officer may require the Parties to file proposed findings of fact and conclusions of law, or post-hearing briefs, and it prescribes a procedure for doing so. BX Rule 9267 lists the contents of the evidentiary record.

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See id.

BX Rule 9268 governs New Hearing Panel decisions. Similar to Existing Rule 1607, BX Rule 9268(a) requires a New Hearing Panel to make a determination in a matter based on a majority vote, which is reflected in a written decision drafted by the Hearing Officer. Also similar to the Existing Rule, BX Rule 9268(b) requires that each decision include a statement of the specific violations alleged, findings of underlying facts, and conclusions of law. Unlike the Existing Rule, however, BX Rule 9268(c) permits the Hearing Officer or a Hearing Panelist to prepare a written dissenting opinion. BX Rule 9268(a) also specifically requires that the decision be issued within 60 days of the final date allowed for filing proposed findings of fact, conclusions of law, and post hearing briefs, or by a date established by the Chief Hearing Officer. Last, under subparagraph (d) of the BX Rule, the OHO must serve the decision and any dissenting opinion on the Parties, publish notice of the decision and any dissenting opinion in the Central Registration Depository (“CRD”) and provide a copy of the decision and any dissent thereto to the each Member of the Exchange with which the Respondent is associated.

BX Rules 9264 and 9269 concern the disposition of a disciplinary matter through a summary proceeding. BX Rule 9264 states that a motion for summary disposition must be initiated by a Party. Under BX Rule 9264(a), the Respondent and/or staff may, prior to the hearing but after the Respondent has filed an answer and had opportunity to inspect documents in the record, make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent, as well as any defense raised in a Respondent’s answer. If a hearing on the merits has begun, then BX Rule 9264(b) states that Parties may submit a motion for summary disposition only with leave of the

Hearing Officer. BX Rule 9264(c) provides the process for proceeding when a summary motion does not dispose of the matter entirely. BX Rule 9264(d) requires motions for summary disposition to be supported by a statement of undisputed facts, a supporting memorandum of points and authorities, and affidavits or declarations that set forth such facts. BX Rule 9264(e) concerns rulings on motions for summary disposition. This provision of the BX Rule provides that a Hearing Officer may deny or defer a decision on any motion for summary disposition, yet only a New Hearing Panel may grant such a motion (except the Hearing Officer may grant motions for summary disposition with respect to questions of jurisdiction). BX Rule 9264(e) also provides that a motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.

Meanwhile, BX Rule 9269 governs the issuance of default decisions by the Hearing Officer against Respondents that fail to provide timely answers to complaints or any Party that fails to appear at any hearing for which they have due notice. Where the defaulting Party is the Respondent, the BX Rule specifies that the Hearing Officer may issue a default decision that deems the allegations against the Respondent to be admitted. Where the defaulting Party is the Departments, the Hearing Officer may issue a default decision that dismisses the complaint with prejudice. The Hearing Officer also may order a Party who fails to attend a pre-hearing conference or a hearing to pay the costs of attendance for the other Party. Like Existing Rule 1608, the BX Rule provides for default decisions to be set aside, but unlike the Existing Rule, BX Rule 9269 provides for the Hearing Officer to set them aside only upon a motion and a showing of good cause.

The BX Rule provides, however, that default decisions may be appealed to or called for review by the Board within 25 days after service.<sup>97</sup>

BX Rule 9270 governs settlements. It permits a Party to propose in writing an offer of settlement at any time and to do so without limit to the number of offers it proposes. Under BX Rule 9270(e), if an offer of settlement is uncontested, then the Departments must, if a hearing has not yet commenced, transmit the offer and a proposed order of acceptance to the Exchange Review Council (or the ODA, if the Respondent is an affiliate of the Exchange) for approval or rejection. If a hearing has already commenced when the offer is made, then the Departments must send the offer and proposed order to the New Hearing Panel for preliminary approval and then to the Exchange Review Council (or, if a Respondent is an affiliate of the Exchange, to the ODA) for ultimate approval or rejection. Under BX Rule 9270(f), if an offer of settlement is made and it is contested, then the Departments must provide a written opposition to the New Hearing Panel, which may issue an order approving the offer, or it may order the Parties to attend a settlement conference. If a New Hearing Panel approves

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<sup>97</sup> In addition to the above, BX Rule 9280 authorizes a New Hearing Panel to exclude or impose sanctions upon a Party, an attorney for a Party, or another authorized representative of a Party that violates an order or otherwise engages in contemptuous conduct during a proceeding. Authorized sanctions include, but are not limited to, imposing orders that establish facts in favor of the opposing Party, precluding a Party from making claims or defenses, striking portions of pleadings, or staying procedures until compliance occurs. No similar provisions exist in the Existing Rules.

Meanwhile, BX Rule 9150(a) authorizes an adjudicator to exclude from disciplinary proceedings an attorney for a Party or any other person authorized to represent a Party to the extent that the adjudicator deems said attorney or persons to be engaging in contemptuous conduct, under BX Rule 9280, or unethical or unprofessional conduct. The BX Rule authorizes an attorney or person so excluded to seek review of their exclusion from the Exchange Review Council.

a contested offer of settlement, then the Hearing Officer shall send the order of acceptance of the offer of settlement to the Exchange Review Council (or, if a Respondent is an affiliate of the Exchange, to the ODA) for ultimate acceptance or rejection. Pursuant to BX Rule 9270(h), if an offer of settlement is rejected, then the Respondent shall be notified in writing, the offer shall be withdrawn, and the rejected order shall not constitute part of the record in any subsequent proceeding against the Respondent. BX Rule 9270(j) further clarifies that a Respondent shall not be prejudiced by a rejected order of settlement.<sup>98</sup>

BX Rule 9280 authorizes the issuance of sanctions for Parties, their attorneys, and their representatives, for contemptuous conduct. As set forth in BX Rule 9280(a)(2), such sanctions may include exclusion of an attorney or representative from proceedings. They may also include, in part, orders that establish disputed facts in favor of the non-sanctioned Party, preclude the disobedient Party from supporting or opposing claims or defenses, or strike pleadings or portions thereof.<sup>99</sup> The exclusion of an attorney or representative is subject to review by the Exchange Review Council.<sup>100</sup>

BX Rule 9290 states that hearings shall be held and orders shall be issued as to temporary cease and desist proceedings on an expedited basis. BX Rule 9291 governs the form and delivery of permanent cease and desist orders.

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<sup>98</sup> Finally, BX Rule 9270(i) states that, when a disciplinary proceeding names multiple respondents, settlement offers may be accepted or rejected as to any one or all of the Respondents submitting offers.

<sup>99</sup> See BX Rule 9280(b).

<sup>100</sup> See BX Rule 9280(c).

*The BX Rule 9300 Series*

The BX Rule 9300 Series sets forth the process for review of disciplinary proceedings by the Exchange Review Council and the Board.

BX Rule 9311 sets forth the process for appellate reviews of New Hearing Panel decisions. Under BX Rule 9311, a Party may appeal a New Hearing Panel decision to the Exchange Review Council within 25 days after service of a decision.<sup>101</sup> Additionally, on their own motion, any member of the Exchange Review Council, a Review Subcommittee thereof, or the CRO (as to default decisions) may issue a call to review a New Hearing Panel decision within 45 days after the date of service of the decision (or within 25 days after the date of service, as to calls for review that the CRO initiates). BX Rule 9311(c) and (d) require that Parties file written notices of appeal (and cross-appeal) with the OHO and it prescribes requirements for such notices. BX Rule 9311(e) states that the Exchange Review Council, in its discretion, may waive any issues not raised in appeal or cross-appeal notices, but it provides a process by which the Parties may petition for consideration of such issues.

Meanwhile, BX Rule 9312 governs the process by which the Exchange Review Council, the Review Subcommittee, or the CRO may call a matter for review. It provides that a decision of a New Hearing Panel issued pursuant to BX Rule 9268 may be called for review by any member of the Exchange Review Council or any member of a Review Subcommittee within 45 days after service of the decision. It also provides that a default decision against a Respondent, pursuant to BX Rule 9269, may be called for review by

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<sup>101</sup> However, the Exchange notes that a decision involving a Respondent who is an affiliate of the Exchange may not be appealed to the Exchange Review Council.

the CRO, on his or her own motion, within 25 days after service of the decision.

Additionally, it provides that a decision with respect to a Member that is an affiliate of the Exchange may not be called for review by the Exchange Review Council. BX Rule 9312(b) states that a decision to call a matter for review by the Exchange Review Council, the Review Subcommittee, or the CRO operates as a stay of a final decision until such time as the Council or Board issues its decision, except with respect to permanent cease and desist orders.

BX Rule 9321 provides for the transmission of the record of a disciplinary proceeding to the Exchange Review Council within 21 days after the filing of a notice of appeal or notice of review, or at such a later time as the Council may designate. BX Rule 9322 grants discretion, with good cause shown, to the Exchange Review Council, the Review Subcommittee, a Subcommittee, an Extended Proceeding Committee, and Counsel to the Exchange Review Council (defined below) to modify filing deadlines, adjourn appeal proceedings, and change hearing locations in certain instances and subject to certain limitations.

BX Rule 9331 states that, following the filing of a notice of appeal or a call for review, the Exchange Review Council or the Review Subcommittee shall appoint a Subcommittee or an Extended Proceeding Committee, composed of two or more persons who are or were members of the Exchange Review Council or former Directors, for the purpose of making recommendations to the full Council as to how to dispose of matters before it.<sup>102</sup>

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<sup>102</sup> Under the BX Rules, the Exchange Review Council is assigned its own counsel in appellate matters. BX Rule 9120(e) defines the term “Counsel to the Exchange

Under BX Rule 9332, Exchange Review Council members, including members of the Review Subcommittee, panelists of a Subcommittee or an Extended Proceeding Committee, or Counsel to the Exchange Review Council, are subject to the same disqualification and recusal standards as the Hearing Panelists and Hearing Officers.

The BX Rule 9340 Series governs the proceedings of the Exchange Review Council, Extended Proceeding Committee, and Subcommittees. BX Rule 9341 provides for oral arguments before a Subcommittee and the Extended Proceeding Committee, upon written request of a Party or otherwise at the discretion of Subcommittee or Committee.<sup>103</sup> BX Rule 9343 provides that, if no oral argument is held, a matter shall be decided on the record, supplemented by any written materials submitted to or issued by

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Review Committee” as an attorney that reports to the CRO of the Exchange who is responsible for advising the Exchange Review Council, the Review Subcommittee, a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the Exchange Review Council. Counsel also may decide a motion on a procedural matter in the BX Rule 9300 Series. See BX Rule 9146(j)(2). BX Rule 9313 describes the authority of the Counsel and the process for seeking the review of a Counsel decision. Under BX Rule 9313(a), Counsel has authority to take ministerial and administrative actions to further the efficient administration of a proceeding. A Party may seek review of a Counsel decision on motion to the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee. See BX Rule 9313(b). Counsel is subject to the same conflict of interest prohibitions as the Exchange Review Council, see BX Rule 9332, which requires Counsel to withdraw from a matter any time that the Counsel has a conflict of interest or bias or circumstances otherwise exists where the fairness of the Counsel might reasonably be questioned. Moreover, the Counsel may be removed on motion based upon a good faith belief that the Counsel has a conflict of interest or bias or circumstances otherwise exists where the fairness of the Counsel might reasonably be questioned.

<sup>103</sup> BX Rule 9342 states that if a Party requests, but fails to appear at an oral argument, then the Committee or Subcommittee may proceed with oral arguments without that Party or consider the matter on the basis of the record, without oral argument, as to that Party.

the Exchange Review Council, a Subcommittee, or the Extended Proceeding Committee. BX Rule 9344 grants discretion to the Council or the Review Subcommittee to proceed with or dismiss the appeal and remand appeals of Parties that failed to participate in initial disciplinary hearings and show good cause for their failure to participate. It also prescribes circumstances under which an appeal or cross-appeal will be deemed abandoned. BX Rule 9345 states that a Subcommittee or the Extended Proceeding Committee shall present a recommended decision to the Exchange Review Council. Pursuant to BX Rule 9346, the Exchange Review Council is charged with issuing a decision based on the record, supplemented by briefs and other papers submitted to the Subcommittee, Extended Proceedings Committee, or the Exchange Review Council, any oral arguments that occur, and upon a showing of good cause and with the leave of the Council, Extended Proceeding Committee, or Subcommittee, additional evidence that is introduced on appeal.<sup>104</sup> It also provides that the formal rules of evidence shall not apply during the appeals process.<sup>105</sup> BX Rule 9347 sets forth the form, format, and filing procedures and deadlines for papers filed in Exchange Review Council proceedings. BX Rule 9348 states the powers of the Exchange Review Council to affirm, dismiss, modify, or reverse New Hearing Panel decisions with respect to each finding, or to remand the proceeding with instructions. It also provides that the Exchange Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. The Exchange Review Council must issue a decision consistent with BX Rule

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<sup>104</sup> BX Rule 9346(f) also permits the Council, Extended Proceeding Committee, or Subcommittee to order, on its own motion, that the record be supplemented with such additional evidence as they deem relevant.

<sup>105</sup> See BX Rule 9346(g).

9349(b), which provides elements required to be included in an Exchange Review Council decision.

BX Rule 9351 governs discretionary review by the Board. Pursuant to BX Rule 9351(a), a Director may call for review a decision of the Exchange Review Council (other than a decision with respect to a Member that is an affiliate of the Exchange) not later than the next meeting of the Board that is at least 15 days after the date on which the Board receives the Exchange Review Council decision. As set forth in BX Rule 9351(d), the Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council and it may affirm, modify, reverse, increase, or reduce any sanction (including the terms of any permanent cease and desist order) or impose any other fitting sanction. The Board also may remand the proceeding with instructions. The Board is required to issue its decision in writing pursuant to BX Rule 9351(e).<sup>106</sup>

Unlike the Existing Rules, BX Rule 9370 expressly provides for a Respondent aggrieved by a final disciplinary action to apply for review by the Commission pursuant to Section 19(d)(2) of the Act.

#### *The BX Rule 9400 and 9500 Series*

The BX Rule 9400 Series provides the process for expedited client suspension proceedings involving alleged violations of Rule 403 (Disruptive Quoting and Trading Activity Prohibited). The BX Rule 9500 Series provides the process for proceedings other than formal disciplinary proceedings. The Exchange proposes that these BX Rules

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<sup>106</sup> BX Rules 9360 and 9370 states when sanctions become effective, including when a Respondent appeals a decision to the Commission.

will replace Chapter 15 of the Existing Rules, which also provide for the Exchange to impose summary suspensions in various circumstance.

BX Rule 9400 authorizes and prescribes the process for adjudicating expedited client suspensions that may be imposed upon Members or Associated Persons that violate the prohibition on disruptive quoting and trading activity.<sup>107</sup> BX Rule 9400 states that the Regulation Department, with the prior authorization of the CRO, may issue a notice initiating a suspension proceeding of a Member or an Associated Person for engaging in disruptive quoting and trading activity, which shall trigger the appointment of a New Hearing Panel and the occurrence of a hearing not later than 15 days after service of the notice, unless extended for good cause shown. The New Hearing Panel may issue a written decision imposing a suspension (within 10 days of receipt of the hearing transcript, unless otherwise extended) only if the New Hearing Panel finds by a preponderance of the evidence that the violation occurred and that it is likely to result in significant market disruption or harm to investors. BX Rule 9400(e) also permits a Respondent to apply to the New Hearing Panel to modify, set aside, limit, or revoke a suspension order and it requires the New Hearing Panel to respond to such a request in writing within 10 days after receiving it, unless such time period is extended with the consent of the Parties for good cause shown. Finally, BX Rule 9400(f) states that suspensions imposed by New Hearing Panels may be appealed to the Commission as set forth in Section 19 of the Act.

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<sup>107</sup> Although BX Rule 9400 references the BX Rule that prohibits disruptive quoting and trading, the Exchange proposes to substitute reference to its own analogous provision, Rule 403.

The BX Rule 9500 Series permits the Exchange to impose sanctions, such as suspensions, cancellations of membership, bars of association with Members, and prohibitions or restrictions on access to Exchange services, as well as the adjudication of such sanction orders, for actions or circumstances that include the following: (1) failures to provide information, reports, data, or testimony requested or required by the Exchange or failures to keep membership applications or supporting documentation current (BX Rule 9552); (2) failures to pay Exchange dues, fees and other charges or to submit a required report or information related to such payment (BX Rule 9553); (3) failures to comply with arbitration awards or settlements or orders of restitution (BX Rule 9554); (4) failures to meet the eligibility or qualification standards or prerequisites for access to services (BX Rule 9555); (5) failures to comply with temporary and permanent cease and desist orders (BX Rule 9556); (6) financial or operational difficulties that require limiting or ceasing certain business activities (BX Rule 9557); and (7) actions authorized by Section 6(d)(3) of the Act, including in part summary suspensions of or limitations or prohibitions with respect to services offered by the Exchange on Members, Associated Persons, or other persons subject to the Exchange's jurisdiction, including those who have been suspended or expelled from another SRO, barred or suspended from being associated with a member of another SRO, or are experiencing severe financial or operation difficulties threaten investors, creditors, other Members, or the Exchange (BX Rule 9558). The BX Rule 9520 Series also provides for adjudication of statutory disqualifications or determinations of ineligibility to become or remain a Member or associated with a Member. Generally, each of these provisions of the BX Rules require the Exchange to serve written notice to the Member or Associated Person, offer them an

opportunity to request a hearing in writing, and permit them to request termination of sanctions upon achieving compliance.<sup>108</sup> Meanwhile, BX Rule 9559 sets forth extensive procedures governing hearings and it provides for appellate reviews by the Exchange Review Council, upon its call for review, and by the Commission, pursuant to Section 19 of the Act.

*The BX Rule 9600 Series*

The BX Rule 9600 Series provides procedures to be followed when a Member seeks exemptive relief pursuant to any Rule that references the BX Rule 9600 Series. As discussed below, the Exchange proposes to amend the Supplementary Material to Existing Rule 303 to provide for the BX Rule 9600 Series to govern requests to waive

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<sup>108</sup> The BX Rule 9520 Series provides for a somewhat different process from the BX Rule 9550 Series. BX Rule 9522 requires Members and Associated Persons to file applications for relief from statutory disqualifications or determinations of ineligibility. BX Rule 9522(e) authorizes the Department of Member Regulation, to the extent it deems consistent with the public interest and the protection of investors, to approve a written request for relief from the eligibility requirements by a disqualified Member with or without the filing of an application by such disqualified Member, under certain specified conditions. Pursuant to BX Rule 9523, the Department of Member Regulation also may recommend membership or association or continued membership or association pursuant to a supervisory plan that is subject to approval by the Chair of the Statutory Disqualification Committee (a Subcommittee of the Exchange Review Council, as defined in BX Rule 9120(cc)) or the Exchange Review Council. Pursuant to BX Rule 9523(a), the Member or Associated Person may request a hearing before a New Hearing Panel to seek relief from disqualification or conditions imposed upon continued membership or association. In such instances, the Hearing Panel shall issue a recommended decision to the Statutory Disqualification Committee, which in turn shall issue a recommended decision to the Exchange Review Council for ultimate determination. The decision of the Exchange Review Council is subject to discretionary review by the Board. See id. The BX Rule also provides for the Exchange Review Council to conduct an expedited review of a recommended decision of the Statutory Disqualification Committee. See id. Finally, it provides for review by the Commission of any action taken pursuant to the BX Rule 9520 Series. See id.

applicable qualification examination requirements for applicants that apply to become associated with Members of the Exchange.

*The BX Rule 9800 Series<sup>109</sup>*

The BX Rule 9800 Series provides the process followed by the Exchange in administering temporary cease and desist orders, including the initiation of proceeding to issue such an order,<sup>110</sup> service thereof,<sup>111</sup> subsequent review of the order by the Hearing Panel,<sup>112</sup> the consequences of non-compliance,<sup>113</sup> and the process for seeking Commission review of the order.<sup>114</sup>

The BX Rule 9800 Series provides for temporary cease and desist orders and a process for adjudicating them. BX Rule 9810 states that with the prior written authorization of the CRO and FINRA's Chief Executive Officer (or such other senior officers as he or she designates), the Departments may initiate a temporary cease and desist proceeding with respect to alleged violations of Section 10(b) of the Act and SEC Rule 10b-5, SEC Rules 15g-1 through 15g-9, and BX Rules 2110, 2120, or 2150 (references to these BX Rules will be replaced with references to Exchange Rules 400, 405, and Chapter 6, respectively). The Departments must serve written notice upon Respondents of a proposed temporary cease and desist order and file a copy of such

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<sup>109</sup> The BX Rule 9700 Series is reserved.

<sup>110</sup> BX Rule 9810.

<sup>111</sup> Id.

<sup>112</sup> BX Rule 9850.

<sup>113</sup> BX Rule 9860.

<sup>114</sup> BX Rule 9870.

notice with the OHO. Additionally, if a complaint has not already been issued against the Respondents, then the Departments must file and serve a complaint together with the notice of the temporary cease and desist order. BX Rule 9820 provides for the Chief Hearing Officer of the OHO to assign a New Hearing Panel to adjudicate the proposed cease and desist order. BX Rule 9830 provides for a hearing to be held, generally speaking, not later than 15 days after service of the notice. BX Rule 9840 states that the New Hearing Panel shall issue a written decision as to whether to impose a temporary cease and desist order within 10 days after receipt of the hearing transcript, unless such deadline is extended for good cause. It states that the New Hearing Panel should impose such an order if it finds that the Departments have demonstrated a likelihood of success on the merits and that the alleged misconduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of disciplinary proceedings. BX Rule 9850 permits a Party to apply to the New Hearing Panel to modify, set aside, limit, or suspend a temporary cease and desist order. BX Rule 9860 states that a Respondent that violates a temporary cease and desist order may have its association or membership suspended or cancelled or be subject to any fitting sanction, pursuant to BX Rule 9556. Finally, BX Rule 9870 states that a Respondent may apply to the Commission to review the issuance of a temporary cease and desist order, as set forth in Section 19 of the Act.

## **Additional Conforming Rule Changes**

As discussed above, the Exchange is amending its By-Laws to conform to the BX by-laws, largely deleting the Existing Rule 1500, 1600, and 1700 Series,<sup>115</sup> and adopting in their place the BX Rule 8000 and 9000 Series. As a consequence of these changes, the Exchange proposes to amend or delete certain other Existing Rules, which are either not needed, duplicated elsewhere, or reference the deleted Existing Rules. Below is a description of the specific changes the Exchange proposes to make to its Existing Rules.

Existing Rule 100 provides definitions for purposes of the Existing Rules. The Exchange is proposing to amend this Existing Rule to include definitions for several new terms. For example, the proposed Rules will define the new term “Code of Procedure” as the procedural rules contained in Chapter 90. The Exchange also defines the new term “Exchange Review Council,” which is largely copied from BX Rule 0120(m). The Exchange notes that item (6) of the new definition differs from the BX item (6) in that it cites the analogous rules of the Exchange, which have different rule numbers. Finally, the Exchange proposes to amend the definition of “SEC” so that it also includes the word “Commission.”

Existing Rule 210 concerns the consequences of a Member’s or an Associated Person’s failure to pay dues, fees and other charges. The Exchange proposes to delete this Existing Rule in favor of BX Rule 9553, which is more comprehensive than the Existing Rule and differs from it in several respects. Existing Rule 210 provides that instances of nonpayment shall be reported to the Exchange President when they are 30

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<sup>115</sup> As noted elsewhere, the Exchange proposes to retain Existing Rules 1600 and 1614(a) and (d) in their current form (and to renumber Rule 1614(d) as 1614(b)).

days past due, and that the President thereafter shall provide reasonable notice to the delinquent Member that continued non-payment will result in suspension of trading privileges. An Associated Person that fails to pay may be suspended from association with a Member. Moreover, although Existing Rule 210(a) does not specify a time period for a reasonable notice that precedes suspension, it nevertheless provides that the Exchange shall dispose of the memberships of Members who are more than six months delinquent. By contrast, BX Rule 9553 states that the Regulation Department, within an unspecified period of time period after the onset of a delinquency, may issue a written notice to the delinquent Member or Associated Person that failure to comply within 21 days of service of the notice will result in suspension or cancellation of membership or suspension or bar of association with a Member, as applicable. BX Rule 9553 also provides for detailed provisions for serving such notice, a provision for requesting a hearing with respect to such a notice, a provision declaring the effectiveness of such notices (21 days after service) when no hearing is requested, and a means to request termination of a suspension, which may be granted for good cause shown.

Existing Rule 302 sets forth circumstances in which the Exchange may deny or condition approval of membership applications or applications to associate with Members. Existing Rule 302(c) also sets forth circumstances in which the Exchange may determine not to permit a Member or Associated Person from continuing their membership or association with a Member, including because they become subject to statutory disqualification under the Act. Existing Rule 302(f) furthermore permits a Member or Associated Person that becomes subject to statutory disqualification under the Act to apply to the Exchange to continue as a Member or as an Associated Person, within

30 days of becoming subject to the statutory disqualification. Existing Rule 302(g) states that, subject to the summary suspension rules in Chapter 15, any applicant for membership or association with a Member whose application is denied or conditioned or who is not permitted to continue as a Member or Associated Person may appeal such determinations under Chapter 17 of the Existing Rules.

The Exchange proposes to modify Existing Rule 302(f) so that it refers to new and more robust procedures, set forth in the BX Rule 9520 series, by which a Member or an Associated Person may obtain relief from disqualification or ineligibility determinations (BX Rule 9522).

The Exchange also proposes to amend Existing Rule 302(g), which states that subject to Chapter 15, the BCC may review in part Exchange determinations to deny membership or association with a Member pursuant to Chapter 17 of the Existing Rules. The Exchange proposes to re-assign responsibility for these reviews from the BCC to the Exchange Review Council and replace the review process presently set forth in Chapter 17 of the Existing Rules with processes that are substantially the same as those set forth in BX Rules 1015 and 1016. Specifically, the proposed amendments to Exchange Rule 302(g) state that, subject to Chapter 90, the Exchange Review Council will have jurisdiction to review these decisions. Proposed Rule 302(g) states that anyone whose application for membership on the Exchange, association with an Exchange Member, or whose continuing membership or association is denied or conditioned by the Exchange's Membership Department, may file a written request for review by the Exchange Review

Council within 25 days after service of the Exchange’s decision.<sup>116</sup> The request must state specifically why the applicant believes that the Membership Department’s decision is inconsistent with the permissible bases for denial set forth in Rule 302, or otherwise should be set aside and state whether a hearing is requested.<sup>117</sup> The request will be heard by a Subcommittee appointed by the Exchange Review Council or the Review Subcommittee composed of two or more persons who are either current or past members of the Council or former Directors of the Exchange.<sup>118</sup> If a hearing is requested or directed, it must be held within 45 days after the request for review is filed with the Exchange or service of the notice by the Subcommittee.<sup>119</sup> Applicants and the Membership Department may be represented by counsel at the hearing and formal rules of evidence will not apply during the hearing.<sup>120</sup> The Subcommittee must present a recommended decision in writing to the Exchange Review Council within 60 days after

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<sup>116</sup> See proposed Rule 302(g)(1). The Exchange notes that the deadline for filing petitions for BCC review of an Exchange action under Existing Rule 1701(a) is 30 days from the date of such action.

The Existing Rules pertaining to membership do not reference or define the terms “Membership Department” or “Department.” As part of this proposal, the Exchange proposes to amend Rule 302(g) to specify that the Exchange’s Membership Department – rather than simply the “Exchange” – makes determinations as to whether to grant, deny, or conditionally grant applications for membership or association or to continue as a Member or an Associated Person.

<sup>117</sup> See id.

<sup>118</sup> See proposed Rule 302(g)(4). The Exchange notes that Existing Rule 1702 provides for review by a BCC panel composed of two or more of its members.

<sup>119</sup> See proposed Rule 302(g)(6)(A).

<sup>120</sup> See proposed Rule 302(g)(6)(B) & (C). Unlike Existing Rule 1703, proposed Rule 302(g) does not provide for intervention in proceedings by interested non-Parties.

the date of the hearing, and not later than seven days before the meeting of the Exchange Review Council at which the proceeding shall be considered.<sup>121</sup> The Exchange Review Council must issue a proposed written decision that affirms, modifies, or reverses the Membership Department's decision, or remands the proceedings with instructions and provide the proposed decision to the Exchange Board.<sup>122</sup> If the Exchange Board does not call the decision for review, it shall become final. If the Exchange Review Council does not serve its final written decision within the time period prescribed by Rule 302(g)(10)(C), then the Applicant may file a written request with the Exchange Board for the Board to direct the Exchange Review Council to issue its decision immediately or show good cause why it needs additional time to issue its decision.<sup>123</sup> Proposed Rule 302(h), which mirrors BX Rule 1016, grants the Exchange Board discretion, at the request of a Director, to review decisions of the Exchange Review Council.<sup>124</sup>

Existing Rule 305(b) requires Members to file with the Exchange and keep current their addresses at which notices may be served. The Exchange proposes to amend this Existing Rule to incorporate the language set forth in BX Rule 1160. Rather than merely requiring Members to provide the Exchange with their current address, the proposed amendment more broadly requires Members to report to the Exchange, through the FINRA Contact System, all of their contact information, including their mailing

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<sup>121</sup> See proposed Rule 302(g)(9).

<sup>122</sup> See proposed Rule 302(g)(10)(A).

<sup>123</sup> See proposed Rule 302(g)(10)(D).

<sup>124</sup> Unlike Existing Rule 1704, proposed Rule 302(h) does not authorize the applicant or the President of the Exchange to request that the Board review the decision of the Exchange Review Council.

addresses, email addresses, facsimile numbers, and other information. It also requires members to update such contact information in the FINRA System within 30 days of any changes thereto, and to generally verify that such information remains accurate within 17 business days after the end of each calendar year. This proposed amendment to the Existing Rule will ensure that the Exchange has available to it multiple means of contacting its Members, including for purposes of serving the notices specified in the BX Rule 9550 series by email or by facsimile. The Exchange proposes, in its introduction to Chapter 90, to state that cross references in the BX Rule 9000 Series to BX Rule 1160 should be read instead to refer to Exchange Rule 305(b), as modified herein.

To maintain consistency with the BX Rules, the Exchange also proposes to eliminate Existing Rule 305(d), which requires Members to maintain a current copy of the Exchange's governing documents and Rules in an accessible place and make them available for examination by customers, and to replace it with BX Rule 8110, which is materially equivalent.

Existing Rule 307 and its Supplementary Material govern the sale and transfer of market maker rights. Item .01 of the Supplementary Material presently provides that decisions by the Exchange (and specifically, by the Membership Department) to deny approval of such sales and transfers are appealable under Chapter 17 of the Existing Rules. The Exchange proposes to state instead that these decisions are appealable to the Exchange Review Council. The Exchange notes that no analogue exists to this proposal in the BX Rules, which do not provide for the sale and transfer of such rights or reviews of decisions to deny or condition such sales or transfers. Nevertheless, the Exchange believes that the Exchange Review Council is the logical and appropriate body for

reviewing such determinations given its other responsibilities. The Exchange also proposes to replace the review procedures set forth in Chapter 17 of the Existing Rules with processes that are substantially the same as those set forth in BX Rules 1015 and 1016. To accomplish the foregoing, the Exchange proposes to eliminate Supplementary Material .01 and insert its substance into the body of Rule 307 as paragraphs (c) and (d). Proposed Rule 307(d) states that the Exchange Review Council will have jurisdiction to review Membership Department decisions to deny the sale and transfer of market maker rights. Proposed Rule 307(d)(1) states that anyone is an owner or an approved applicant that is a party to an executed transfer agreement that is denied approval may file a written request for review by the Exchange Review Council within 25 days after service of the Exchange's decision. The request must state specifically why the applicant believes that the Membership Department's decision is inconsistent with the permissible bases for denial set forth in Rule 307(c), or otherwise should be set aside and state whether a hearing is requested.<sup>125</sup> The request will be heard by a Subcommittee composed of two or more persons who are either current or past members of the Council or former Directors of the Exchange.<sup>126</sup> If a hearing is requested or directed, the hearing must be held within 45 days after the request for review is filed with the Exchange or service of the notice directing a hearing by the Subcommittee.<sup>127</sup> Applicants and the Membership Department may be represented by counsel at the hearing and formal rules of evidence

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<sup>125</sup> See proposed Rule 307(d)(1).

<sup>126</sup> See proposed Rule 307(d)(3).

<sup>127</sup> See proposed Rule 307(d)(5)(A).

will not apply during the hearing.<sup>128</sup> The Subcommittee must present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing, and not later than seven days before the meeting of the Exchange Review Council at which the proceeding shall be considered.<sup>129</sup> The Exchange Review Council must issue a proposed written decision that affirms, modifies, or reverses the Membership Department's decision, or remands the proceedings with instructions and provide it to the Exchange Board.<sup>130</sup> If the Exchange Board does not call the decision for review, it shall become final. If the Exchange Review Council does not serve its final written decision within the time period prescribed by Rule 307(d)(9)(C), then the applicant may file a written request with the Exchange Board for the Board to direct the Exchange Review Council to issue its decision immediately or show good cause why it needs additional time to issue its decision.<sup>131</sup> Proposed Rule 307(d)(10), which mirrors BX Rule 1016, grants the Exchange Board discretion, at the request of a Director, to review decisions of the Exchange Review Council.

Existing Rule 310 requires a Member to notify the Exchange upon its adoption of a plan of liquidation or dissolution. The Existing Rule also provides that upon receipt of such notice, the Member's trading privileges may be suspended in accordance with Chapter 15 of the Existing Rules. The Exchange proposes to replace this reference to Chapter 15 with a reference to BX Rule 9558. Again, no analogue to this proposal exists

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<sup>128</sup> See proposed Rule 307(d)(5)(B) & (C).

<sup>129</sup> See proposed Rule 307(d)(8).

<sup>130</sup> See proposed Rule 307(d)(9).

<sup>131</sup> See proposed Rule 307(d)(9)(D).

in the BX rules insofar as those rules do not expressly address suspensions for such reasons or reviews of suspension determinations. Nevertheless, the Exchange believes that the process set forth in BX Rule 9558 is most appropriate for reviewing suspension determinations in these circumstances given that they already apply in circumstances where a Member is experiencing extreme financial or operating difficulty such that the Exchange determines that the Member cannot safely continue to do business on the Exchange.

The Supplementary Material to Existing Rule 313 concerns the Exchange's authority to waive the applicable qualification examination requirements and accept other standards as evidence of an applicant's qualifications for registration. The Exchange is amending this Rule to specify that such requests are handled pursuant to the BX Rule 9600 Series process. The BX Rule 9600 Series concerns the procedures for requesting exemptions, and the appeal of adverse decisions regarding an exemptive request. The Exchange notes that the proposed revisions will render the text of the Supplementary Material to Existing Rule 313 consistent with BX Rule 1070(d).

Existing Rule 410 provides for the summary suspension of a Member that fails to perform on its contracts or is insolvent or is in such financial or operational condition or is otherwise conducting business in such a manner that it cannot be permitted to continue in business without compromising the safety of customers, creditors, or the Exchange. The Existing Rule provides for such suspensions to be administered in accordance with Chapter 15 of the Rules. The Exchange proposes to replace this reference to Chapter 15 with a reference to BX Rule 9558, which provides procedures for summary proceedings for actions authorized by Section 6(d)(3) under the Act.

Existing Rule 413(b)(1) states that decisions denying market makers exemptions from standard position limits in options trading on the Exchange are not subject to appeal under Chapter 17 of the Existing Rules. The Exchange proposes to remove this reference to Chapter 17 as the Exchange proposes to delete it.

Existing Rule 720 concerns obvious and catastrophic errors. Existing Rule 720(k) currently references the OEP as the body responsible for reviewing determinations made by Options Exchange Officials pursuant to the Rule and it sets forth procedures to govern OEP review proceedings. In light of the fact that the OEP's responsibilities will be incorporated into those of the Exchange Review Council,<sup>132</sup> the amendments to the Rule remove references to the OEP and replaces them with references to a panel of the Exchange Review Council. The amended Rule also includes language grafted from the BX Rules prescribing the composition of panels convened for purposes of these reviews.<sup>133</sup>

Existing Rule 720A also provides for reviews by a "Review Panel" of decisions nullifying or adjusting transactions arising out of system disruptions or malfunctions. The Exchange proposes to eliminate the Review Panel in the Exchange's Rules and transfer its responsibility to a panel of the Exchange Review Council. The new Rule also includes language grafted from the BX Rules prescribing the composition of Exchange Review Council panels convened for purposes of these reviews.<sup>134</sup>

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<sup>132</sup> See proposed Rule 100(a)(20A).

<sup>133</sup> See BX Options Rules Ch. V, Sec. 6(l).

<sup>134</sup> See *id.*

Existing Rule 804 permits a Primary Market Maker to apply to the Exchange to withdraw temporarily from its Primary Market Maker status in an options class. The Existing Rule does not presently authorize reviews of Exchange determinations to deny requests for temporary withdrawals or to impose conditions on the reentry of quotations. However, BX Rule 4619(f) does provide for such reviews. To provide consistency, the Exchange proposes to amend Existing Rule 804(f) to state that the Exchange Review Council will have authority conduct such reviews.

Existing Rule 1000 provides for the treatment of the options contracts of suspended Members. In discussing the nature of suspensions to which the Existing Rule applies, it references Chapter 15 several times. The Exchange proposes replacing this reference with a reference to the Chapter 90, which comprises the BX Rules that govern suspensions in lieu of Chapter 15.

Existing Rule 1406 states that no Member or Associated Person may refuse to appear or testify before another exchange or SRO in connection with a regulatory investigation, examination or disciplinary proceeding or refuse to furnish documentary materials or other information or otherwise impede or delay such investigation, examination or disciplinary proceeding if the Exchange requests such information or testimony in connection with an inquiry resulting from an agreement entered into by the Exchange. Existing Rule 1406(d) states that when Members and Associated Persons respond to such requests for appearance, testimony, documents, or information, they shall have the same rights and procedural protections as they would if they were responding to requests from the Exchange pursuant to Existing Rule 1601(b). The Exchange proposes to replace the reference to Existing Rule 1601(b), which is being deleted, with a reference

to BX Rule 8210. BX Rule 8210(a) authorizes the Regulation Department, including FINRA staff, to require a Member or Associated Persons to provide information and testimony and to permit inspection and copying of their books, records, and accounts as to any matters involved in an investigation, complaint, examination, or proceeding. BX Rule 8210(b) provides that the Regulation Department and FINRA may exercise the aforementioned authority with respect to investigations, complaints, examinations, or proceedings conducted by other SROs. Lastly, BX Rule 8210(c) states that no Member or Associated Person may fail to provide information or testimony or to submit to inspection and copying of books, records, or accounts.

Existing Rule 1800 states that any Member or Associated Person that fails to honor an arbitration award shall be subject to disciplinary proceedings in accordance with Chapter 16. The Exchange proposes to replace this reference to Chapter 16 with a reference to BX Rule 9554, which is the BX Rule that governs such sanctions.

### **Proposed Introductory Paragraphs to Chapters 80 and 90**

The Exchange proposes to include introductory paragraphs to both Chapters 80 and 90 which state that they incorporate by reference the BX Rule 8000 and 9000 Series, respectively, and that such BX Rules shall be applicable to Exchange Members, Associated Persons, and other persons subject to the Exchange's jurisdiction.

These proposed introductory paragraphs also list instances in which cross references in the BX Rule 8000 and 9000 Series to other BX rules should be read to refer instead to the Exchange Rules, and references to defined BX terms shall be read to refer to the Exchange-related meanings of those terms. For example, references in both the BX Rule 8000 and 9000 Series to the following defined terms shall be read to refer to the Exchange-specific meanings of those terms: "Exchange" or "Nasdaq BX" shall be read to

refer to the Exchange; “Rule” or “BX Rule” shall be read to refer to the Exchange Rules; “Board” or “Exchange Board” shall be read to refer to the Exchange Board of Directors; “Member” shall be read to refer to an Exchange Member; “Associated Person” shall be read to refer to an Exchange Associated Person; “BX Regulatory Department” or “Regulation Department” shall be read to refer to the Exchange’s Regulatory Department; “BX Regulation” shall be read to refer to Exchange Regulation; “Chief Regulatory Officer” shall be read to refer to the Chief Regulatory Officer of the Exchange; and “Equity Rule” shall be read to refer to an Exchange Rule.

Additionally, the proposed introduction to Chapter 80 states that cross references in the BX Rule 8000 Series to the term “Rule 0120” shall be read to refer to Exchange Rule 100 and cross references in the BX Rule 8000 Series to “Rule 1015” shall be read to refer to Exchange Rule 302. Similarly, the proposed introduction to Chapter 90 states that cross-references in the BX Rule 9000 Series to the following terms shall be read to refer to the following Exchange Rules: “Rule 0120” shall be read to refer to Exchange Rule 100; “Rule 1013” shall be read to refer to Exchange Rules 305 and 306; “Rule 1070” shall be read to refer to the Supplementary Material to Exchange Rule 313; “Rule 1160” shall be read to refer to Exchange Rule 305(b); “Equity Rule 2110” shall be read to refer to Exchange Rule 400; “Equity Rule 2120” shall be read to refer to Exchange Rule 405; “Rule 2140” shall be read to refer to Exchange Rule 312; “Equity Rule 2150” shall be read to refer to Exchange Rules Chapter 6; “Rule 2170” shall be read to refer to Exchange Rule 403; “Rule 4110A” shall be read to refer to Exchange Rules Chapter 13; “Rule 4120A” shall be read to refer to Exchange Rules Chapter 13; “Rule 10000 Series”

shall be read to refer to Exchange Rules Chapter 18; and “Chapter III, Section 16” shall be read to refer to Exchange Rule 403.

Finally, as noted above, the introduction to Chapter 90 states that BX IM-9216 in the BX Rules shall not apply to the Exchange, its Members, Associated Persons, or other persons subject to the jurisdiction of the Exchange and that instead, references to BX IM-9216 shall be read to refer to Exchange Rule 1614(b). Similarly, the introduction states that the Exchange’s procedures set forth in BX Rule 9216(b) and 9143(e)(3), which govern its handling of MRVP violations and the issuance of MRVP violation letters, shall also apply to the Exchange’s handling of minor rule violations and the issuance of minor rule violation letters, except that the Exchange shall promptly report any final disciplinary action to the Commission, in accordance with SEC Rule 19d-1(c)(1).

## **Conclusion**

The changes proposed herein will allow the Exchange to harmonize its investigatory and disciplinary processes with the processes of BX, thus providing a uniform process for the investigation and discipline of Members and Associated Persons across all of the Nasdaq, Inc. SROs, as administered by FINRA pursuant to RSAs. Harmonizing the investigatory and disciplinary processes of all of the Nasdaq, Inc. SROs will bring efficiency to FINRA’s administration of its responsibilities under the RSAs because the process it must follow are nearly identical, and are all based on the process that FINRA follows. Harmonized processes will bring consistency to investigations and adjudication of rule violations, and will reduce the number of disciplinary processes and requirements with which Members and Associated Persons, as well as their counsel, must be familiar.

The Exchange believes that the new investigatory and disciplinary processes are substantially similar to the existing process, and where there are differences between the new and old processes, the Exchange believes that the new process does not disadvantage its Members or Associated Persons. To the contrary, the Exchange believes that the new process will benefit all parties as it provides greater detail and specificity than the retired Rules, and that it is consequently more transparent.

The Exchange intends to announce the operative date of the new Rules at least 30 days in advance via a regulatory alert.<sup>135</sup> To facilitate an orderly transition from the Existing Rules to the new Rules, the Exchange is proposing to apply the Existing Rules to all Letters of Consent that the CRO has approved and which are pending approval of the BCC prior to the operative date. The Exchange also will apply the Existing Rules to any matter for which, prior to the operative date, the Exchange has provided notice to a Subject of its determination to impose an MRVP fine or a minor rule violation fine whereby the Subject may yet or has contested the determination pursuant to Existing Rule 1614(a). In terms of formal disciplinary matters, any matter that has been approved for the issuance of a statement of charges by the CRO will continue under the Existing Rules. Moreover, any appeal of a matter that is pending before an OEP pursuant to Existing Rule 720, a Review Panel pursuant to Existing Rule 720A, or the BCC pursuant to Existing Rule 302 or Supplementary Material .01 to Existing Rule 307, will continue

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<sup>135</sup> The Exchange notes that the proposed changes will not become operative unless and until the Commission approves the Exchange's request, which it has filed pursuant to Section 36 of the Exchange Act and SEC Rule 0-12 thereunder, for an exemption from the rule filing requirements of Section 19(b) of the Exchange Act as to changes to Chapters 80 and 90 that are effected solely by virtue of a change to the BX Rule 8000 or 9000 Series.

under the Existing Rules. As a consequence of this transition process, the Exchange will retain the BCC, the OEP, the Review Panel, and the existing processes during the transition period until such time that there are no longer any matters proceeding under the Existing Rules. To facilitate this transition process, the Exchange will retain a transitional Rulebook that will contain the Exchange's Rules as they are at the time of that this proposal is filed with the Commission. This transitional Rulebook will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules website. When the transition is complete and there are no longer any Members, Associated Persons or other persons subject to the existing disciplinary processes, the Exchange will remove the transitional Rulebook from its public rules website.

The Exchange furthermore notes that it expects the transition from the BCC to the Exchange Review Council to be smooth given that it expects to nominate the existing (and common) members of the BX, Nasdaq, and Phlx exchange review councils to also become members of the Exchange Review Council.<sup>136</sup> The Exchange does not expect that any existing members of the BCC will be nominated to become members of the Exchange Review Council; however, the Exchange will ensure that, in advance of the operative day, the members of the Exchange Review Council will familiarize themselves

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<sup>136</sup> The Exchange anticipates that the members of the Exchange Review Council will serve in a manner that is consistent with their tenures on the Nasdaq, BX, and Phlx review councils. That is, to the extent that the tenure of a member of these other review councils is due to expire on a particular date, then the same expiration date will apply to that member's tenure on the Exchange Review Council. All terms for members on the Exchange Review Council will comply with Article VI, Section 4 of the proposed By-Laws.

with the Rules and procedures of the Exchange so that they will be prepared to fulfill their responsibilities.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>137</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>138</sup> 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposal is consistent with Section 6(b)(6) of the Act,<sup>139</sup> which requires that the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

The Exchange believes that the proposed changes are consistent with these requirements because the changes harmonize the Exchange's investigative, disciplinary, and adjudicatory processes with the similar processes used by BX. The new processes are well-established as fair and designed to protect investors and the public interest,

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<sup>137</sup> 15 U.S.C. 78f(b).

<sup>138</sup> 15 U.S.C. 78f(b)(5).

<sup>139</sup> 15 U.S.C. 78f(b)(6).

providing greater detail and transparency in the processes than is currently provided under the Existing Rules. Because the Exchange is adopting these Rules materially unchanged from the related BX Rules, with minor differences to account for the Exchange's unique MRVP and minor rule violation schedule of fines, the Exchange believes that the proposed changes should facilitate prompt, appropriate, and effective discipline of Members and Associated Persons consistent with the Act.

The proposed Rule change also makes miscellaneous changes to the Existing Rules to account for the adoption of the BX Rule 8000 and 9000 Series and the replacement of the BCC with the Exchange Review Council. For example, subject to Chapter 90, proposed changes to Rule 302 re-assign responsibility to the Exchange Review Council to review decisions of the Exchange's Membership Department to deny or condition applications for membership and association with Exchange Members and to deny or condition continuing membership or association. The proposal also establishes a new process by which the Exchange Review Council will adjudicate such reviews. Likewise, the Exchange proposes to amend Rule 307 to re-assign responsibility to the Exchange Review Council to review decisions of the Exchange to deny sales or transfers of market maker rights. It also proposes to establish a new process by which the Exchange Review Council will adjudicate such reviews. The Exchange believes that these proposed changes to the Existing Rules are consistent with the Act because the new adjudicatory processes that the Exchange proposes to adopt in place of its existing processes are substantially similar to those that BX already utilizes. Moreover, the Exchange believes that the proposed processes will facilitate prompt, appropriate, and fair adjudications, consistent with the Act.

Additionally, the Exchange proposes to make minor updates, corrections, and conforming amendments to the Exchange's Rules, which are consistent with the Act because they are necessary to ensure that the Exchange's cross-references and terminology remain current and accurate.

The Exchange believes that harmonizing its investigative, disciplinary, and adjudicatory processes with those of BX will reduce the burden on Members and Associated Persons that are also members of BX, Nasdaq, Phlx, and/or FINRA. The Exchange notes that all but one of its Members are also members of BX, Nasdaq, Phlx, and/or FINRA. BX, Nasdaq, Phlx, and FINRA already have in place investigative, disciplinary, and adjudicatory processes that are the same or similar to those that the Exchange proposes to incorporate by reference.

As discussed above, the Exchange believes that the proposed Rules will benefit all parties involved in the Exchange's disciplinary and adjudicatory processes as they will include greater detail and specificity than do the Existing Rules. The proposal will render the Exchange's investigatory, disciplinary, and adjudicatory processes more transparent than the Existing Rules.

The Exchange also believes that adopting an Exchange Review Council is consistent with the Act because the Council's mandate is to, among other things, ensure consistent and fair application of the Exchange rules pertaining to discipline of Members and Associated Persons. The Exchange Review Council will be a body appointed by the Exchange Board of Directors and composed of representatives of the securities industry as well as persons from outside the securities industry. The broad membership of the new Exchange Review Council will ensure that the decisions and guidance it provides

will be fair and balanced. The Exchange Review Council will be similar in structure and function to the BX exchange review council. In addition to reviewing appeals of disciplinary actions, the Exchange Review Council will also have jurisdiction to review membership decisions (proposed Rule 302) and appeals regarding limitations placed on Members or their employees that are subject to a statutory disqualification (BX Rule 9524). Additionally, the Exchange Review Council may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and Associated Persons, and enforcement policies, including policies with respect to fines and other sanctions. Thus, the Exchange Review Council will provide the Exchange and market participants with a fair and impartial body overseeing disciplinary matters, as well as the rules and policies concerning the disciplinary process. For these reasons, the Exchange believes that adoption of the Exchange Review Council is consistent with the Act.

The Exchange believes that eliminating the BCC, the OEP (as provided for under Existing Rule 720), and the Review Panel (as provided for under Existing Rule 720A) is consistent with Sections 6(b)(5) and 6(b)(6) of the Act,<sup>140</sup> because the Exchange Review Council and the New Hearing Panels will assume the responsibilities of the BCC and the Panels. In particular, the functions of the Current Hearing Panels of the BCC will be handled by the New Hearing Panels, which the OHO shall convene. Going forward, the BCC's (and the CRO's) responsibility for approving settlements will be assumed by the Exchange Review Council and, in certain instances, the ODA. The BCC's responsibilities for hearing appeals of Exchange decisions on membership or association

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<sup>140</sup> 15 U.S.C. 78f(b)(5)-(6).

with a Member will be assumed by the Exchange Review Council. The responsibilities of the OEP and the Review Panel to hear appeals of Exchange determinations to nullify or adjust transactions that involve obvious errors or that result from system disruptions and malfunctions also will be assumed by the Exchange Review Council. The Exchange believes that the proposal will provide for the Exchange Review Council, the New Hearing Panels, and the ODA to execute the responsibilities of the BCC and the Panels in a manner that the Commission, within the context of the BX Rules, has already deemed to be consistent with the Act.<sup>141</sup> For example, the Exchange proposes to replace its existing process for handling appeals of membership decisions, as set forth in Existing Rule 302 and Chapter 17, with a process that BX already employs in BX Rules 1015 and 1016. Moreover, most Exchange Members and Associated Persons will already be familiar with the proposed responsibilities and procedures of the Exchange Review Council, the New Hearing Panels, and the ODA from their experiences as members of BX and other self-regulatory organizations whose rules provide for similar assignments of responsibilities and processes.

The Exchange believes that its proposal furthers the objectives of Section 6(b)(7) of the Act<sup>142</sup> in that it is designed to provide a fair procedure for the disciplining of members and Associated Persons, 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

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<sup>141</sup> See Securities Exchange Act Release No. 34-59154 (Dec. 23, 2008), 73 FR 80468 (Dec. 31, 2008) (SR-BSE-2008-048).

<sup>142</sup> 15 U.S.C. 78f(b)(7).

access to services offered by the Exchange or a Member thereof. Specifically, the Exchange believes that the proposed investigatory, disciplinary, and adjudicatory processes are consistent with Section 6(b)(7) of the Act<sup>143</sup> because they are based on the existing processes used by BX. The BX processes are well-established as consistent with the Act.<sup>144</sup>

Last, the Exchange believes that its proposal to phase-in the implementation of the new investigatory, disciplinary, and adjudicatory processes is consistent with Section 6(b)(7)<sup>145</sup> of the Act because both the current and proposed processes are consistent with the Act, providing fair procedures for investigating, disciplining, and adjudicating the rights of Members and Associated Persons. The Exchange is proposing to provide advanced notice of the implementation date of the new processes, and will apply the new processes to new matters that are initiated on or after that implementation date. Any matters initiated prior to the implementation date will be completed using the current processes. As a consequence, the Exchange will delete the applicable portions of Chapters 15-17 from the Exchange's Rulebook, but it will maintain a transitional Rulebook on the Exchange's public rules website (<http://nasdaqISE.cchwallstreet.com/>), which will contain the Exchange Rules as they are at the time of filing this rule change.<sup>146</sup> These transitional Rules will apply exclusively to the matters initiated prior to

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<sup>143</sup> Id.

<sup>144</sup> See n.141, supra.

<sup>145</sup> 15 U.S.C. 78f(b)(7).

<sup>146</sup> The posting of the transitional rules on the public rules website will make it clear what disciplinary proceedings are governed by the transitional rules (i.e., matters initiated prior to the implementation date).

the implementation date. Upon conclusion of the last matter to which the transitional rules apply, the Exchange will remove the defunct transitional rules from its public rules website. Thus, the transition will be conducted in a fair, orderly, and transparent manner.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change is not intended to address competitive issues, but it should reduce burdens on Members, and Associated Persons. Specifically and as described in detail above, the Exchange believes that this change will bring efficiency and consistency in application of the investigative, disciplinary, and adjudicatory processes, thereby reducing the burden on Members and Associated Persons who are also members of BX.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)<sup>147</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>148</sup> in that it effects a

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<sup>147</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>148</sup> 17 CFR 240.19b-4(f)(6).

change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

The Exchange believes that, because the proposed rule change provides investigative, disciplinary, and adjudicatory processes that are well-established as fair and designed to protect investors and the public interest, and because the proposed changes are based on the current Rules of BX, the proposed rule change does not affect the protection of investors or the public interest. Moreover, because the substantially similar processes are used by BX, Nasdaq, Phlx, the New York Stock Exchange LLC (“NYSE”),<sup>149</sup> NYSE American LLC (“NYSE American”),<sup>150</sup> and FINRA, the Exchange does not believe that the changes will be impactful to competition whatsoever but will reduce the burden of complying with different disciplinary processes experienced by Members that are also members of FINRA, BX, Nasdaq, Phlx, and/or other exchanges. All Exchange members except one are also members of BX, Nasdaq, Phlx, and/or FINRA, and as a consequence, all Exchange Members except one are already subject to

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<sup>149</sup> In 2013, NYSE adopted rules governing investigations, the discipline of its members, the sanctions that it may impose upon them, cease and desist authority, and other procedural rules, which were modeled on the rules of FINRA. See Securities Exchange Act Release No. 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013)(SR-NYSE-2013-02).

<sup>150</sup> In 2016, NYSE American (formerly known as NYSE MKT LLC) adopted rules concerning investigations, discipline, sanctions, as well as other procedural rules, modeled on the rules of NYSE. See Securities Exchange Act Release No. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016)(SR-NYSEMKT-2016-30).

very similar processes to those that the Exchange proposes to adopt.<sup>151</sup> To the extent that the one exclusive Exchange Member or other Members are not necessarily familiar with the new processes, the Exchange is providing a transition period in applying the proposed new investigatory, disciplinary, and adjudicatory processes, which will allow such Members to become familiar with these processes. The transition period will allow those subject to the Exchange's investigatory, disciplinary, and adjudicative processes to assess and manage the proposed changes by providing a clear demarcation between what matters would be subject to the current processes and the new processes. As such, the proposed transition to the new processes will be fair and transparent, and should be considered non-controversial by Members and Associated Persons.

The Exchange also believes that the proposed changes to the Exchange's By-Laws and Existing Rules are non-controversial. The BX Rule 8000 and 9000 Series have already been deemed to be consistent with the Act,<sup>152</sup> and thus incorporation of these Rules will not affect the protection of investors or the public interest, nor does it raise new or novel issues. Although the Exchange's proposal will retain several of its existing disciplinary Rules, including Rules 1600 (disciplinary jurisdiction) and Rule 1614(a) and (d) (MRVP and minor rule violations and associated fines), these retained Rules will not affect the protection of investors or the public interest because they are reflective of current processes used by the Exchange and reflect the current fine schedule. Moreover,

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<sup>151</sup> Moreover, a large number of market participants that are members of FINRA, NYSE and/or NYSE American and that are not Members of the Exchange are familiar with the process. Thus, the process is widely used in the U.S. securities markets.

<sup>152</sup> See n.141, supra.

proposed changes to the Existing Rules that will assign responsibility to the Exchange Review Council to review determinations as to clearly erroneous transactions (Existing Rule 720), erroneous trades due to system disruptions and malfunctions (Existing Rule 720A), membership determinations (Existing Rule 302), and the sale and transfer of market maker rights (Supplemental Material to Existing Rule 307), and denials of excused withdrawals of quotations by primary market makers (Existing Rule 804) are noncontroversial because these assignments of responsibility will be familiar to Members who are also BX members and/or members of the other Nasdaq, Inc. Exchanges whose respective exchange review councils have similar responsibilities. To the extent that the Exchange proposes additional changes to the Existing Rules, these changes are noncontroversial as they merely seek to conform the Existing Rules, cross-references, and definitions to the BX Rules and processes.

The Exchange Review Council, like the BX review council, will function as an appellate body charged with the review of disciplinary, statutory disqualification and membership proceedings. Consequently, members of the Exchange Review Council will be called upon to preside over matters, apply Exchange Rules and render decisions that represent disposition of the matter for the Parties. Because the role of the Exchange Review Council is based on the role of the BX review council, adoption of the Exchange Review Council does not raise new or novel issues.

The Exchange also notes that it expects to nominate the existing (and shared) membership of the BX, Nasdaq, and Phlx review councils to become members of the Exchange Review Council and, as such, the Exchange expects that the members of the Exchange Review Council will be familiar with their responsibilities and with the

investigatory, disciplinary, and adjudicatory procedures set forth in the BX Rules. The Exchange does not expect that any existing members of the BCC will be nominated to become members of the Exchange Review Council; however, the Exchange will ensure that, in advance of the operative day, the members of the Exchange Review Council will familiarize themselves with the Rules and procedures of the Exchange so that they will be prepared to fulfill their responsibilities.

Moreover, the Exchange believes that the proposed elimination of the BCC, the Obvious Error Panel (Existing Rule 720), and the Review Panel (Existing Rule 720A) is noncontroversial because all of the functions of the BCC and those two Panels will be handled by the Exchange Review Council, the ODA, or the New Hearing Panels. Although the processes for these other bodies for handling these functions may differ from the current processes in some respects, as described above, the new processes will provide for the former responsibilities of the BCC and the Panels to be handled in a manner that mirrors the BX rules, which in turn are well-established and recognized as providing a fair and effective system of disciplining members and for protecting investors and the public interest.

For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4.<sup>153</sup>

Furthermore, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

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<sup>153</sup> 17 CFR 240.19b-4(f)(6)(iii).

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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.

8. Proposed Rule Change Based on Rules of another Self-Regulatory Organization or of the Commission

The proposed rule change is based on Article VII of the BX By-Laws and the BX Code of Procedure under the BX Rule 8000 and 9000 Series.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1. Notice of proposed rule change for publication in the Federal Register.

Exhibit 5. Text of the proposed rule change.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_; File No. SR-ISE-2018-59)

July \_\_\_, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Align its Existing Investigatory and Disciplinary Processes and Related Rules with the Investigatory and Disciplinary Processes and Associated Rules of Nasdaq BX, Inc.

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 July 12, 2018, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change 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 from interested persons.

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

The Exchange proposes to align its existing investigatory and disciplinary processes and related rules with the investigatory and disciplinary processes and associated rules of Nasdaq BX, Inc. (“BX”).

The text of the proposed rule change is available on the Exchange’s Website at <http://ise.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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 eliminate its existing processes for: (1) summarily suspending and limiting or prohibiting access to Exchange services by Exchange members (“Members”), persons associated with such Members (“Associated Persons”), (2) investigating and disciplining Exchange Members and Associated Persons, and (3) adjudicating actions brought by persons economically aggrieved by certain Exchange actions. The Exchange also seeks to eliminate Chapters 15, 16, and 17<sup>3</sup> of the Exchange’s Rules (with certain exceptions, discussed below), which set forth and govern such processes, respectively, and it proposes to eliminate the Exchange’s Business Conduct Committee (“BCC”), which is a body that exists to help to enforce the Exchange’s Rules. The Exchange further proposes to adopt, in place of the aforementioned Rules, the investigatory, disciplinary, and adjudicatory processes of the

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<sup>3</sup> As discussed below, the Exchange proposes to replace Chapter 17, which sets forth processes for persons aggrieved by Exchange actions, including adverse membership or association determinations, by adding to Exchange Rules 302 and 307 provisions adapted from BX Rules 1015 and 1016, which provide for similar adjudicative processes. Portions of proposed Chapter 90 also replace portions of Chapter 17, e.g., statutory disqualification in the 9520 Series.

Exchange's sister exchange, BX. It also proposes to replace the BCC with an Exchange Review Council that is similar to one that BX has in place. Specifically, the Exchange proposes to establish new Chapters 80 and 90 of its Rules<sup>4</sup> and incorporate by reference into those Chapters (again with certain exceptions, described below) the BX Rule 8000 and 9000 Series,<sup>5</sup> which set forth and govern the BX investigatory, disciplinary, and adjudicative processes.<sup>6</sup> The proposed changes, when coupled with certain changes to the Exchange's other Rules, including Rules that govern appeals of the Exchange's membership and other decisions, will render the Exchange's investigative, disciplinary, and adjudicatory processes substantially the same as those, not only of BX, but also of other Nasdaq, Inc. family of exchanges (the "Nasdaq, Inc. Exchanges").<sup>7</sup> The proposal change will also further harmonize the work that the Financial Industry Regulatory Authority ("FINRA") conducts for all these exchanges.

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<sup>4</sup> The Exchange proposes to add Chapters 23-79 and Chapters 81-89 to its Rules, but reserve such Chapters for future use.

<sup>5</sup> Citation herein to rules of the proposed Chapters 80 and 90 will be preceded by the term "BX Rule" to reflect incorporation of the BX Rule 8000 and 9000 Series. References to current rules will be preceded by the term "Existing Rule."

<sup>6</sup> The Exchange proposes to separately request an exemption from the rule filing requirements of Section 19(b) of the Act for changes to Chapters 80 and 90 to the extent such rules are effected solely by virtue of a change to the BX Rule 8000 and 9000 Series.

<sup>7</sup> The Exchange notes that the BX Rule 8000 and 9000 Series are substantially similar to corresponding rules of The Nasdaq Stock Market, LLC ("Nasdaq") and Nasdaq PHLX, LLC ("Phlx"). Moreover, the Exchange notes that Nasdaq MRX, LLC and Nasdaq GEMX, LLC will propose similar changes to their respective investigatory and disciplinary processes and associated rules that will render them substantially similar to those of BX.

## **Overview of the Exchange’s Existing Investigatory, Disciplinary, and Adjudicatory Processes and Rules**

The existing processes for investigating and disciplining Exchange Members<sup>8</sup> and Associated Persons,<sup>9</sup> for taking summary action against them, and for adjudicating Exchange actions that aggrieve them, are set forth in Existing Chapters 15-17 of the Exchange’s Rulebook.

With respect to investigations, Existing Rule 1602 authorizes the Exchange’s regulatory staff (hereinafter described in this filing, for consistency with the BX rules, as “Regulation Department” or “Exchange Regulation Department”)<sup>10</sup> to investigate Members and Associated Persons based on information it receives from a variety of sources, such as surveillance reviews, examinations, industry notifications, third party complaints, and referrals.<sup>11</sup> Alternatively, the Rule provides that the Exchange may, and it typically does, refer such investigatory matters to FINRA.

FINRA performs, among other things, investigatory and prosecutorial work for the Exchange pursuant to a Regulatory Services Agreement between the two parties (the “RSA”).<sup>12</sup> Under the RSA, FINRA is responsible<sup>13</sup> for the investigation of potential

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<sup>8</sup> As defined in Existing Rule 100(a)(30).

<sup>9</sup> As defined in Existing Rule 100(a)(4).

<sup>10</sup> The Exchange notes that the scope of its Regulation Department is the same as that of the BX Regulation Department.

<sup>11</sup> Existing Rule 1601 obligates each Member and Associated person to comply with investigatory requests by the Exchange (or FINRA, acting on its behalf) for testimony, or for written information or documentary materials.

<sup>12</sup> See RSA, dated June 10, 2013, as amended. The Exchange retains ultimate legal responsibility for the regulation of its Members, persons associated with its Members, and its market. See Existing Rule 1615 and its Supplementary Material.

violations of the Exchange Rules and the Act, and for the prosecution of any such violations thereof, by Exchange Members and Associated Persons.<sup>14</sup> Upon completion of an investigation, FINRA analyzes the evidence and applicable law, and makes preliminary determinations, known as “Sufficiency of Evidence” reviews, as to whether or not violations have occurred.<sup>15</sup> The Sufficiency of Evidence review determines the nature of FINRA’s recommendation to the Exchange’s Chief Regulatory Officer (“CRO”) as to whether and how to proceed further with matters. If probable cause exists that a Member or Associated Person has violated the Exchange Rules or the Act, then the Regulation Department may file charges against the Member or Associated Person for adjudication before a Current Hearing Panel.<sup>16</sup> A Current Hearing Panel consists of a professional hearing officer and two members of the Exchange’s BCC.

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<sup>13</sup> Although Existing Rule 1615 and its Supplementary Material authorizes the Exchange to contract with FINRA or another self-regulatory organization (“SRO”) to perform its disciplinary functions, the Existing Rule states that the Exchange retains ultimately legal responsibility for and control over such functions.

<sup>14</sup> Under the RSA, ISE’s Regulation Department may elect to exercise jurisdiction over a matter involving an ISE Member or an Associated Person, performing the investigation and any resulting prosecutorial work without FINRA’s involvement.

<sup>15</sup> See FINRA Regulatory Notice 09-17 (March 2009) (available at <http://www.finra.org/sites/default/files/NoticeDocument/p118171.pdf>).

<sup>16</sup> Both the Existing Rules and the BX Rules refer to their respective disciplinary adjudication panels as “Hearing Panels.” In the discussion that follows, the Exchange distinguishes between these two types of panels, which differ from one another substantively, by referring to the type of panel that exists under the Existing Rules as a “Current Hearing Panel” and the panel that the Exchange proposes to establish under the BX Rules as a “New Hearing Panel.” For purposes of the following discussion, the term New Hearing Panel shall also refer to an “Extended Hearing Panel,” as that term is defined in BX Rule 9120(l).

Currently, the BCC is charged with enforcing the Rules of the Exchange with respect to Members and Associated Persons. The BCC is a committee, established by the Board,<sup>17</sup> whose enforcement jurisdiction includes the following: (1) ordering investigations of possible Rule violations; (2) considering letters of consent in expedited disciplinary actions; (3) making its members available to serve on Current Hearing Panels that adjudicate formal disciplinary proceedings; (4) imposing sanctions on Members or Associated Persons in disciplinary proceedings (“Respondents”); (5) reviewing Exchange actions involving minor rule violations; (6) appointing panels to conduct hearings and reviews of Exchange actions that deny membership or Member association privileges; and (7) generally overseeing all matters relating to the conduct of disciplinary hearings and hearings for review of Exchange decisions, and providing the Exchange with advice for improving disciplinary procedures.<sup>18</sup>

The Existing Rules provide several means by which the Exchange may pursue disciplinary actions.

First, Existing Rule 1603 permits informal disposition of disciplinary matters through “letters of consent.” The Existing Rule states that disciplinary matters are disposable in this manner if: (1) the Parties agree to the terms of such a letter, including any sanctions imposed therein; (2) the CRO approves of the draft letter; and (3) the BCC subsequently approves of the draft letter. If the Parties to the letter cannot reach agreement to its terms, or if the CRO or BCC reject it, then the disciplinary matter proceeds through formal channels.

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<sup>17</sup> See Resolution of the Board of Directors of the International Securities Exchange LLC Delegating Authority, dated May 11, 2000.

<sup>18</sup> See ISE Business Conduct Committee Charter, as amended, May 1, 2003.

Second, Existing Rules 1604 -1613 provide for formal adjudication of disciplinary matters. These Existing Rules state that, whenever probable cause exists for finding that a Member or Associated Person has committed a violation within the disciplinary jurisdiction of the Exchange, regulatory staff may prepare a “statement of charges,” subject to the approval of the CRO. The Existing Rules further provide for Current Hearing Panels to adjudicate disciplinary matters. Current Hearing Panels are composed of a professional hearing officer, who serves as the Current Hearing Panel Chair, and two members of the BCC. The Existing Rules provide for the Parties to a disciplinary proceeding to receive at least 28 calendar days’ notice prior to the occurrence of a hearing. They also provide for a pre-hearing conference to expedite disciplinary proceedings by, among other things, seeking the Parties’ agreement regarding undisputed facts. They permit non-Parties to proceedings to intervene, under certain circumstances, and they grant the Current Hearing Panel Chair broad discretion to determine the course of the proceedings, including with respect to timing, filing deadlines, if not specified in the Rules, and evidentiary matters. They generally prohibit interlocutory review of Current Hearing Panel decisions as well as ex parte communications among Members and Associated Persons and Panelists, the BCC, or the Board concerning the merits of a disciplinary matter. They require Current Hearing Panels to issue their decisions by majority vote and in writing.

Existing Rule 1608 permits Current Hearing Panels to engage in summary disciplinary proceedings, meaning that they may reach decisions and impose penalties without holding hearings as to violations that Respondents admit, do not dispute, or fail to answer. The Rule provides, in such instances, that Respondents have 10 calendar days

following service of such summary decisions to request hearings as to matters not previously admitted or to contest the penalties imposed.

Existing Rule 1609 sets forth procedures for settlements of disciplinary matters. The Rule generally provides that a Party may submit up to two written “offers of settlement” at any time period prior to 120 calendar days following service of the statement of charges. Settlements must be approved by the Current Hearing Panel (or the CRO if a Current Hearing Panel has yet to be appointed).

Pursuant to Existing Rule 1610, Respondents may appeal Current Hearing Panel decisions to the Board. The Rule also permits the Board to review Current Hearing Panel decisions upon its own initiative within 30 calendar days after service of such decisions. The Rule permits the Board to delegate responsibility for its review to a committee composed of at least three of its Directors whose decision must be ratified by the Board. The Board may affirm, reverse, or modify decisions of Current Hearing Panels, and such Board decisions are final.

Third, Existing Rule 1614 provides for the disposition of certain minor disciplinary violations through the summary assessment of fines.<sup>19</sup> This Rule comprises violations of the Rules listed in Rule 1614(d) and that are set forth in the Exchange’s Minor Rule Violation Plan (“MRVP”) approved by the Commission pursuant to SEC Rule 19d-1 (“MRVP violations”) as well as violations that are not included in the Exchange’s MRVP but may be considered “minor” in nature (“minor rule violations”)

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<sup>19</sup> Generally, notice to the SEC of final disciplinary action by an SRO is required pursuant to Rule 19d-1 of the Act; however, uncontested fines of \$2,500 or less assessed for violations of MRVP rules are subject to abbreviated periodic SEC reporting. None of the fines assessed in lieu of formal disciplinary action exceed \$5,000.

and thus possibly resolved outside of the formal disciplinary process.<sup>20</sup> Existing Rule 1614(a) sets forth the Exchange's general authority to assess such fines in amounts no greater than \$5,000 (up to \$2,500 for MRVP violations, and up to \$5,000 for minor rule violations). Existing Rule 1614(b) sets forth the notice requirements for service upon the Member or person against which the fine is to be levied (a "Subject"). The Existing Rule requires the Exchange to serve notice upon the Subject, along with a written statement that describes the nature of the alleged violation and the basis for finding that the Subject committed the violation, the amount of the fine to be imposed for each violation, and a date, not less than 30 calendar days after service of the notice, by which such determination becomes final and such fine must be paid or contested.

Under Existing Rule 1614(c), a Subject may contest the fine by filing an answer to this written determination prior to the date when the fine is payable. Additionally, the Subject may request a hearing as part of the answer.<sup>21</sup> The Rule charges the BCC, or a subcommittee thereof, with adjudicating contested fines. The BCC may decide to overturn, affirm, or modify fines levied by the Exchange.<sup>22</sup> A Subject or the Exchange staff may appeal such determinations to the Board, and the Board may also call the matter for review on its own initiative.<sup>23</sup>

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<sup>20</sup> Determinations to issue a fine under Rule 1614 are made on a case-by-case basis, whereby the Exchange considers the individual facts and circumstances to determine whether a fine of more or less than the recommended amount is appropriate for the violation, or whether the violation requires formal disciplinary action.

<sup>21</sup> Existing Rule 1614(c).

<sup>22</sup> See id.

<sup>23</sup> See id.

Existing Rule 1614(d) sets forth the list of violations and a corresponding schedule of fines that the Exchange may impose and disciplinary actions it may pursue for MRVP violations and minor rule violations.<sup>24</sup> They include the following:

- Violations of Rule 412 pertaining to position limits (with fines ranging from \$500 for the first offense within any 24 month rolling period to \$5,000 for the fourth and subsequent offenses within the same period);
- Violation of Rule 1403 for failing to file focus reports (with sanctions ranging from a \$200 fine for delinquencies of up to 30 calendar days and formal disciplinary action for delinquencies of 90 or more calendar days);
- Failing to make timely responses to requests for trade data in violation of Rule 1404 (with sanctions for the first offense ranging from a \$200 fine for delinquencies of up to 9 business days to formal disciplinary action for delinquencies of 30 or more business days, and sanctions for subsequent offenses ranging from a \$500 fine for the second offense to formal disciplinary action beginning with the fifth offense);
- Violating Rule 717(d) and (e) regarding limits on orders entered by Electronic Access Members (with a letter of caution for the first five offenses within one calendar year, fines escalating from \$500 to \$2,000 for the sixth through the twentieth offenses within the same period, and formal disciplinary action thereafter);
- Violations of Rule 803 and 805(b)(1)(i) regarding pre- and post-opening quote spread parameters for market maker quotations (with a letter of

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See n.20, infra.

caution for the first offense within any 24 month rolling period, fines escalating from \$1,000 to \$5,000 for the second through the fourth offenses within the same period, and formal disciplinary action thereafter);

- Violations of Rule 805, which requires market makers to execute in appointed options classes a minimum percentage of the total number of contracts executed during a quarter (with a letter of caution for the first offense within any 12 month rolling period, fines escalating from \$500 to \$2,500 for the second through the fourth offenses within the same period, and formal disciplinary action thereafter);
- Failure to conduct mandatory systems testing in violation of Rule 419 (with fines escalating from \$250 to \$2,000 for the first through the fourth offenses within one calendar year, and formal disciplinary action thereafter);
- Failure to timely submit information or instructions regarding the exercise or non-exercise of noncash-settled equity options in violation of Rule 1100 (with fines for member organizations<sup>25</sup> escalating from \$1,000 for the first offense within any 24 month rolling period to \$5,000 for the third and subsequent offenses within the same period, and for individuals, from \$500 for the first offense within any 24 month rolling period to \$2,500 for the third and subsequent offenses within the same period);

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The Exchange notes that it proposes to amend the term “Member Organization” so that it merely reads “Member.” These terms are synonymous.

- Failure to accurately report positions and account information in violation of Rule 415 (with fines escalating from \$500 for the first offense within any 24 month rolling period to \$5,000 for the fourth and subsequent offenses within the same period); and
- Failure of a market maker to enter continuous quotations for the option classes to which it is appointed in violation of Rule 804(e) (with fines ranging from a letter of caution for the first offense within any 24 month rolling period, to fines ranging from \$1,000 to \$5,000 for the second through fourth offenses within the same period, and formal disciplinary actions beginning with the fifth offense).<sup>26</sup>

As explained below, the Exchange proposes to retain but renumber Existing Rule 1614(d) insofar as the Exchange's MRVP and schedule of minor violations are unique to

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<sup>26</sup> As explained below, the Exchange also proposes to retain Existing Rule 1600, which sets forth the general jurisdiction of the Exchange with respect to disciplinary matters. Existing Rule 1600 states that a Member or Associated Person who is alleged to have violated or aided and abetted a violation of the Act, the rules and regulations promulgated thereunder, and the By-Laws or Rules of the Exchange, or any interpretation thereof are subject to the disciplinary jurisdiction of the Exchange and may be, after notice and opportunity for a hearing, appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a Member, or any other fitting sanction in accordance with the provisions of the disciplinary rules. It also permits the Exchange to charge a supervisor with a violation of a rule within the disciplinary jurisdiction of the Exchange committed by an employee under his supervision or by the Member as though such violations were his own. Finally, it extends the disciplinary jurisdiction of the Exchange to continue after deregistration of the Member from the Exchange or a person's termination of association with a Member as to matters that occurred prior to such termination or deregistration. The Exchange must serve written notice to the former Member within one year of receipt by the Exchange of notice of such termination or deregistration that the Exchange is making inquiry into a matter or matters.

it. The Exchange cannot and does not seek to simply incorporate by reference the BX MRVP.

Existing Rule 1615 and its Supplementary Material authorizes the Exchange to contract with FINRA or another SRO to perform its disciplinary functions, but the Existing Rule states that the Exchange retains ultimately legal responsibility for and control over such functions.

Existing Rule 1616 authorizes and prescribes the process for adjudicating expedited client suspensions that may be imposed upon Members or Associated Persons that violate the prohibition in Existing Rule 403 on disruptive quoting and trading activity. Existing Rule 1616 states that the initiation of expedited suspension proceedings requires the prior written authorization of the CRO or his designees. It requires the Exchange to provide prior notice to the Respondent as well as to convene a Current Hearing Panel to adjudicate the matter. The Existing Rule provides that such hearings are to be administered generally in accordance with Existing Rule 1606. If a Respondent fails to appear at a hearing for which it receives proper notice, the Existing Rule states that the Current Hearing Panel may issue a suspension order without further proceedings, while the failure of the Exchange to appear may result in the dismissal of the suspension proceeding. Existing Rule 1616(d) requires a Current Hearing Panel to issue a written decision as to whether to order suspension not later than 10 days after receiving the hearing transcript. It further provides that a Panel may issue an order imposing suspension only if it finds, by a preponderance of the evidence, that the alleged violation specified in the notice occurred. At any time after a Respondent is served with a suspension order, a Party may apply to the Current Hearing Panel to modify, set aside,

limit, or revoke the order, and the Current Hearing Panel must respond to the request within 10 days after receipt thereof, unless extended. Finally, Existing Rule 1616(f) provides for the right of a Respondent to seek Commission review of a suspension order.

Chapter 15 of the Existing Rules states that the Board, a committee thereof, or an Exchange Official designated by the Board may summarily suspend a Member or an Associated Person that has been expelled or suspended from any other SRO or has been barred or suspended from being associated with a member of another SRO, if the Board, a committee thereof, or a designated Exchange Official determines that their ongoing transaction of business on the Exchange would compromise the safety of investors, creditors, other Members of the Exchange, or the Exchange itself.<sup>27</sup> On the same grounds, the Board, a committee thereof, or a designated Exchange Official may summarily suspend a Member if it is experiencing operational or financial difficulties and cannot continue doing business as a member with safety to investors, creditors, other Members, or the Exchange.<sup>28</sup> Furthermore, the Board, committee, or Exchange Official may limit or prohibit any person's access to services offered by the Exchange for these same reasons or, as to a Member, they may take such actions if they determine that such Member does not meet the qualification requirements or other prerequisites for access with safety to investors, creditors, Members, or the Exchange.<sup>29</sup> Chapter 15 provides for

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<sup>27</sup> See Existing Rule 1500.

<sup>28</sup> See id.

<sup>29</sup> See id.

the Exchange to notify the SEC upon imposing a summary suspension or when summarily limiting or prohibiting access to Exchange services.<sup>30</sup>

Chapter 15 provides that, following the imposition of a suspension or a limitation on or prohibition against accessing Exchange services, the Exchange will conduct an investigation of the affairs of the affected Member, Associated Person, or person.<sup>31</sup> A suspended, limited, or prohibited Member, Associated Person, or person must file with the Exchange a written statement covering all information that the Exchange may request in this regard, including a complete list of creditors and amounts owed to each as well as a complete list of positions in Exchange options contracts they maintain on their own behalf and that of their customers.<sup>32</sup>

Those subject to summary suspension or that are limited or prohibited with respect to access to Exchange services may petition for reinstatement within six months of their suspension, limitation, or prohibition, if they are suspended, limited, or prohibited due to operating difficulty, or within 30 days of suspension, limitation, or prohibition, if they are suspended, limited, or prohibited for reason of financial difficulty.<sup>33</sup> An applicant for reinstatement is afforded an opportunity for a hearing, in certain circumstances.<sup>34</sup> The Exchange may approve an application for reinstatement if it finds that the applicant is operationally and financially able to conduct their business with

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<sup>30</sup> See id.

<sup>31</sup> See Existing Rule 1501.

<sup>32</sup> See id.

<sup>33</sup> See Existing Rule 1502.

<sup>34</sup> See id.

safety to investors, creditors, Members, and the Exchange.<sup>35</sup> The failure of a suspended, limited, or prohibited Member to obtain reinstatement will result in disposition of membership, unless the Member sells or leases their membership.<sup>36</sup> Finally, Existing Rule 1504 provides that a Member suspended under Chapter 15 shall be deprived for all of the rights and privileges of being a Member of the Exchange during the period of suspension.

Lastly, Chapter 17 of the Existing Rules sets forth a procedure by which persons who are economically aggrieved by Exchange actions, including but not limited to those organizations whose applications for membership are denied, persons who are prohibited from becoming associated with a Member, and organizations and persons that are prohibited or limited with respect to the use of Exchange services or the services of Members, may seek review of such actions.<sup>37</sup>

Existing Rule 1701 provides that aggrieved persons must file written applications for hearing and review within 30 days of the occurrence of relevant Exchange actions, unless the Chair of the BCC grants, in writing, an extension of time to file an appeal.

Existing Rule 1702 provides for the BCC, or a panel comprised of at least three members thereof, to review applications. The BCC, or the panel, must set a hearing date and receive materials relevant to the proceeding at least 72 hours in advance of the hearing.

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<sup>35</sup> See id.

<sup>36</sup> See Existing Rule 1503.

<sup>37</sup> See Existing Rule 1700.

Existing Rule 1703 provides for intervention in a hearing by a third party under certain circumstances. Current Rule 1703 also authorizes the panel to determine all questions concerning the admissibility of evidence and to otherwise regulate the conduct of hearings. Finally, Existing Rule 1703 directs panels to render their decisions in writing and to include in such decisions the Panel's reasons for their conclusions.

Existing Rule 1704 states that panel decisions are subject to review by the Board (or a committee composed of at least three Directors thereof), either upon the Board's own motion (within 30 days of issuance of the decision), upon written request of the President of the Exchange (within 15 days after issuance of the decision), or upon written request by the applicant. The Board has discretion to grant requests for written or oral arguments before it. The Board may affirm, reverse, or modify the decision of the panel. A decision of the Board is a final Exchange Action.

Existing Rule 1705 governs the service of process for notices or other documents served pursuant to the proceedings set forth in Chapter 17 and the extension of time limits for the submission of answers, petitions, or other materials.

Existing Rule 1706 states that the Exchange may contract with another SRO to perform some or all of the functions specified in Chapter 17, provided that the Exchange shall retain ultimate legal responsibility for and control of such functions.

### **Overview of the Exchange Review Council and the BX Rule 8000 and 9000 Series**

The Exchange proposes to amend its By-Laws to replace the BCC with a new "Exchange Review Council." The Exchange also proposes, with limited exceptions described below, to delete in their entirety Chapters 15-17 of the Existing Rules, establish new Chapters 80 and 90 of the Exchange's Rulebook, and then incorporate by reference into Chapters 80 and 90 the BX Rule 8000 and 9000 Series, respectively. The principal

purpose of these proposals is to harmonize the Exchange’s disciplinary processes and Rules consistent with those of its sister exchanges, including not only BX, but also Nasdaq and Phlx.

Broadly speaking, the BX Rules and processes will be similar to the existing ones. Both provide processes for informal resolution and formal adjudication of disciplinary matters. Both set forth procedures that are designed to provide due process to Members and Associated Persons, including fair notice of allegations and proceedings, opportunities to be heard and to present and rebut arguments and evidence before hearing panels, and opportunities to appeal adverse determinations made by such panels.

However, in a number of respects, the new Rules and processes will differ from the existing ones. One key difference concerns the role that FINRA will play in the new regime. Not only will FINRA continue to assist the Exchange in investigating matters under the BX Rules, through FINRA’s Department of Enforcement and Department of Market Regulation (collectively, the “Departments”)<sup>38</sup> but it will also assist in the adjudication of matters. Specifically, the adjudicatory functions of the BCC and Current Hearing Panels will be administered by FINRA’s Office of Disciplinary Affairs (“ODA”) and Office of Hearing Officers (“OHO”), respectively.<sup>39</sup> The ODA and OHO are offices within FINRA that are independent of the FINRA enforcement function and not involved

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<sup>38</sup> The Departments are authorized to act on behalf of BX in investigating and administering disciplinary matters pursuant to the RSA, and will do the same for the Exchange upon adoption of the new process.

<sup>39</sup> See FINRA Rule 9211(a); see also BX Rule 9211(a). The Exchange notes, however, that the Board may direct the ODA to authorize a complaint when, on the basis of information and belief, it is of the opinion that a Member or Associated Person has committed a violation which the Exchange has jurisdiction to enforce. See BX Rule 9211(a)(2).

in investigating or litigating cases. The ODA will review each proposed complaint to determine the legal and evidentiary sufficiency of proposed charges as well as proposed settlements, in certain instances.<sup>40</sup> A recommendation proposed by the Departments or the Exchange’s Regulation Department in a matter involving formal disciplinary action will require approval by the ODA. Going forward, the ODA will authorize (pursuant to a request by the Exchange’s Regulation Department or the Departments) the issuance of a complaint.<sup>41</sup> The OHO, in turn, will be responsible for convening and administering New Hearing Panels in lieu of the Exchange’s Current Hearing Panels.

Another key difference involves the replacement of the BCC with the Exchange Review Council. The Exchange Review Council, as the successor to the BCC, will play a more limited role in disciplinary matters than does the BCC presently. As to disciplinary matters, the Exchange Review Council will not be responsible for approving the issuance of complaints (formerly, statements of charges) or routinely approving<sup>42</sup>

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<sup>40</sup> Pursuant to BX Rule 9270, proposed settlements must be submitted to and accepted by the Exchange Review Council, except that proposed settlements involving an affiliate of the Exchange must be reviewed by the ODA. BX Rule 9216(a) provides that proposed letters of acceptance, waiver, and consent must be submitted to and accepted by either the ODA, the Review Subcommittee, or the Exchange Review Council.

<sup>41</sup> BX Rule 9211(a) also provides that the Board has authority to direct the issuance of a complaint.

<sup>42</sup> Under BX Rule 9216(a), the ODA or a Review Subcommittee of the Exchange Review Council may accept or refer letters of acceptance, waiver, and consent to the Exchange Review Council for approval or rejection. The Review Subcommittee can also reject such letters. Similarly, under BX Rule 9270, a Review Subcommittee of the Exchange Review Council may accept, reject, or refer offers of settlement to the Exchange Review Council for approval or rejection (except where the offer of settlement involves an affiliate of the Exchange, in which case the ODA must decide whether to accept or reject the offer). As a practical matter and based upon the experiences of Nasdaq and BX,

letters of acceptance, waiver, and consent or offers of settlement. Instead, the Exchange Review Council will function principally as an intermediate appellate body for decisions rendered by the New Hearing Panels. As to non-disciplinary matters, the Exchange Review Council will assume regulatory responsibilities that currently rest with various panels, including reviews of staff determinations made as to obvious errors.

Other noteworthy differences between the Existing Rules and the BX Rules and processes include the following:

- The BX Rules generally include more comprehensive rights and detailed procedures for, among other things, discovery and service of process than do the Existing Rules.
- As to the assessment of fines for violations of the Exchange's MRVP or other minor rule violations, the BX Rules do not authorize the issuance of minor rule violation letters or the imposition of fines of more than \$2,500.<sup>43</sup> Should a Respondent fail to consent to the imposition of a fine or if the Review Subcommittee or the Exchange Review Council reject the terms of an MRVP or minor rule violation letter, then the matter will proceed through formal disciplinary channels. The BX Rules do not allow for a fine to be reversed, modified or affirmed, prior to formal disciplinary proceedings.

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the Exchange expects such referrals to the Exchange Review Council to occur infrequently.

<sup>43</sup> As the Exchange discusses below, the Exchange proposes to retain certain of its Existing Rules to preserve its existing authorities with respect to minor rule violations, the issuance of minor rule violation letters, and the imposition of fines for such minor rule violations of up to \$5,000.

The following is a more detailed overview of each of the Exchange's proposals.

Overview of the Exchange Review Council

The Exchange proposes to retire the BCC<sup>44</sup> and to amend its By-Laws to establish in its place an Exchange Review Council. The amended By-Laws that the Exchange proposes to adopt in this regard are substantially the same as those that BX adopted to establish the BX Exchange Review Council.<sup>45</sup> Thus, the By-Laws provide for the Exchange Review Council to have the same general structure and powers as does the BX Exchange Review Council.<sup>46</sup> The proposed By-Laws will authorize the Exchange

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<sup>44</sup> In a May 11, 2000 resolution, the Exchange Board delegated its authority to the President of the Exchange to establish a BCC to, among other things, conduct disciplinary hearings under Chapter 16 of the Existing Rules and conduct other hearings and reviews as set forth in Chapter 17 of the Existing Rules. On February 1, 2017, the Board passed a resolution that both revoked the President's authority to establish a BCC and authorized the establishment of an Exchange Review Council, effective upon the date when this rule filing becomes operative.

<sup>45</sup> The BX by-laws differ from the proposed Exchange By-Laws because the BX by-laws have a different numbering convention from the Exchange's By-Laws and, in various places, the BX by-laws refer to a Listing and Hearing Review Council, which has no analogue with respect to the Exchange.

<sup>46</sup> The BX by-laws do not describe in detail the process of the proceedings over which the BX Exchange Review Council presides. However, Section 7.9 of the BX by-laws state that a quorum of three BX Exchange Review Council members is necessary to adjudicate appeals of determinations made under BX Rules 4612 (appeal of denial of registration as an Equities Market Maker), 4619 (review of denial of an excused withdrawal of Equities Market Maker quotation), 4620 (appeal of denial of reinstatement of Equities Market Maker that accidentally withdraws), 11890 (appeal of clearly erroneous transaction determination), and BX Options Chapter V, Section 6 (appeal of obvious error determination). See BX by-laws, Article VII, Section 9. The Exchange's Rules do not have analogues to BX Rules 4612, 4620, and 11890 and, as such, the corresponding provision of the Exchange's proposed By-Laws (Article VII, Section 9) provides only that a quorum of three Exchange Review Council members is necessary for it to adjudicate appeals involving determinations made under Rules 720 (appeal of obvious error determination), 720A (appeal of determinations of erroneous trades due to system malfunctions and disruptions), and 804 (review of denial of an excused withdrawal of market maker quotation).

Review Council to adjudicate disciplinary actions and approve settlements thereof as well as make recommendations to the Board on certain policy matters and rule changes. Such policy functions of the Exchange Review Council render its jurisdiction broader than that of the BCC.

Specifically, proposed Article VI, Section 1 of the proposed By-Laws provides that the Exchange Review Council may be authorized to act for the Board with respect to: an appeal or review of a disciplinary proceeding, a statutory disqualification proceeding, or a membership proceeding; a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; the exercise of exemptive authority; and such other proceedings or actions as may be authorized by the Exchange rules. The Exchange Review Council also may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and Associated Persons and enforcement policies, including policies with respect to fines and other sanctions. It may advise the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices and it may advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Exchange Members' conduct and trading activities in the Exchange.

Proposed Article VI, Section 2 states that the Exchange Review Council would consist of no fewer than eight and no more than 12 members. The Exchange Review Council must include a number of Member Representative members<sup>47</sup> that is equal to at least 20% of the total number of members of the Exchange Review Council. The number

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<sup>47</sup> See n.52, infra.

of Non-Industry members,<sup>48</sup> including at least three Public members,<sup>49</sup> shall equal or exceed the sum of the number of Industry members<sup>50</sup> and Member Representative members. As soon as practicable, following the appointment of members, the Exchange Review Council shall elect a Chair from among its members. The Chair shall have such powers and duties as may be determined from time to time by the Exchange Review Council. The Board, by resolution adopted by a majority of Directors then in office, may remove the Chair from such position at any time for refusal, failure, neglect, or inability to discharge the duties of Chair. No more than 50% of the members of the Exchange Review Council shall be engaged in market making activity or employed by an Exchange Member firm whose revenues from market making activity exceed 10 percent of its total revenues.

Proposed Article VI, Section 3 requires the Exchange's Secretary to collect from each nominee for the office of member of the Exchange Review Council such information as is reasonably necessary to serve as the basis for a determination of the nominee's qualifications and classification as an Industry, Member Representative, Non-Industry, or Public member. The Secretary must also certify to the Nominating Committee or the Member Nominating Committee<sup>51</sup> (as applicable) each nominee's qualifications and classification. After appointment to the Exchange Review Council, each member must update such information at least annually and upon request of the

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<sup>48</sup> See id.

<sup>49</sup> See id.

<sup>50</sup> See id.

<sup>51</sup> The terms "Nominating Committee" and "Member Nominating Committee" are defined in Exchange By-Laws, Article I.

Exchange's Secretary, and must report immediately to the Secretary any change in such information.

Proposed Article VI, Section 4 provides that Exchange Review Council members shall serve three-year terms, or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason by death, resignation, removal, disqualification, or other reason. Members are term limited out after two consecutive terms. Proposed Article VI, Section 5 sets forth the procedures for resigning as a member of the Exchange Review Council and provides that an Exchange Review Council member may resign at any time upon written notice to the Board. Under proposed Article VI, Section 6, any member of the Exchange Review Council may be removed from office at any time for refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the Board.

Under proposed Article VI, Section 7, an Exchange Review Council member would be disqualified and removed immediately upon a determination by the Board, by a majority vote, that: (a) the member no longer satisfies the classification (Industry, Member Representative, Non-Industry, or Public) for which the member was elected; and (b) the member's continued service as such would violate the compositional requirements of the Exchange Review Council set forth in Article VI, Section 2. If the term of office of an Exchange Review Council member terminates under this Section, and the remaining term of office of such member at the time of termination is not more than six months, during the period of vacancy the Exchange Review Council shall not be deemed to be in violation of Article VI, Section 2 by virtue of such vacancy. Proposed Article VI, Section 8 contains provisions for the filling of vacancies on the Exchange Review

Council and states that if a position on the Exchange Review Council becomes vacant, the Nominating Committee or the Member Nominating Committee (as applicable) shall nominate, and the Board shall appoint a person satisfying the qualifications for the position as provided in Article VI, Section 2 to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

Proposed Article VI, Section 9 provides that a quorum of the Exchange Review Council will consist of a majority of its members, including not less than 50% of its Non-Industry members and one Member Representative member. Proposed Article VI, Section 10 contains provisions related to the meetings of the Exchange Review Council.

Under proposed Article VI, Section 11, the Exchange Review Council is required to establish a Review Subcommittee to determine whether disciplinary and membership proceedings decisions should be called for review by the Exchange Review Council under the disciplinary and membership rules to be proposed for the Exchange. The Review Subcommittee shall be composed of no fewer than two and no more than four members of the Exchange Review Council. The number of Non-Industry members of the Review Subcommittee shall equal or exceed the sum of the number of Industry members and Member Representative members of the Review Subcommittee, and the subcommittee must include at least one Member Representative member. At all meetings of the Review Subcommittee, a quorum for the transaction of business shall consist of not less than 50 percent of the members of the Review Subcommittee, including not less than 50 percent of the Non-Industry members of the Review Subcommittee and one Member

Representative member of the Review Subcommittee.<sup>52</sup>

The BX Rules implement the foregoing responsibilities of the Exchange Review Council by establishing various procedures, described below, to govern its reviews. As the Exchange also describes in further detail below, the Exchange proposes to transfer to the Exchange Review Council (or panels thereof) certain responsibilities currently vested in other Exchange committees or the Board. For example, pursuant to Existing Rule 720, an Obvious Error Panel (“OEP”) is presently responsible for reviewing determinations regarding obvious and catastrophic errors. Pursuant to Existing Rule 720A, a “Review Panel” is responsible for reviewing determinations to nullify or adjust transactions that arise from system disruptions and malfunctions. The Exchange is proposing to eliminate the OEP and the Review Panel and to transfer their responsibilities to a panel of the new Exchange Review Council, which corresponds to the practice of BX. Subject to Chapter 90, the Exchange also proposes to transfer responsibility to the Exchange Review Council to review denials or conditions imposed upon those that seek to become or remain a Member of the Exchange or become or remain associated with a Member of the

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<sup>52</sup> In addition to adding Article VI to the By-Laws, the Exchange proposes to make changes to other articles of the By-Laws to accommodate the existence of the Exchange Review Council. For example, the Exchange proposes to amend Article I, which defines the terms that the Exchange uses in the By-Laws, to provide that the terms “Industry member,” “Member representative member,” “Non-industry member,” and “Public member” mean, in part, members of the Exchange Review Council. The Exchange also proposes to amend Article III, Section 6, to add a new subsection (a) that directs the Board to appoint an Exchange Review Council, as provided in Article VI. It also proposes to amend Article III, Section 6(b) to state that the Nominating Committee and the Member Nominating Committee of the Board shall have responsibility for nominating members of the Exchange Review Council. Finally, the Exchange proposes to amend Sections 7 and 8 of Article III, which deal with Director conflicts-of-interest/self-interested transactions and Director compensation, respectively, to ensure that the restrictions and benefits that these provisions provide apply to Exchange Review Council members.

Exchange, as set forth in Existing Rule 302. Similarly, the Exchange proposes to transfer responsibility to the Exchange Review Council to review denials or conditions imposed upon Members that seek to transfer or sell market maker rights, as set forth in the Supplementary Material to Existing Rule 307.<sup>53</sup> In addition, the Exchange proposes to amend Existing Rule 804 to provide for the Exchange Review Council to review determinations regarding temporary withdrawals of quotations, which are not reviewable under the Existing Rules. The Exchange notes that BX vests in its Exchange Review Council responsibility for reviewing similar types of matters.<sup>54</sup>

#### The BX Rule 8000 Series

The Exchange proposes to incorporate by reference into a new Chapter 80 of its Rulebook the BX Rule 8000 Series. The BX Rule 8000 Series is entitled “Investigation and Sanctions,” and it governs the investigative process, including FINRA’s authority under the RSA to conduct investigations of Members and Associated Persons on behalf of the Exchange.

BX Rule 8001 states that the Exchange and FINRA are parties to the RSA, pursuant to which FINRA has agreed to perform certain functions on behalf of the

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<sup>53</sup> The Exchange notes that it proposes to establish procedures in Existing Rule 302 and Rule 307 to govern the review by the Exchange Review Council of adverse membership, association, or market maker sale or transfer determinations. The Exchange proposes to base these procedures upon those set forth BX Rules 1015 and 1016.

<sup>54</sup> See Securities Exchange Act Release No. 72149 (May 12, 2014), 79 FR 28564 (May 16, 2014) (SR-BX-2014-024).

Exchange. It also specifies, however, that the Exchange retains ultimate legal responsibility for, and control over the functions that FINRA performs on its behalf.<sup>55</sup>

BX Rule 8110 requires Members to keep and maintain copies of the NASD (now known as FINRA) and Exchange Manuals in readily accessible places and make them available for examination by customers upon request.

BX Rule 8120 sets forth definitions for the BX Rule 8000 Series.

BX Rule 8210 generally authorizes the Exchange's Regulation Department and FINRA, acting on the Exchange's behalf to require a Member, an Associated Person, or another person subject to the Exchange's jurisdiction to provide information orally, in writing or electronically, to provide testimony under oath, or to allow for the inspection of their books, records, and accounts, with respect to any matter associated with an investigation, complaint, examination, or proceeding of the Exchange or of other Self-Regulatory Organizations or regulators.

BX Rule 8211 requires a Member to submit certain specified trade data in an automated form, as the Regulation Department or FINRA may require or request.

BX Rule 8310 sets forth the Exchange's authority to sanction a Member or an Associated Person for violations of the federal securities laws, rules, or regulations thereunder, or the Exchange's Rules, as well as for neglect or refusal to comply with an order, direction, or decision issued under the Exchange Rules.<sup>56</sup> BX Rule 8310(a)

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<sup>55</sup> BX Rule 9001 also states that the Exchange has contracted with FINRA to perform some or all of the Exchange's disciplinary functions, while noting that the Exchange retains ultimate legal responsibility for and control of such functions.

<sup>56</sup> The Exchange proposes to retain Existing Rule 1600, which provides a more general statement of the Exchange's disciplinary authority than that which exists in BX Rule 8310. Existing Rule 1600 states that a Member or Associated Person

provides for sanction that include censure, fine, suspension of membership or registration of a person associated with a Member, expulsion or cancellation of membership or association, suspension or bar from association with all Members, temporary or permanent cease and desist order, or any other fitting sanction. BX IM-8310-1 precludes Members from allowing Associated Persons from remaining associated with them, even in a clerical or ministerial capacity, upon issuance of orders suspending, revoking, or cancelling the registration of such Associated Persons and it prohibits payment of any salary, commission, profit, or other remuneration such Associated Persons might have earned during their periods of suspension. BX IM-8310-3 states, in part, that the Exchange's Regulation Department shall release certain information to the public regarding disciplinary complaints and decisions and release, upon request, a copy of any complaint or disciplinary decision issued by the Exchange or any committee thereof.

BX Rule 8320 states that fines and other monetary sanctions shall be paid to the Treasurer of the Exchange. It authorizes the Exchange, after seven days written notice, to

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who is alleged to have violated or aided and abetted a violation of the Act, the rules and regulations promulgated thereunder, and the By-Laws or Rules of the Exchange, or any interpretation thereof are subject to the disciplinary jurisdiction of the Exchange and may be, after notice and opportunity for a hearing, appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a Member, or any other fitting sanction in accordance with the provisions of the disciplinary rules. It also permits the Exchange to charge a supervisor with a violation of a rule within the disciplinary jurisdiction of the Exchange committed by an employee under his supervision or by the Member as though such violations were his own. Finally, it extends the disciplinary jurisdiction of the Exchange to continue after termination of the Member from the Exchange or a person's termination of association with a Member as to matters that occurred prior to such termination. Staff must serve written notice to the former Member or Associated Persons within one year of receipt by the Exchange of notice of such termination that the Exchange is making inquiry into a matter or matters.

in part summarily suspend or expel Members if they are delinquent in paying sanctions or fines.

BX Rule 8330 states that a Member or an Associated Person disciplined pursuant to Rule 8310 shall bear the costs of disciplinary proceedings as the New Hearing Panels or the Board deem appropriate under the circumstances.

#### The BX Rule 9000 Series

The Exchange proposes to incorporate by reference into a new Chapter 90 of its Rulebook the BX Rule 9000 Series. The BX Rule 9000 Series is entitled “Code of Procedure,” and it governs proceedings for disciplining Members and Associated Persons, proceedings for regulating Members experiencing financial or operational difficulties, proceedings for summary or non-summary suspensions, cancellations, bars, prohibitions, or limitations, and proceedings for obtaining relief from the eligibility requirements of the Exchange By-Laws and the Exchange Rules.

#### *BX Rule 9100 Series*

The BX Rule 9100 Series describes the application and purpose of the BX Rule 9000 Series, including the types of proceedings covered by the BX Rules,<sup>57</sup> the rights, duties, and obligations of Members and Associated Persons,<sup>58</sup> defined terms,<sup>59</sup> and rules concerning the filing and service of papers.<sup>60</sup> The BX Rule 9100 Series also provides

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<sup>57</sup> See BX Rule 9110.

<sup>58</sup> Id.

<sup>59</sup> See BX Rule 9120.

<sup>60</sup> See BX Rules 9131 – 9138.

rules concerning proceedings, including appearance and practice,<sup>61</sup> withdrawal by attorney or representative,<sup>62</sup> ex parte communications,<sup>63</sup> separation of functions among adjudicators and interested staff,<sup>64</sup> rules of evidence and official notice,<sup>65</sup> motions,<sup>66</sup> rulings on procedural matters,<sup>67</sup> and interlocutory review.<sup>68</sup>

Specifically, BX Rule 9110 sets forth the general rights, duties, and obligations of Members and Associated Persons under the Code of Procedure, including the rights, in any disciplinary matter thereunder, to be presented with specific charges, to have a hearing, to have due notice thereof, to present a defense and relevant supporting material, to be represented by counsel, to have a record kept of proceedings, and to receive a written determination that sets forth the basis therefor.

BX Rule 9120 sets forth definitions of various terms used throughout the Rule 9000 Series.

The BX Rule 9130 Series governs the requirements for service of complaints and other written documents in connection with disciplinary proceedings. The BX Rule 9130 Series prescribes the timing and form of required service based on the type of the notice.

BX Rule 9134 concerns the permissible methods of service and the procedures for

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<sup>61</sup> See BX Rule 9141.

<sup>62</sup> See BX Rule 9142.

<sup>63</sup> See BX Rule 9143.

<sup>64</sup> See BX Rule 9144.

<sup>65</sup> See BX Rule 9145.

<sup>66</sup> See BX Rule 9146.

<sup>67</sup> See BX Rule 9147.

<sup>68</sup> See BX Rule 9148.

service. BX Rule 9134 permits personal service, service by U.S. Postal Service, or service by courier. BX Rules 9135 through 9138 set forth the form, format, and procedures for filing papers with adjudicators as well as the effect for a Party or its counsel or representative for affixing or failing to affix their signatures to such papers.

Other BX Rules govern service of notices and other documents in particular situations.<sup>69</sup>

BX Rule 9141 concerns appearances before adjudications in proceedings, both by Parties and by their attorneys and representatives. BX Rule 9141 permits a person to represent themselves in any proceeding as well as to be represented by others (pursuant to a notice of appearance), including a licensed attorney,<sup>70</sup> a member of a partnership (to represent a partnership), and a bona fide officer of a corporation, trust or association (to represent a corporation, trust or association).

BX Rule 9143(a) prohibits Parties, their representatives, or Interested Staff<sup>71</sup> from having ex parte communications with adjudicators or with Exchange staff who are

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<sup>69</sup> See, e.g., BX Rule 9360 (effective dates of bars, expulsions, and permanent cease and desist orders); BX Rule 9400 (various service requirements pertaining to expedited client suspension proceedings); BX Rule 9550 Series (various service requirements pertaining to: (1) suspensions for failures to provide information or keep information current; (2) suspensions and cancellations for failures to pay Exchange dues, fees, or other charges; (3) suspensions or cancellations for failures to comply with arbitration awards, settlements, or restitution orders or settlements; (4) suspensions, cancellations, or bars from membership or suspensions or bars from association with Members, or limitations or prohibitions of access to Exchange services; (5) suspensions, cancellations, and bars for failure to comply with cease and desist orders; (6) restrictions on Members' activities due to financial or operational difficulties; and (7) suspensions for actions authorized by Section 6(d)(3) of the Act).

<sup>70</sup> Pursuant to BX Rule 9142, an attorney or representative may withdraw from a proceeding for good cause, pursuant to written notice and at least 30 days prior notice.

<sup>71</sup> BX Rule 9120(t) defines “Interested Staff” to include certain enumerated Exchange or FINRA employees. The applicable employees who constitute

participating in or advising on a proceeding about the merits of the proceeding.<sup>72</sup> BX Rule 9143(b) also requires adjudicators participating in a proceeding to disclose and place in the record any written ex parte communications (or memoranda summarizing any oral ex parte communications) concerning the merits of the proceeding. BX Rule 9143(c) furthermore permits the Exchange Regulation Department or an adjudicator (consistent with the interests of justice, the policies, underlying the Act, and the Rules of the Exchange) to order any Party that violates the ex parte prohibition to show cause why the Party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such ex parte communication. BX Rule 9143(d) generally specifies that the ex parte prohibition applies beginning with the authorization of a complaint. Finally, BX Rule 9143(e) specifies circumstances in which a Party's claim as to a violation of the ex parte rules are waived, including when a Respondent submits an offer of settlement, an executed letter of acceptance, waiver, and consent, or an MRVP letter.<sup>73</sup>

BX Rule 9145 states that formal rules of evidence do not apply to proceedings brought under the BX Rule 9000 Series. It also permits adjudicators, after providing

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"Interested Staff" under this BX Rule vary depending upon the type of disciplinary proceeding at issue.

<sup>72</sup> BX Rule 9144(a) generally prohibits Interested Staff from advising adjudicators, and adjudicators from advising Interested Staff, with respect decisions of the other, including as to whether to file complaints, appeals or cross appeals. BX Rule 9144(b) also prohibits Hearing Officers and Panelists, absent waivers in certain circumstances, from participating in decisions as to whether to issue complaints, appeal or cross-appeal disciplinary proceedings to the Exchange Review Council, or call decisions for review.

<sup>73</sup> In the proposed introduction to Chapter 90, the Exchange states that the Exchange's procedure for handling MRVP letters, including as set forth in BX Rule 9143(e)(3), shall also apply to minor rule violation letters.

notice and an opportunity for a Party to comment or oppose, to take official notice of matters that may be judicially noticed by courts or of other matters within the specialized knowledge of the Exchange.

BX Rules 9146 through 9148 govern motion practice before adjudicators. BX Rule 9146 provides that the filing of a motion does not stay a proceeding, unless an adjudicator orders otherwise. It also provides that, unless otherwise ordered by an adjudicator, a Party may file an opposition or response to a written motion within 14 days after service of the motion and that, if the Party fails to do so, it shall be deemed to have waived its objection to the motion. However, BX Rule 9146 states that a moving Party is not entitled to file a reply to such an opposition or response, except at the discretion of the adjudicator. BX Rule 9146 also authorizes an adjudicator to permit oral arguments on motions and to summarily deny frivolous motions. It specifically provides for motions for protective orders. Finally, along with BX Rule 9147, BX Rule 9146 designates adjudicators for procedural and summary disposition motions at both the Hearing Panel and appellate levels. BX Rule 9148 specifies that there are no interlocutory reviews of rulings on motions or orders.

BX Rule 9150 authorizes an adjudicator to exclude from disciplinary proceedings an attorney for a Party or any other person authorized to represent a Party to the extent that the adjudicator deems said attorney or persons to be engaging in contemptuous conduct, under BX Rule 9280, or unethical or improper professional conduct. The BX Rule authorizes an attorney or person so excluded to seek review of their exclusion from the Exchange Review Council. Moreover, BX Rule 9150(b) states that even if it prohibits an attorney or other person authorized to represent others from practicing or

appearing in an Exchange proceeding, such action by the Exchange shall not preclude it from initiating other proceedings against such person.

BX Rule 9160 sets forth conditions for the recusal or disqualification of an adjudicator. Such conditions include a conflict of interest, bias, or other circumstances in which the adjudicator's fairness might reasonably be questioned. The Rule also designates those who are authorized to order the disqualification of Board Directors, members of the Exchange Review Council or committees thereof, or New Hearing Panels.

*The BX Rule 9200 Series*

The BX Rule 9200 Series sets forth the disciplinary process, providing rules concerning the issuance of a complaint, the briefing and hearings process, issuance of a decision and the settlement process. The BX Rule 9200 Series also governs permanent cease and desist orders.

BX Rule 9211(a)(1) states that if the Departments believe that a Member or an Associated Person has violated any law, rule, or regulation over which the Exchange has jurisdiction, then the Regulation Department or the Departments may request authorization from the ODA to issue a complaint. Likewise, BX Rule 9211(a)(2) states that the Board may direct the ODA to authorize and the Departments to issue a complaint when the Board is of the opinion that any Member or Associated Person has violated any law, rule, or regulation within the Exchange's jurisdiction. Unlike the Existing Rule, the BX Rules do not specify that "probable cause" or any other legal standard must be satisfied for the ODA to authorize issuance of a complaint.

BX Rule 9212 sets forth the requirements for the issuance of complaints. It states that if a complaint is authorized, the Departments shall issue it.<sup>74</sup> It furthermore states that complaints must be in writing and specify, in reasonable detail, the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision allegedly violated by such conduct.<sup>75</sup> The BX Rule provides that complaints must be signed by the Department of Enforcement or of Market Regulation and served by the Departments on the Parties in accordance with the Rules.<sup>76</sup> The BX Rules permit amendments to and withdrawals of complaints. As to amendments, BX Rule 9212(b) provides that the Departments may amend a complaint once, as a matter of course, at any time before the Respondent answers the complaint, and otherwise, upon a motion to the Hearing Officer, a showing of good cause, and a determination that the Respondent will suffer no unfair prejudice as a result of the amendment. As to withdrawals, BX Rule 9212(c) states that the Departments may withdraw a complaint with prior leave of the Hearing Officer. BX Rule 9212(d) provides for the docketing of complaints.

BX Rule 9214 governs the consolidation and severance of disciplinary proceedings. Unlike Existing Rule 1606(d), BX Rule 9214 does not permit a non-Party to intervene in disciplinary proceedings, but it does permit the consolidation of proceedings. Under the BX Rule, either the Hearing Officer may order or a Party may request consolidation of two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, or if the subject complaints

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<sup>74</sup> See BX Rule 9212(a)(1).

<sup>75</sup> See id.

<sup>76</sup> See id.

involve common questions of law or fact or one or more of the same Respondents. When determining whether to order the consolidation of such disciplinary proceedings, BX Rule 9214(a) requires the Chief Hearing Officer to consider whether the same or similar evidence reasonably would be expected to be offered at each of the hearings, whether the proposed consolidation would conserve the time and resources of the Parties, and whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation. If consolidation is ordered, BX Rule 9214(c) provides that the Chief Hearing Officer shall issue an order specifying which New Hearing Panel will preside over the consolidated proceedings or the Chief Hearing Panel shall appoint another New Hearing Panel to do so.

BX Rule 9215 requires a Respondent to file an answer to a complaint with the OHO within 25 days after service of the complaint (unless the Hearing Officer extends that deadline for good cause) and to state in such answer whether they admit, deny, or lack sufficient information to admit or deny each allegation made in the complaint. However, the BX Rule differs in certain respects from Existing Rule 1605, which governs answers to statements of charges. For example, it specifically authorizes a Respondent to file a motion for a more definite statement of the allegations set forth in the complaint as well as to amend the answer.<sup>77</sup> Although the BX Rule, similar to Existing Rule 1605, permits extensions of time to respond to an amended complaint, the BX Rule provides for the greater of the original remaining answer period or 14 days to do

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<sup>77</sup> See BX Rule 9215(c) and (d).

so, rather than 25 days.<sup>78</sup> Finally, instead of simply providing that a failure to file an answer shall be deemed to be an admission of the matters alleged, BX Rule 9215(f) requires the Departments to send a second notice to Respondents before they may impose sanctions, which may include, not only the admission of unanswered allegations, but also the issuance of default decisions pursuant to BX Rule 9269.

BX Rule 9216 sets forth procedures to informally dispose of matters, where appropriate. Specifically, BX Rule 9216 provides that the Departments may prepare and request that a Member or Associated Person execute a letter of acceptance, waiver, and consent (“AWC”) accepting a finding of a violation and consenting to the imposition of sanctions. Unlike Existing Rule 1603, which governs analogous “letters of consent,” the BX Rule provides that in executing an AWS letter, a Member or Associated Person is deemed to waive their rights to a hearing, to appeal, to otherwise challenge the terms of a letter, to claim bias or pre-judgment, or to claim violation of the ex parte prohibitions of BX Rule 9143. The BX Rule states that executed AWC letters are subject to approval by the ODA, the Exchange Review Council, or the Review Subcommittee and, if rejected, they may not be introduced into evidence in connection with any subsequent disciplinary hearing that occurs.

BX Rule 9216(b) concerns the process for assessing fines for MRVP violations.<sup>79</sup> Under BX Rule 9216(b), if the Departments have reason to believe that a Member or an Associated Person has violated certain specified Rules, then they may prepare an MRVP

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<sup>78</sup> If the Respondent files an answer before the complaint is amended, the Respondent receives 14 days to respond to the amended complaint. See BX Rule 9215(e).

<sup>79</sup> As discussed previously, the Exchange proposes to retain its existing MRVP fine schedule.

letter (for fines of up to \$2,500 for violations subject to the Exchange's MRVP plan) and request that the Member or Associated Person accept the letter and the fine set forth in it.<sup>80</sup> BX Rule 9216(b) provides that executed MRVP letters are to be submitted for approval to the Exchange Review Council. The Review Subcommittee or the ODA may accept such letters or refer them to the Exchange Review Council for acceptance or rejection. The Review Subcommittee may also reject such letters or refer them to the Exchange Review Council. If the letter is accepted, then it is deemed to be a final decision of the Exchange. If a Member or an Associated Person chooses not to consent to the issuance of an MRVP letter, or the Review Subcommittee or the Exchange Review Council rejects the letter, then the matter becomes subject to formal disciplinary adjudication.<sup>81</sup>

BX Rule 9216(b) will replace Existing Rule 1614, with three exceptions. First, the Exchange proposes to retain Existing Rule 1614(a), which sets forth its authority to impose fines of up to \$2,500 for MRVP violations and up to \$5,000 for minor rule violations (other than those subject to an MRVP), because BX Rule 9216(b) does not authorize the imposition of fines of up to \$5,000 for minor rule violations. Existing Rule 1614(a) also includes a sentence (that the BX Rules lack) clarifying that the Exchange has discretion to decide, on a case-by-case basis, whether to impose a fine for an MRVP

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<sup>80</sup> Pursuant to BX Rule 9216(b), if a Member or Associated Person agrees to execute an MRVP or a violation letter, they also agree to waive certain of their rights with respect to the alleged violations, including their rights to dispute the allegations or the validity of the letter, as well as to make claims of bias or pre-judgment, and to raise violations of the ex parte and separation of functions rules.

<sup>81</sup> Because the minor rule violation process proceeds only to the extent that a Member or Associated Person assents to the letter and its terms, there is no provision under the BX Rules, as there is under the Existing Rules, for a Member or Associated Person to contest a minor rule violation fine.

violation or a minor rule violation or whether instead to proceed with a formal disciplinary action under proposed Chapter 90. Second and relatedly, the Exchange proposes to include in its introduction to Chapter 90 a statement that the procedures set forth in BX Rule 9216(b) for handling MRVP violations and MRVP violation letters also apply to the handling of minor rule violations and minor rule violation letters, except that the Exchange will promptly report to the Commission any final Exchange action, in accordance with SEC Rule 19d-1(c)(1). Third, the Exchange proposes to retain Existing Rule 1614(d) (renumbered as Rule 1614(b)), which presently sets forth the Exchange's schedule of MRVP violations and minor rule violations and their associated fines. This schedule is particular to the Exchange and cannot be replaced summarily with the corresponding BX schedule, which is set forth in BX IM-9216. The Exchange will not incorporate by reference BX IM-9216.

The BX Rule 9200 Series sets forth the procedures of the Exchange for holding disciplinary hearings. Although the BX hearing rules are broadly similar to the Existing Rules, the BX Rules are more comprehensive and robust. One noteworthy difference between them is that under the Existing Rule 1606, a Respondent is entitled to a hearing as a matter of course, whereas under BX Rule 9221, a Respondent must affirmatively request a hearing in their answer or else, in absence of good cause shown, they are deemed to waive their right to one.<sup>82</sup> A Hearing Officer or the Hearing Panel may also call a hearing on their own initiative or the Hearing Panel may issue its decision on the record.<sup>83</sup> BX Rule 9221(d) provides for notice of a hearing to be given to the Parties at

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<sup>82</sup> BX Rule 9221(a) provides that any request by a Respondent for a hearing shall be granted.

<sup>83</sup> See BX Rule 9221(b)-(c).

least 28 days beforehand, but the BX Rule provides an exception if the Hearing Officer determines that extraordinary circumstances require a shorter notice period or the Parties waive the notice period.

BX Rule 9231(a) states that the Chief Hearing Officer of the OHO shall appoint a New Hearing Panel or an Extended New Hearing Panel<sup>84</sup> to conduct formal disciplinary procedures. BX Rule 9231(b) specifies that a New Hearing Panel, in most instances, is to be composed of a Hearing Officer and two Panelists,<sup>85</sup> that the Hearing Officer shall preside over the hearings, and that the Chief Hearing Officer is responsible for selecting the Panelists, who must be associated with a Members or retired therefrom.<sup>86</sup> BX Rule 9231(e) states that the Chief Hearing Officer may appoint a replacement Hearing Officer if the Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue

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<sup>84</sup> Like Extended New Hearing Panels, Extended Proceeding Committees are established for proceedings that involve unusually complex issues or will require an extended period of time to hear. Pursuant to BX Rule 9331(a)(2), members of Extended Proceeding Committees may be entitled to compensation at the rates then in effect for arbitrators appointed under the FINRA Rule 10000 Series.

<sup>85</sup> BX Rule 9120(z) defines the term “Panelist” as used in the Rule 9200 Series, the Rule 9550 Series, and the Rule 9800 Series, to mean a “member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer.” As used in the Rule 9300 Series, the term means a “current or former member of the Exchange Review Council or a former Director who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.” The Exchange will select Panelists in accordance the requirements set forth in BX Rules 9120(z) and 9231.

<sup>86</sup> BX Rule 9232 sets forth other criteria for the Chief Hearing Officer to use when selecting New Hearing Panels, including their level of expertise, the absence of any conflicts of interest or bias and any appearance thereof, their availability for service, and the frequency of their prior service on New Hearing Panels (with a preference towards providing opportunities for new or infrequently-serving individuals).

service after being appointed.<sup>87</sup> Meanwhile, BX Rule 9234 authorizes the Chief Hearing Officer to appoint new Hearing Panelists under similar circumstances. Like Existing Rule 1606(a)(3), BX Rules 9233 and 9234 provide for the recusal or withdrawal of Hearing Officers and Panelists with conflicts of interest or biases and their replacement by the Chief Hearing Officer. Unlike the Existing Rule, however, BX Rules 9233 and 9234 authorize a Party to file a request that Hearing Officers or Panelists be disqualified for such reasons.<sup>88</sup>

BX Rule 9241 governs pre-hearing conferences. BX Rule 9241(a) states that such conferences may be held to expedite proceedings, establish efficient procedures to manage proceedings, or to improve the quality of hearings through preparation. BX Rule 9241(b) states that pre-hearing conferences may be held upon the motion of the Hearing Officer or at the request of a Party. BX Rule 9241(c) provides that subjects for discussion at pre-hearing conferences may include, not only the simplification of issues for adjudication and the expedition of proceedings, but also the exchange of witness and exhibit lists and exhibits, the stipulation of the authenticity and admissibility of evidence, taking official notice of facts, the scheduling of pre-hearing motions or briefs, the method

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<sup>87</sup> BX Rule 9235(b) also authorizes the Chief Hearing Officer or his or her Deputy to exercise the authority of a Hearing Officer in his or her temporary absence.

<sup>88</sup> BX Rule 9233(b) permits a Party to move for the disqualification of a Hearing Officer not later than 15 days after the later of: (1) when the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Officer. Similarly, BX Rule 9234(b) permits a Party to move for the disqualification of a Hearing Panelist within 15 days after the later of: (1) when the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Panelist. BX Rule 9233(c) provides that the Chief Hearing Officer shall promptly investigate whether disqualification is required and issue a written ruling on the motion. BX Rule 9234 provides for a similar process for motions and decisions on motions to disqualify Hearing Panelists.

of service, the scheduling of hearing dates, any amendments to the complaint or answers, and the production of documents. Generally, under BX Rule 9241(d), initial pre-hearing conferences, unless determined by a Hearing Officer to be unnecessary or premature, shall be held within 21 days after the filing of an answer. BX Rule 9241(e) provides for agreements and procedural determination made during pre-hearing conferences to be recorded in orders issued by the Hearing Officer. Under BX Rule 9241(f), a Hearing Officer may issue a default decision against a Party that fails to appear at a pre-hearing conference, if the Party was provided due notice.

Additionally, prior to a hearing, BX Rule 9242 authorizes a Hearing Officer to order a Party to furnish information to all other Parties and to the New Hearing Panel that may include an outline or narrative summary of the Party's case or defense, the legal theories upon which a Party will rely, a list and copies of documents that the Party intends to introduce at the hearing, a list of witnesses that the Party intends to call to testify on their behalf and a summary of the expected testimony, and if a witness is to be called as an expert witness, a statement of the witness' expertise.

The BX Rule 9250 Series governs discovery during disciplinary proceedings. The BX Rule 9250 Series provides for more extensive discovery than that which exists under the Existing Rules. BX Rule 9251(a) generally provides that the Departments must make available to Respondents information and documents obtained in connection with the investigations that led to the institution of disciplinary proceedings, such as requests for information and documents, responses thereto, and all transcripts and exhibits. BX Rule 9251(b) permits the Departments to withhold certain documents from Respondents under certain circumstances, including to the extent that they are privileged, contain

attorney work product, constitute internal memoranda or examination reports, reveal examination or investigatory methods, the identities of confidential sources, or the existence of other prospective investigations or enforcement actions, or if the Hearing Officer grants leave to withhold a document.<sup>89</sup> The BX Rule does not permit the Departments to withhold from Respondents exculpatory evidence. The Hearing Officer may require the Departments to submit a list of withheld documents.<sup>90</sup> However, the Rule states that unless the Hearing Officer orders otherwise, the Departments generally must make documents available to a Respondent not later than 21 days after service of the Respondent's answer.<sup>91</sup> If the Departments fail to make documents or witness statements available to Respondents as required under BX Rule 9251, no rehearing or amended decision may be in order, unless the Hearing Officer determines that the failure was not harmless error.<sup>92</sup>

BX Rule 9252 provides for a process by which a Respondent may request that the Exchange invoke BX Rule 8210 to compel the production of documents or testimony at

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<sup>89</sup> BX Rule 9253 provides in part that, notwithstanding BX Rule 9251(b), a Respondent may file a motion requesting that the Departments produce witness statements or witness deposition transcripts. It provides that the failure to produce such materials shall not result in rehearing or an amended decision unless the Respondent establishes that the failure was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to provide any statement was not harmless error.

<sup>90</sup> See BX Rule 9251(c).

<sup>91</sup> See BX Rule 9251(d).

<sup>92</sup> See BX Rule 9251(g). The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Exchange Review Council, shall determine whether the failure to make the document available was not harmless error. See *id.*

the hearing. Pursuant to BX Rule 9252(a), such a request must be submitted to the Hearing Officer no later than 21 days before the hearing date. The request may be granted upon a showing that the information sought is relevant, material, and non-cumulative, that the requesting Party has been unsuccessful in obtaining the requested documents or testimony despite good faith attempts to do so, and that each of the persons for whom the documents and testimony are sought is subject to the Exchange's jurisdiction.<sup>93</sup> The Hearing Officer shall also consider whether the request is unreasonable, oppressive, excessive, in scope, or unduly burdensome, or whether it should be denied, limited, or modified.<sup>94</sup> If the Hearing Officer determines that a request is unreasonable, excessive, or unduly burdensome, he or she may deny the request or grant it only upon such conditions as fairness requires.<sup>95</sup> If the Hearing Officer grants the request, the Hearing Officer shall order that requested documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the documents or testimony shall be produced immediately to all Parties.<sup>96</sup>

Several BX Rules govern the hearing process. Broadly speaking, these Rules are similar to, albeit more comprehensive than, the hearings process that exists under

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<sup>93</sup> See BX Rule 9252(b).

<sup>94</sup> See *id.*

<sup>95</sup> See BX Rule 9252(c).

<sup>96</sup> See *id.*

Existing Rule 1606(e). BX Rule 9261(a) requires a Party to submit to all other Parties and to the Hearing Officer, no later than 10 days before a hearing, or at such earlier date as may be specified by the Hearing Officer, copies of documentary evidence and the names of the witnesses that it intends to present at the hearing. BX Rule 9261(b) states that a Party is entitled to appear at a hearing in person, by counsel, or by their representative. BX Rule 9262 requires sworn testimony at hearings. BX Rule 9263(a) grants the Hearing Officer authority to receive relevant evidence and to exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. BX Rule 9145(a) provides that the formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series. BX Rule 9265 requires hearings and (unless otherwise ordered by a Hearing Officer) pre-hearing conferences to be recorded by a court reporter and for transcripts to be available for correction and purchase. BX Rule 9266 states that the Hearing Officer may require the Parties to file proposed findings of fact and conclusions of law, or post-hearing briefs, and it prescribes a procedure for doing so. BX Rule 9267 lists the contents of the evidentiary record.

BX Rule 9268 governs New Hearing Panel decisions. Similar to Existing Rule 1607, BX Rule 9268(a) requires a New Hearing Panel to make a determination in a matter based on a majority vote, which is reflected in a written decision drafted by the Hearing Officer. Also similar to the Existing Rule, BX Rule 9268(b) requires that each decision include a statement of the specific violations alleged, findings of underlying facts, and conclusions of law. Unlike the Existing Rule, however, BX Rule 9268(c) permits the Hearing Officer or a Hearing Panelist to prepare a written dissenting opinion. BX Rule 9268(a) also specifically requires that the decision be issued within 60 days of

the final date allowed for filing proposed findings of fact, conclusions of law, and post hearing briefs, or by a date established by the Chief Hearing Officer. Last, under subparagraph (d) of the BX Rule, the OHO must serve the decision and any dissenting opinion on the Parties, publish notice of the decision and any dissenting opinion in the Central Registration Depository (“CRD”) and provide a copy of the decision and any dissent thereto to the each Member of the Exchange with which the Respondent is associated.

BX Rules 9264 and 9269 concern the disposition of a disciplinary matter through a summary proceeding. BX Rule 9264 states that a motion for summary disposition must be initiated by a Party. Under BX Rule 9264(a), the Respondent and/or staff may, prior to the hearing but after the Respondent has filed an answer and had opportunity to inspect documents in the record, make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent, as well as any defense raised in a Respondent’s answer. If a hearing on the merits has begun, then BX Rule 9264(b) states that Parties may submit a motion for summary disposition only with leave of the Hearing Officer. BX Rule 9264(c) provides the process for proceeding when a summary motion does not dispose of the matter entirely. BX Rule 9264(d) requires motions for summary disposition to be supported by a statement of undisputed facts, a supporting memorandum of points and authorities, and affidavits or declarations that set forth such facts. BX Rule 9264(e) concerns rulings on motions for summary disposition. This provision of the BX Rule provides that a Hearing Officer may deny or defer a decision on any motion for summary disposition, yet only a New Hearing Panel may grant such a motion (except the Hearing Officer may grant motions for summary disposition with

respect to questions of jurisdiction). BX Rule 9264(e) also provides that a motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.

Meanwhile, BX Rule 9269 governs the issuance of default decisions by the Hearing Officer against Respondents that fail to provide timely answers to complaints or any Party that fails to appear at any hearing for which they have due notice. Where the defaulting Party is the Respondent, the BX Rule specifies that the Hearing Officer may issue a default decision that deems the allegations against the Respondent to be admitted. Where the defaulting Party is the Departments, the Hearing Officer may issue a default decision that dismisses the complaint with prejudice. The Hearing Officer also may order a Party who fails to attend a pre-hearing conference or a hearing to pay the costs of attendance for the other Party. Like Existing Rule 1608, the BX Rule provides for default decisions to be set aside, but unlike the Existing Rule, BX Rule 9269 provides for the Hearing Officer to set them aside only upon a motion and a showing of good cause. The BX Rule provides, however, that default decisions may be appealed to or called for review by the Board within 25 days after service.<sup>97</sup>

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<sup>97</sup> In addition to the above, BX Rule 9280 authorizes a New Hearing Panel to exclude or impose sanctions upon a Party, an attorney for a Party, or another authorized representative of a Party that violates an order or otherwise engages in contemptuous conduct during a proceeding. Authorized sanctions include, but are not limited to, imposing orders that establish facts in favor of the opposing Party, precluding a Party from making claims or defenses, striking portions of pleadings, or staying procedures until compliance occurs. No similar provisions exist in the Existing Rules.

Meanwhile, BX Rule 9150(a) authorizes an adjudicator to exclude from disciplinary proceedings an attorney for a Party or any other person authorized to

BX Rule 9270 governs settlements. It permits a Party to propose in writing an offer of settlement at any time and to do so without limit to the number of offers it proposes. Under BX Rule 9270(e), if an offer of settlement is uncontested, then the Departments must, if a hearing has not yet commenced, transmit the offer and a proposed order of acceptance to the Exchange Review Council (or the ODA, if the Respondent is an affiliate of the Exchange) for approval or rejection. If a hearing has already commenced when the offer is made, then the Departments must send the offer and proposed order to the New Hearing Panel for preliminary approval and then to the Exchange Review Council (or, if a Respondent is an affiliate of the Exchange, to the ODA) for ultimate approval or rejection. Under BX Rule 9270(f), if an offer of settlement is made and it is contested, then the Departments must provide a written opposition to the New Hearing Panel, which may issue an order approving the offer, or it may order the Parties to attend a settlement conference. If a New Hearing Panel approves a contested offer of settlement, then the Hearing Officer shall send the order of acceptance of the offer of settlement to the Exchange Review Council (or, if a Respondent is an affiliate of the Exchange, to the ODA) for ultimate acceptance or rejection. Pursuant to BX Rule 9270(h), if an offer of settlement is rejected, then the Respondent shall be notified in writing, the offer shall be withdrawn, and the rejected order shall not constitute part of the record in any subsequent proceeding against the

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represent a Party to the extent that the adjudicator deems said attorney or persons to be engaging in contemptuous conduct, under BX Rule 9280, or unethical or unprofessional conduct. The BX Rule authorizes an attorney or person so excluded to seek review of their exclusion from the Exchange Review Council.

Respondent. BX Rule 9270(j) further clarifies that a Respondent shall not be prejudiced by a rejected order of settlement.<sup>98</sup>

BX Rule 9280 authorizes the issuance of sanctions for Parties, their attorneys, and their representatives, for contemptuous conduct. As set forth in BX Rule 9280(a)(2), such sanctions may include exclusion of an attorney or representative from proceedings. They may also include, in part, orders that establish disputed facts in favor of the non-sanctioned Party, preclude the disobedient Party from supporting or opposing claims or defenses, or strike pleadings or portions thereof.<sup>99</sup> The exclusion of an attorney or representative is subject to review by the Exchange Review Council.<sup>100</sup>

BX Rule 9290 states that hearings shall be held and orders shall be issued as to temporary cease and desist proceedings on an expedited basis. BX Rule 9291 governs the form and delivery of permanent cease and desist orders.

#### *The BX Rule 9300 Series*

The BX Rule 9300 Series sets forth the process for review of disciplinary proceedings by the Exchange Review Council and the Board.

BX Rule 9311 sets forth the process for appellate reviews of New Hearing Panel decisions. Under BX Rule 9311, a Party may appeal a New Hearing Panel decision to the Exchange Review Council within 25 days after service of a decision.<sup>101</sup> Additionally, on

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<sup>98</sup> Finally, BX Rule 9270(i) states that, when a disciplinary proceeding names multiple respondents, settlement offers may be accepted or rejected as to any one or all of the Respondents submitting offers.

<sup>99</sup> See BX Rule 9280(b).

<sup>100</sup> See BX Rule 9280(c).

<sup>101</sup> However, the Exchange notes that a decision involving a Respondent who is an affiliate of the Exchange may not be appealed to the Exchange Review Council.

their own motion, any member of the Exchange Review Council, a Review Subcommittee thereof, or the CRO (as to default decisions) may issue a call to review a New Hearing Panel decision within 45 days after the date of service of the decision (or within 25 days after the date of service, as to calls for review that the CRO initiates). BX Rule 9311(c) and (d) require that Parties file written notices of appeal (and cross-appeal) with the OHO and it prescribes requirements for such notices. BX Rule 9311(e) states that the Exchange Review Council, in its discretion, may waive any issues not raised in appeal or cross-appeal notices, but it provides a process by which the Parties may petition for consideration of such issues.

Meanwhile, BX Rule 9312 governs the process by which the Exchange Review Council, the Review Subcommittee, or the CRO may call a matter for review. It provides that a decision of a New Hearing Panel issued pursuant to BX Rule 9268 may be called for review by any member of the Exchange Review Council or any member of a Review Subcommittee within 45 days after service of the decision. It also provides that a default decision against a Respondent, pursuant to BX Rule 9269, may be called for review by the CRO, on his or her own motion, within 25 days after service of the decision. Additionally, it provides that a decision with respect to a Member that is an affiliate of the Exchange may not be called for review by the Exchange Review Council. BX Rule 9312(b) states that a decision to call a matter for review by the Exchange Review Council, the Review Subcommittee, or the CRO operates as a stay of a final decision until such time as the Council or Board issues its decision, except with respect to permanent cease and desist orders.

BX Rule 9321 provides for the transmission of the record of a disciplinary proceeding to the Exchange Review Council within 21 days after the filing of a notice of appeal or notice of review, or at such a later time as the Council may designate. BX Rule 9322 grants discretion, with good cause shown, to the Exchange Review Council, the Review Subcommittee, a Subcommittee, an Extended Proceeding Committee, and Counsel to the Exchange Review Council (defined below) to modify filing deadlines, adjourn appeal proceedings, and change hearing locations in certain instances and subject to certain limitations.

BX Rule 9331 states that, following the filing of a notice of appeal or a call for review, the Exchange Review Council or the Review Subcommittee shall appoint a Subcommittee or an Extended Proceeding Committee, composed of two or more persons who are or were members of the Exchange Review Council or former Directors, for the purpose of making recommendations to the full Council as to how to dispose of matters before it.<sup>102</sup>

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<sup>102</sup> Under the BX Rules, the Exchange Review Council is assigned its own counsel in appellate matters. BX Rule 9120(e) defines the term “Counsel to the Exchange Review Committee” as an attorney that reports to the CRO of the Exchange who is responsible for advising the Exchange Review Council, the Review Subcommittee, a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the Exchange Review Council. Counsel also may decide a motion on a procedural matter in the BX Rule 9300 Series. See BX Rule 9146(j)(2). BX Rule 9313 describes the authority of the Counsel and the process for seeking the review of a Counsel decision. Under BX Rule 9313(a), Counsel has authority to take ministerial and administrative actions to further the efficient administration of a proceeding. A Party may seek review of a Counsel decision on motion to the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee. See BX Rule 9313(b). Counsel is subject to the same conflict of interest prohibitions as the Exchange Review Council, see BX Rule 9332, which requires Counsel to withdraw from a matter any time that the Counsel has a conflict of interest or bias or circumstances otherwise exists

Under BX Rule 9332, Exchange Review Council members, including members of the Review Subcommittee, panelists of a Subcommittee or an Extended Proceeding Committee, or Counsel to the Exchange Review Council, are subject to the same disqualification and recusal standards as the Hearing Panelists and Hearing Officers.

The BX Rule 9340 Series governs the proceedings of the Exchange Review Council, Extended Proceeding Committee, and Subcommittees. BX Rule 9341 provides for oral arguments before a Subcommittee and the Extended Proceeding Committee, upon written request of a Party or otherwise at the discretion of Subcommittee or Committee.<sup>103</sup> BX Rule 9343 provides that, if no oral argument is held, a matter shall be decided on the record, supplemented by any written materials submitted to or issued by the Exchange Review Council, a Subcommittee, or the Extended Proceeding Committee. BX Rule 9344 grants discretion to the Council or the Review Subcommittee to proceed with or dismiss the appeal and remand appeals of Parties that failed to participate in initial disciplinary hearings and show good cause for their failure to participate. It also prescribes circumstances under which an appeal or cross-appeal will be deemed abandoned. BX Rule 9345 states that a Subcommittee or the Extended Proceeding Committee shall present a recommended decision to the Exchange Review Council. Pursuant to BX Rule 9346, the Exchange Review Council is charged with issuing a

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where the fairness of the Counsel might reasonably be questioned. Moreover, the Counsel may be removed on motion based upon a good faith belief that the Counsel has a conflict of interest or bias or circumstances otherwise exists where the fairness of the Counsel might reasonably be questioned.

<sup>103</sup> BX Rule 9342 states that if a Party requests, but fails to appear at an oral argument, then the Committee or Subcommittee may proceed with oral arguments without that Party or consider the matter on the basis of the record, without oral argument, as to that Party.

decision based on the record, supplemented by briefs and other papers submitted to the Subcommittee, Extended Proceedings Committee, or the Exchange Review Council, any oral arguments that occur, and upon a showing of good cause and with the leave of the Council, Extended Proceeding Committee, or Subcommittee, additional evidence that is introduced on appeal.<sup>104</sup> It also provides that the formal rules of evidence shall not apply during the appeals process.<sup>105</sup> BX Rule 9347 sets forth the form, format, and filing procedures and deadlines for papers filed in Exchange Review Council proceedings. BX Rule 9348 states the powers of the Exchange Review Council to affirm, dismiss, modify, or reverse New Hearing Panel decisions with respect to each finding, or to remand the proceeding with instructions. It also provides that the Exchange Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. The Exchange Review Council must issue a decision consistent with BX Rule 9349(b), which provides elements required to be included in an Exchange Review Council decision.

BX Rule 9351 governs discretionary review by the Board. Pursuant to BX Rule 9351(a), a Director may call for review a decision of the Exchange Review Council (other than a decision with respect to a Member that is an affiliate of the Exchange) not later than the next meeting of the Board that is at least 15 days after the date on which the Board receives the Exchange Review Council decision. As set forth in BX Rule 9351(d), the Board may affirm, modify, or reverse the proposed written decision of the Exchange

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<sup>104</sup> BX Rule 9346(f) also permits the Council, Extended Proceeding Committee, or Subcommittee to order, on its own motion, that the record be supplemented with such additional evidence as they deem relevant.

<sup>105</sup> See BX Rule 9346(g).

Review Council and it may affirm, modify, reverse, increase, or reduce any sanction (including the terms of any permanent cease and desist order) or impose any other fitting sanction. The Board also may remand the proceeding with instructions. The Board is required to issue its decision in writing pursuant to BX Rule 9351(e).<sup>106</sup>

Unlike the Existing Rules, BX Rule 9370 expressly provides for a Respondent aggrieved by a final disciplinary action to apply for review by the Commission pursuant to Section 19(d)(2) of the Act.

*The BX Rule 9400 and 9500 Series*

The BX Rule 9400 Series provides the process for expedited client suspension proceedings involving alleged violations of Rule 403 (Disruptive Quoting and Trading Activity Prohibited). The BX Rule 9500 Series provides the process for proceedings other than formal disciplinary proceedings. The Exchange proposes that these BX Rules will replace Chapter 15 of the Existing Rules, which also provide for the Exchange to impose summary suspensions in various circumstance.

BX Rule 9400 authorizes and prescribes the process for adjudicating expedited client suspensions that may be imposed upon Members or Associated Persons that violate the prohibition on disruptive quoting and trading activity.<sup>107</sup> BX Rule 9400 states that the Regulation Department, with the prior authorization of the CRO, may issue a notice initiating a suspension proceeding of a Member or an Associated Person for engaging in disruptive quoting and trading activity, which shall trigger the appointment of a New

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<sup>106</sup> BX Rules 9360 and 9370 states when sanctions become effective, including when a Respondent appeals a decision to the Commission.

<sup>107</sup> Although BX Rule 9400 references the BX Rule that prohibits disruptive quoting and trading, the Exchange proposes to substitute reference to its own analogous provision, Rule 403.

Hearing Panel and the occurrence of a hearing not later than 15 days after service of the notice, unless extended for good cause shown. The New Hearing Panel may issue a written decision imposing a suspension (within 10 days of receipt of the hearing transcript, unless otherwise extended) only if the New Hearing Panel finds by a preponderance of the evidence that the violation occurred and that it is likely to result in significant market disruption or harm to investors. BX Rule 9400(e) also permits a Respondent to apply to the New Hearing Panel to modify, set aside, limit, or revoke a suspension order and it requires the New Hearing Panel to respond to such a request in writing within 10 days after receiving it, unless such time period is extended with the consent of the Parties for good cause shown. Finally, BX Rule 9400(f) states that suspensions imposed by New Hearing Panels may be appealed to the Commission as set forth in Section 19 of the Act.

The BX Rule 9500 Series permits the Exchange to impose sanctions, such as suspensions, cancellations of membership, bars of association with Members, and prohibitions or restrictions on access to Exchange services, as well as the adjudication of such sanction orders, for actions or circumstances that include the following: (1) failures to provide information, reports, data, or testimony requested or required by the Exchange or failures to keep membership applications or supporting documentation current (BX Rule 9552); (2) failures to pay Exchange dues, fees and other charges or to submit a required report or information related to such payment (BX Rule 9553); (3) failures to comply with arbitration awards or settlements or orders of restitution (BX Rule 9554); (4) failures to meet the eligibility or qualification standards or prerequisites for access to services (BX Rule 9555); (5) failures to comply with temporary and permanent cease and

desist orders (BX Rule 9556); (6) financial or operational difficulties that require limiting or ceasing certain business activities (BX Rule 9557); and (7) actions authorized by Section 6(d)(3) of the Act, including in part summary suspensions or limitations or prohibitions with respect to services offered by the Exchange on Members, Associated Persons, or other persons subject to the Exchange's jurisdiction, including those who have been suspended or expelled from another SRO, barred or suspended from being associated with a member of another SRO, or are experiencing severe financial or operation difficulties threaten investors, creditors, other Members, or the Exchange (BX Rule 9558). The BX Rule 9520 Series also provides for adjudication of statutory disqualifications or determinations of ineligibility to become or remain a Member or associated with a Member. Generally, each of these provisions of the BX Rules require the Exchange to serve written notice to the Member or Associated Person, offer them an opportunity to request a hearing in writing, and permit them to request termination of sanctions upon achieving compliance.<sup>108</sup> Meanwhile, BX Rule 9559 sets forth extensive

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<sup>108</sup> The BX Rule 9520 Series provides for a somewhat different process from the BX Rule 9550 Series. BX Rule 9522 requires Members and Associated Persons to file applications for relief from statutory disqualifications or determinations of ineligibility. BX Rule 9522(e) authorizes the Department of Member Regulation, to the extent it deems consistent with the public interest and the protection of investors, to approve a written request for relief from the eligibility requirements by a disqualified Member with or without the filing of an application by such disqualified Member, under certain specified conditions. Pursuant to BX Rule 9523, the Department of Member Regulation also may recommend membership or association or continued membership or association pursuant to a supervisory plan that is subject to approval by the Chair of the Statutory Disqualification Committee (a Subcommittee of the Exchange Review Council, as defined in BX Rule 9120(cc)) or the Exchange Review Council. Pursuant to BX Rule 9523(a), the Member or Associated Person may request a hearing before a New Hearing Panel to seek relief from disqualification or conditions imposed upon continued membership or association. In such instances, the Hearing Panel shall issue a recommended decision to the Statutory Disqualification Committee, which in turn

procedures governing hearings and it provides for appellate reviews by the Exchange Review Council, upon its call for review, and by the Commission, pursuant to Section 19 of the Act.

*The BX Rule 9600 Series*

The BX Rule 9600 Series provides procedures to be followed when a Member seeks exemptive relief pursuant to any Rule that references the BX Rule 9600 Series. As discussed below, the Exchange proposes to amend the Supplementary Material to Existing Rule 303 to provide for the BX Rule 9600 Series to govern requests to waive applicable qualification examination requirements for applicants that apply to become associated with Members of the Exchange.

*The BX Rule 9800 Series<sup>109</sup>*

The BX Rule 9800 Series provides the process followed by the Exchange in administering temporary cease and desist orders, including the initiation of proceeding to issue such an order,<sup>110</sup> service thereof,<sup>111</sup> subsequent review of the order by the Hearing

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shall issue a recommended decision to the Exchange Review Council for ultimate determination. The decision of the Exchange Review Council is subject to discretionary review by the Board. See id. The BX Rule also provides for the Exchange Review Council to conduct an expedited review of a recommended decision of the Statutory Disqualification Committee. See id. Finally, it provides for review by the Commission of any action taken pursuant to the BX Rule 9520 Series. See id.

<sup>109</sup> The BX Rule 9700 Series is reserved.

<sup>110</sup> BX Rule 9810.

<sup>111</sup> Id.

Panel,<sup>112</sup> the consequences of non-compliance,<sup>113</sup> and the process for seeking Commission review of the order.<sup>114</sup>

The BX Rule 9800 Series provides for temporary cease and desist orders and a process for adjudicating them. BX Rule 9810 states that with the prior written authorization of the CRO and FINRA's Chief Executive Officer (or such other senior officers as he or she designates), the Departments may initiate a temporary cease and desist proceeding with respect to alleged violations of Section 10(b) of the Act and SEC Rule 10b-5, SEC Rules 15g-1 through 15g-9, and BX Rules 2110, 2120, or 2150 (references to these BX Rules will be replaced with references to Exchange Rules 400, 405, and Chapter 6, respectively). The Departments must serve written notice upon Respondents of a proposed temporary cease and desist order and file a copy of such notice with the OHO. Additionally, if a complaint has not already been issued against the Respondents, then the Departments must file and serve a complaint together with the notice of the temporary cease and desist order. BX Rule 9820 provides for the Chief Hearing Officer of the OHO to assign a New Hearing Panel to adjudicate the proposed cease and desist order. BX Rule 9830 provides for a hearing to be held, generally speaking, not later than 15 days after service of the notice. BX Rule 9840 states that the New Hearing Panel shall issue a written decision as to whether to impose a temporary cease and desist order within 10 days after receipt of the hearing transcript, unless such deadline is extended for good cause. It states that the New Hearing Panel should impose

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<sup>112</sup> BX Rule 9850.

<sup>113</sup> BX Rule 9860.

<sup>114</sup> BX Rule 9870.

such an order if it finds that the Departments have demonstrated a likelihood of success on the merits and that the alleged misconduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors prior to the completion of disciplinary proceedings. BX Rule 9850 permits a Party to apply to the New Hearing Panel to modify, set aside, limit, or suspend a temporary cease and desist order. BX Rule 9860 states that a Respondent that violates a temporary cease and desist order may have its association or membership suspended or cancelled or be subject to any fitting sanction, pursuant to BX Rule 9556. Finally, BX Rule 9870 states that a Respondent may apply to the Commission to review the issuance of a temporary cease and desist order, as set forth in Section 19 of the Act.

### **Additional Conforming Rule Changes**

As discussed above, the Exchange is amending its By-Laws to conform to the BX by-laws, largely deleting the Existing Rule 1500, 1600, and 1700 Series,<sup>115</sup> and adopting in their place the BX Rule 8000 and 9000 Series. As a consequence of these changes, the Exchange proposes to amend or delete certain other Existing Rules, which are either not needed, duplicated elsewhere, or reference the deleted Existing Rules. Below is a description of the specific changes the Exchange proposes to make to its Existing Rules.

Existing Rule 100 provides definitions for purposes of the Existing Rules. The Exchange is proposing to amend this Existing Rule to include definitions for several new terms. For example, the proposed Rules will define the new term “Code of Procedure” as the procedural rules contained in Chapter 90. The Exchange also defines the new term “Exchange Review Council,” which is largely copied from BX Rule 0120(m). The

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<sup>115</sup> As noted elsewhere, the Exchange proposes to retain Existing Rules 1600 and 1614(a) and (d) in their current form (and to renumber Rule 1614(d) as 1614(b)).

Exchange notes that item (6) of the new definition differs from the BX item (6) in that it cites the analogous rules of the Exchange, which have different rule numbers. Finally, the Exchange proposes to amend the definition of “SEC” so that it also includes the word “Commission.”

Existing Rule 210 concerns the consequences of a Member’s or an Associated Person’s failure to pay dues, fees and other charges. The Exchange proposes to delete this Existing Rule in favor of BX Rule 9553, which is more comprehensive than the Existing Rule and differs from it in several respects. Existing Rule 210 provides that instances of nonpayment shall be reported to the Exchange President when they are 30 days past due, and that the President thereafter shall provide reasonable notice to the delinquent Member that continued non-payment will result in suspension of trading privileges. An Associated Person that fails to pay may be suspended from association with a Member. Moreover, although Existing Rule 210(a) does not specify a time period for a reasonable notice that precedes suspension, it nevertheless provides that the Exchange shall dispose of the memberships of Members who are more than six months delinquent. By contrast, BX Rule 9553 states that the Regulation Department, within an unspecified period of time period after the onset of a delinquency, may issue a written notice to the delinquent Member or Associated Person that failure to comply within 21 days of service of the notice will result in suspension or cancellation of membership or suspension or bar of association with a Member, as applicable. BX Rule 9553 also provides for detailed provisions for serving such notice, a provision for requesting a hearing with respect to such a notice, a provision declaring the effectiveness of such

notices (21 days after service) when no hearing is requested, and a means to request termination of a suspension, which may be granted for good cause shown.

Existing Rule 302 sets forth circumstances in which the Exchange may deny or condition approval of membership applications or applications to associate with Members. Existing Rule 302(c) also sets forth circumstances in which the Exchange may determine not to permit a Member or Associated Person from continuing their membership or association with a Member, including because they become subject to statutory disqualification under the Act. Existing Rule 302(f) furthermore permits a Member or Associated Person that becomes subject to statutory disqualification under the Act to apply to the Exchange to continue as a Member or as an Associated Person, within 30 days of becoming subject to the statutory disqualification. Existing Rule 302(g) states that, subject to the summary suspension rules in Chapter 15, any applicant for membership or association with a Member whose application is denied or conditioned or who is not permitted to continue as a Member or Associated Person may appeal such determinations under Chapter 17 of the Existing Rules.

The Exchange proposes to modify Existing Rule 302(f) so that it refers to new and more robust procedures, set forth in the BX Rule 9520 series, by which a Member or an Associated Person may obtain relief from disqualification or ineligibility determinations (BX Rule 9522).

The Exchange also proposes to amend Existing Rule 302(g), which states that subject to Chapter 15, the BCC may review in part Exchange determinations to deny membership or association with a Member pursuant to Chapter 17 of the Existing Rules. The Exchange proposes to re-assign responsibility for these reviews from the BCC to the

Exchange Review Council and replace the review process presently set forth in Chapter 17 of the Existing Rules with processes that are substantially the same as those set forth in BX Rules 1015 and 1016. Specifically, the proposed amendments to Exchange Rule 302(g) state that, subject to Chapter 90, the Exchange Review Council will have jurisdiction to review these decisions. Proposed Rule 302(g) states that anyone whose application for membership on the Exchange, association with an Exchange Member, or whose continuing membership or association is denied or conditioned by the Exchange's Membership Department, may file a written request for review by the Exchange Review Council within 25 days after service of the Exchange's decision.<sup>116</sup> The request must state specifically why the applicant believes that the Membership Department's decision is inconsistent with the permissible bases for denial set forth in Rule 302, or otherwise should be set aside and state whether a hearing is requested.<sup>117</sup> The request will be heard by a Subcommittee appointed by the Exchange Review Council or the Review Subcommittee composed of two or more persons who are either current or past members of the Council or former Directors of the Exchange.<sup>118</sup> If a hearing is requested or

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<sup>116</sup> See proposed Rule 302(g)(1). The Exchange notes that the deadline for filing petitions for BCC review of an Exchange action under Existing Rule 1701(a) is 30 days from the date of such action.

The Existing Rules pertaining to membership do not reference or define the terms "Membership Department" or "Department." As part of this proposal, the Exchange proposes to amend Rule 302(g) to specify that the Exchange's Membership Department – rather than simply the "Exchange" – makes determinations as to whether to grant, deny, or conditionally grant applications for membership or association or to continue as a Member or an Associated Person.

<sup>117</sup> See id.

<sup>118</sup> See proposed Rule 302(g)(4). The Exchange notes that Existing Rule 1702 provides for review by a BCC panel composed of two or more of its members.

directed, it must be held within 45 days after the request for review is filed with the Exchange or service of the notice by the Subcommittee.<sup>119</sup> Applicants and the Membership Department may be represented by counsel at the hearing and formal rules of evidence will not apply during the hearing.<sup>120</sup> The Subcommittee must present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing, and not later than seven days before the meeting of the Exchange Review Council at which the proceeding shall be considered.<sup>121</sup> The Exchange Review Council must issue a proposed written decision that affirms, modifies, or reverses the Membership Department's decision, or remands the proceedings with instructions and provide the proposed decision to the Exchange Board.<sup>122</sup> If the Exchange Board does not call the decision for review, it shall become final. If the Exchange Review Council does not serve its final written decision within the time period prescribed by Rule 302(g)(10)(C), then the Applicant may file a written request with the Exchange Board for the Board to direct the Exchange Review Council to issue its decision immediately or show good cause why it needs additional time to issue its decision.<sup>123</sup> Proposed Rule

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<sup>119</sup> See proposed Rule 302(g)(6)(A).

<sup>120</sup> See proposed Rule 302(g)(6)(B) & (C). Unlike Existing Rule 1703, proposed Rule 302(g) does not provide for intervention in proceedings by interested non-Parties.

<sup>121</sup> See proposed Rule 302(g)(9).

<sup>122</sup> See proposed Rule 302(g)(10)(A).

<sup>123</sup> See proposed Rule 302(g)(10)(D).

302(h), which mirrors BX Rule 1016, grants the Exchange Board discretion, at the request of a Director, to review decisions of the Exchange Review Council.<sup>124</sup>

Existing Rule 305(b) requires Members to file with the Exchange and keep current their addresses at which notices may be served. The Exchange proposes to amend this Existing Rule to incorporate the language set forth in BX Rule 1160. Rather than merely requiring Members to provide the Exchange with their current address, the proposed amendment more broadly requires Members to report to the Exchange, through the FINRA Contact System, all of their contact information, including their mailing addresses, email addresses, facsimile numbers, and other information. It also requires members to update such contact information in the FINRA System within 30 days of any changes thereto, and to generally verify that such information remains accurate within 17 business days after the end of each calendar year. This proposed amendment to the Existing Rule will ensure that the Exchange has available to it multiple means of contacting its Members, including for purposes of serving the notices specified in the BX Rule 9550 series by email or by facsimile. The Exchange proposes, in its introduction to Chapter 90, to state that cross references in the BX Rule 9000 Series to BX Rule 1160 should be read instead to refer to Exchange Rule 305(b), as modified herein.

To maintain consistency with the BX Rules, the Exchange also proposes to eliminate Existing Rule 305(d), which requires Members to maintain a current copy of the Exchange's governing documents and Rules in an accessible place and make them

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<sup>124</sup> Unlike Existing Rule 1704, proposed Rule 302(h) does not authorize the applicant or the President of the Exchange to request that the Board review the decision of the Exchange Review Council.

available for examination by customers, and to replace it with BX Rule 8110, which is materially equivalent.

Existing Rule 307 and its Supplementary Material govern the sale and transfer of market maker rights. Item .01 of the Supplementary Material presently provides that decisions by the Exchange (and specifically, by the Membership Department) to deny approval of such sales and transfers are appealable under Chapter 17 of the Existing Rules. The Exchange proposes to state instead that these decisions are appealable to the Exchange Review Council. The Exchange notes that no analogue exists to this proposal in the BX Rules, which do not provide for the sale and transfer of such rights or reviews of decisions to deny or condition such sales or transfers. Nevertheless, the Exchange believes that the Exchange Review Council is the logical and appropriate body for reviewing such determinations given its other responsibilities. The Exchange also proposes to replace the review procedures set forth in Chapter 17 of the Existing Rules with processes that are substantially the same as those set forth in BX Rules 1015 and 1016. To accomplish the foregoing, the Exchange proposes to eliminate Supplementary Material .01 and insert its substance into the body of Rule 307 as paragraphs (c) and (d). Proposed Rule 307(d) states that the Exchange Review Council will have jurisdiction to review Membership Department decisions to deny the sale and transfer of market maker rights. Proposed Rule 307(d)(1) states that anyone is an owner or an approved applicant that is a party to an executed transfer agreement that is denied approval may file a written request for review by the Exchange Review Council within 25 days after service of the Exchange's decision. The request must state specifically why the applicant believes that the Membership Department's decision is inconsistent with the permissible bases for

denial set forth in Rule 307(c), or otherwise should be set aside and state whether a hearing is requested.<sup>125</sup> The request will be heard by a Subcommittee composed of two or more persons who are either current or past members of the Council or former Directors of the Exchange.<sup>126</sup> If a hearing is requested or directed, the hearing must be held within 45 days after the request for review is filed with the Exchange or service of the notice directing a hearing by the Subcommittee.<sup>127</sup> Applicants and the Membership Department may be represented by counsel at the hearing and formal rules of evidence will not apply during the hearing.<sup>128</sup> The Subcommittee must present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing, and not later than seven days before the meeting of the Exchange Review Council at which the proceeding shall be considered.<sup>129</sup> The Exchange Review Council must issue a proposed written decision that affirms, modifies, or reverses the Membership Department's decision, or remands the proceedings with instructions and provide it to the Exchange Board.<sup>130</sup> If the Exchange Board does not call the decision for review, it shall become final. If the Exchange Review Council does not serve its final written decision within the time period prescribed by Rule 307(d)(9)(C), then the applicant may file a written request with the Exchange Board for the Board to direct the Exchange Review

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<sup>125</sup> See proposed Rule 307(d)(1).

<sup>126</sup> See proposed Rule 307(d)(3).

<sup>127</sup> See proposed Rule 307(d)(5)(A).

<sup>128</sup> See proposed Rule 307(d)(5)(B) & (C).

<sup>129</sup> See proposed Rule 307(d)(8).

<sup>130</sup> See proposed Rule 307(d)(9).

Council to issue its decision immediately or show good cause why it needs additional time to issue its decision.<sup>131</sup> Proposed Rule 307(d)(10), which mirrors BX Rule 1016, grants the Exchange Board discretion, at the request of a Director, to review decisions of the Exchange Review Council.

Existing Rule 310 requires a Member to notify the Exchange upon its adoption of a plan of liquidation or dissolution. The Existing Rule also provides that upon receipt of such notice, the Member's trading privileges may be suspended in accordance with Chapter 15 of the Existing Rules. The Exchange proposes to replace this reference to Chapter 15 with a reference to BX Rule 9558. Again, no analogue to this proposal exists in the BX rules insofar as those rules do not expressly address suspensions for such reasons or reviews of suspension determinations. Nevertheless, the Exchange believes that the process set forth in BX Rule 9558 is most appropriate for reviewing suspension determinations in these circumstances given that they already apply in circumstances where a Member is experiencing extreme financial or operating difficulty such that the Exchange determines that the Member cannot safely continue to do business on the Exchange.

The Supplementary Material to Existing Rule 313 concerns the Exchange's authority to waive the applicable qualification examination requirements and accept other standards as evidence of an applicant's qualifications for registration. The Exchange is amending this Rule to specify that such requests are handled pursuant to the BX Rule 9600 Series process. The BX Rule 9600 Series concerns the procedures for requesting exemptions, and the appeal of adverse decisions regarding an exemptive request. The

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<sup>131</sup> See proposed Rule 307(d)(9)(D).

Exchange notes that the proposed revisions will render the text of the Supplementary Material to Existing Rule 313 consistent with BX Rule 1070(d).

Existing Rule 410 provides for the summary suspension of a Member that fails to perform on its contracts or is insolvent or is in such financial or operational condition or is otherwise conducting business in such a manner that it cannot be permitted to continue in business without compromising the safety of customers, creditors, or the Exchange. The Existing Rule provides for such suspensions to be administered in accordance with Chapter 15 of the Rules. The Exchange proposes to replace this reference to Chapter 15 with a reference to BX Rule 9558, which provides procedures for summary proceedings for actions authorized by Section 6(d)(3) under the Act.

Existing Rule 413(b)(1) states that decisions denying market makers exemptions from standard position limits in options trading on the Exchange are not subject to appeal under Chapter 17 of the Existing Rules. The Exchange proposes to remove this reference to Chapter 17 as the Exchange proposes to delete it.

Existing Rule 720 concerns obvious and catastrophic errors. Existing Rule 720(k) currently references the OEP as the body responsible for reviewing determinations made by Options Exchange Officials pursuant to the Rule and it sets forth procedures to govern OEP review proceedings. In light of the fact that the OEP's responsibilities will be incorporated into those of the Exchange Review Council,<sup>132</sup> the amendments to the Rule remove references to the OEP and replaces them with references to a panel of the Exchange Review Council. The amended Rule also includes language grafted from the

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<sup>132</sup> See proposed Rule 100(a)(20A).

BX Rules prescribing the composition of panels convened for purposes of these reviews.<sup>133</sup>

Existing Rule 720A also provides for reviews by a “Review Panel” of decisions nullifying or adjusting transactions arising out of system disruptions or malfunctions. The Exchange proposes to eliminate the Review Panel in the Exchange’s Rules and transfer its responsibility to a panel of the Exchange Review Council. The new Rule also includes language grafted from the BX Rules prescribing the composition of Exchange Review Council panels convened for purposes of these reviews.<sup>134</sup>

Existing Rule 804 permits a Primary Market Maker to apply to the Exchange to withdraw temporarily from its Primary Market Maker status in an options class. The Existing Rule does not presently authorize reviews of Exchange determinations to deny requests for temporary withdrawals or to impose conditions on the reentry of quotations. However, BX Rule 4619(f) does provide for such reviews. To provide consistency, the Exchange proposes to amend Existing Rule 804(f) to state that the Exchange Review Council will have authority conduct such reviews.

Existing Rule 1000 provides for the treatment of the options contracts of suspended Members. In discussing the nature of suspensions to which the Existing Rule applies, it references Chapter 15 several times. The Exchange proposes replacing this reference with a reference to the Chapter 90, which comprises the BX Rules that govern suspensions in lieu of Chapter 15.

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<sup>133</sup> See BX Options Rules Ch. V, Sec. 6(l).

<sup>134</sup> See *id.*

Existing Rule 1406 states that no Member or Associated Person may refuse to appear or testify before another exchange or SRO in connection with a regulatory investigation, examination or disciplinary proceeding or refuse to furnish documentary materials or other information or otherwise impede or delay such investigation, examination or disciplinary proceeding if the Exchange requests such information or testimony in connection with an inquiry resulting from an agreement entered into by the Exchange. Existing Rule 1406(d) states that when Members and Associated Persons respond to such requests for appearance, testimony, documents, or information, they shall have the same rights and procedural protections as they would if they were responding to requests from the Exchange pursuant to Existing Rule 1601(b). The Exchange proposes to replace the reference to Existing Rule 1601(b), which is being deleted, with a reference to BX Rule 8210. BX Rule 8210(a) authorizes the Regulation Department, including FINRA staff, to require a Member or Associated Persons to provide information and testimony and to permit inspection and copying of their books, records, and accounts as to any matters involved in an investigation, complaint, examination, or proceeding. BX Rule 8210(b) provides that the Regulation Department and FINRA may exercise the aforementioned authority with respect to investigations, complaints, examinations, or proceedings conducted by other SROs. Lastly, BX Rule 8210(c) states that no Member or Associated Person may fail to provide information or testimony or to submit to inspection and copying of books, records, or accounts.

Existing Rule 1800 states that any Member or Associated Person that fails to honor an arbitration award shall be subject to disciplinary proceedings in accordance with

Chapter 16. The Exchange proposes to replace this reference to Chapter 16 with a reference to BX Rule 9554, which is the BX Rule that governs such sanctions.

### **Proposed Introductory Paragraphs to Chapters 80 and 90**

The Exchange proposes to include introductory paragraphs to both Chapters 80 and 90 which state that they incorporate by reference the BX Rule 8000 and 9000 Series, respectively, and that such BX Rules shall be applicable to Exchange Members, Associated Persons, and other persons subject to the Exchange's jurisdiction.

These proposed introductory paragraphs also list instances in which cross references in the BX Rule 8000 and 9000 Series to other BX rules should be read to refer instead to the Exchange Rules, and references to defined BX terms shall be read to refer to the Exchange-related meanings of those terms. For example, references in both the BX Rule 8000 and 9000 Series to the following defined terms shall be read to refer to the Exchange-specific meanings of those terms: "Exchange" or "Nasdaq BX" shall be read to refer to the Exchange; "Rule" or "BX Rule" shall be read to refer to the Exchange Rules; "Board" or "Exchange Board" shall be read to refer to the Exchange Board of Directors; "Member" shall be read to refer to an Exchange Member; "Associated Person" shall be read to refer to an Exchange Associated Person; "BX Regulatory Department" or "Regulation Department" shall be read to refer to the Exchange's Regulatory Department; "BX Regulation" shall be read to refer to Exchange Regulation; "Chief Regulatory Officer" shall be read to refer to the Chief Regulatory Officer of the Exchange; and "Equity Rule" shall be read to refer to an Exchange Rule.

Additionally, the proposed introduction to Chapter 80 states that cross references in the BX Rule 8000 Series to the term "Rule 0120" shall be read to refer to Exchange Rule 100 and cross references in the BX Rule 8000 Series to "Rule 1015" shall be read to

refer to Exchange Rule 302. Similarly, the proposed introduction to Chapter 90 states that cross-references in the BX Rule 9000 Series to the following terms shall be read to refer to the following Exchange Rules: “Rule 0120” shall be read to refer to Exchange Rule 100; “Rule 1013” shall be read to refer to Exchange Rules 305 and 306; “Rule 1070” shall be read to refer to the Supplementary Material to Exchange Rule 313; “Rule 1160” shall be read to refer to Exchange Rule 305(b); “Equity Rule 2110” shall be read to refer to Exchange Rule 400; “Equity Rule 2120” shall be read to refer to Exchange Rule 405; “Rule 2140” shall be read to refer to Exchange Rule 312; “Equity Rule 2150” shall be read to refer to Exchange Rules Chapter 6; “Rule 2170” shall be read to refer to Exchange Rule 403; “Rule 4110A” shall be read to refer to Exchange Rules Chapter 13; “Rule 4120A” shall be read to refer to Exchange Rules Chapter 13; “Rule 10000 Series” shall be read to refer to Exchange Rules Chapter 18; and “Chapter III, Section 16” shall be read to refer to Exchange Rule 403.

Finally, as noted above, the introduction to Chapter 90 states that BX IM-9216 in the BX Rules shall not apply to the Exchange, its Members, Associated Persons, or other persons subject to the jurisdiction of the Exchange and that instead, references to BX IM-9216 shall be read to refer to Exchange Rule 1614(b). Similarly, the introduction states that the Exchange’s procedures set forth in BX Rule 9216(b) and 9143(e)(3), which govern its handling of MRVP violations and the issuance of MRVP violation letters, shall also apply to the Exchange’s handling of minor rule violations and the issuance of minor rule violation letters, except that the Exchange shall promptly report any final disciplinary action to the Commission, in accordance with SEC Rule 19d-1(c)(1).

## Conclusion

The changes proposed herein will allow the Exchange to harmonize its investigatory and disciplinary processes with the processes of BX, thus providing a uniform process for the investigation and discipline of Members and Associated Persons across all of the Nasdaq, Inc. SROs, as administered by FINRA pursuant to RSAs. Harmonizing the investigatory and disciplinary processes of all of the Nasdaq, Inc. SROs will bring efficiency to FINRA's administration of its responsibilities under the RSAs because the process it must follow are nearly identical, and are all based on the process that FINRA follows. Harmonized processes will bring consistency to investigations and adjudication of rule violations, and will reduce the number of disciplinary processes and requirements with which Members and Associated Persons, as well as their counsel, must be familiar.

The Exchange believes that the new investigatory and disciplinary processes are substantially similar to the existing process, and where there are differences between the new and old processes, the Exchange believes that the new process does not disadvantage its Members or Associated Persons. To the contrary, the Exchange believes that the new process will benefit all parties as it provides greater detail and specificity than the retired Rules, and that it is consequently more transparent.

The Exchange intends to announce the operative date of the new Rules at least 30 days in advance via a regulatory alert.<sup>135</sup> To facilitate an orderly transition from the

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<sup>135</sup> The Exchange notes that the proposed changes will not become operative unless and until the Commission approves the Exchange's request, which it has filed pursuant to Section 36 of the Exchange Act and SEC Rule 0-12 thereunder, for an exemption from the rule filing requirements of Section 19(b) of the Exchange Act as to changes to Chapters 80 and 90 that are effected solely by virtue of a change to the BX Rule 8000 or 9000 Series.

Existing Rules to the new Rules, the Exchange is proposing to apply the Existing Rules to all Letters of Consent that the CRO has approved and which are pending approval of the BCC prior to the operative date. The Exchange also will apply the Existing Rules to any matter for which, prior to the operative date, the Exchange has provided notice to a Subject of its determination to impose an MRVP fine or a minor rule violation fine whereby the Subject may yet or has contested the determination pursuant to Existing Rule 1614(a). In terms of formal disciplinary matters, any matter that has been approved for the issuance of a statement of charges by the CRO will continue under the Existing Rules. Moreover, any appeal of a matter that is pending before an OEP pursuant to Existing Rule 720, a Review Panel pursuant to Existing Rule 720A, or the BCC pursuant to Existing Rule 302 or Supplementary Material .01 to Existing Rule 307, will continue under the Existing Rules. As a consequence of this transition process, the Exchange will retain the BCC, the OEP, the Review Panel, and the existing processes during the transition period until such time that there are no longer any matters proceeding under the Existing Rules. To facilitate this transition process, the Exchange will retain a transitional Rulebook that will contain the Exchange's Rules as they are at the time of that this proposal is filed with the Commission. This transitional Rulebook will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules website. When the transition is complete and there are no longer any Members, Associated Persons or other persons subject to the existing disciplinary processes, the Exchange will remove the transitional Rulebook from its public rules website.

The Exchange furthermore notes that it expects the transition from the BCC to the Exchange Review Council to be smooth given that it expects to nominate the existing (and common) members of the BX, Nasdaq, and Phlx exchange review councils to also become members of the Exchange Review Council.<sup>136</sup> The Exchange does not expect that any existing members of the BCC will be nominated to become members of the Exchange Review Council; however, the Exchange will ensure that, in advance of the operative day, the members of the Exchange Review Council will familiarize themselves with the Rules and procedures of the Exchange so that they will be prepared to fulfill their responsibilities.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>137</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>138</sup> 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>136</sup> The Exchange anticipates that the members of the Exchange Review Council will serve in a manner that is consistent with their tenures on the Nasdaq, BX, and Phlx review councils. That is, to the extent that the tenure of a member of these other review councils is due to expire on a particular date, then the same expiration date will apply to that member's tenure on the Exchange Review Council. All terms for members on the Exchange Review Council will comply with Article VI, Section 4 of the proposed By-Laws.

<sup>137</sup> 15 U.S.C. 78f(b).

<sup>138</sup> 15 U.S.C. 78f(b)(5).

The Exchange also believes that the proposal is consistent with Section 6(b)(6) of the Act,<sup>139</sup> which requires that the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

The Exchange believes that the proposed changes are consistent with these requirements because the changes harmonize the Exchange's investigative, disciplinary, and adjudicatory processes with the similar processes used by BX. The new processes are well-established as fair and designed to protect investors and the public interest, providing greater detail and transparency in the processes than is currently provided under the Existing Rules. Because the Exchange is adopting these Rules materially unchanged from the related BX Rules, with minor differences to account for the Exchange's unique MRVP and minor rule violation schedule of fines, the Exchange believes that the proposed changes should facilitate prompt, appropriate, and effective discipline of Members and Associated Persons consistent with the Act.

The proposed Rule change also makes miscellaneous changes to the Existing Rules to account for the adoption of the BX Rule 8000 and 9000 Series and the replacement of the BCC with the Exchange Review Council. For example, subject to Chapter 90, proposed changes to Rule 302 re-assign responsibility to the Exchange Review Council to review decisions of the Exchange's Membership Department to deny or condition applications for membership and association with Exchange Members and to

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<sup>139</sup> 15 U.S.C. 78f(b)(6).

deny or condition continuing membership or association. The proposal also establishes a new process by which the Exchange Review Council will adjudicate such reviews.

Likewise, the Exchange proposes to amend Rule 307 to re-assign responsibility to the Exchange Review Council to review decisions of the Exchange to deny sales or transfers of market maker rights. It also proposes to establish a new process by which the Exchange Review Council will adjudicate such reviews. The Exchange believes that these proposed changes to the Existing Rules are consistent with the Act because the new adjudicatory processes that the Exchange proposes to adopt in place of its existing processes are substantially similar to those that BX already utilizes. Moreover, the Exchange believes that the proposed processes will facilitate prompt, appropriate, and fair adjudications, consistent with the Act.

Additionally, the Exchange proposes to make minor updates, corrections, and conforming amendments to the Exchange's Rules, which are consistent with the Act because they are necessary to ensure that the Exchange's cross-references and terminology remain current and accurate.

The Exchange believes that harmonizing its investigative, disciplinary, and adjudicatory processes with those of BX will reduce the burden on Members and Associated Persons that are also members of BX, Nasdaq, Phlx, and/or FINRA. The Exchange notes that all but one of its Members are also members of BX, Nasdaq, Phlx, and/or FINRA. BX, Nasdaq, Phlx, and FINRA already have in place investigative, disciplinary, and adjudicatory processes that are the same or similar to those that the Exchange proposes to incorporate by reference.

As discussed above, the Exchange believes that the proposed Rules will benefit

all parties involved in the Exchange's disciplinary and adjudicatory processes as they will include greater detail and specificity than do the Existing Rules. The proposal will render the Exchange's investigatory, disciplinary, and adjudicatory processes more transparent than the Existing Rules.

The Exchange also believes that adopting an Exchange Review Council is consistent with the Act because the Council's mandate is to, among other things, ensure consistent and fair application of the Exchange rules pertaining to discipline of Members and Associated Persons. The Exchange Review Council will be a body appointed by the Exchange Board of Directors and composed of representatives of the securities industry as well as persons from outside the securities industry. The broad membership of the new Exchange Review Council will ensure that the decisions and guidance it provides will be fair and balanced. The Exchange Review Council will be similar in structure and function to the BX exchange review council. In addition to reviewing appeals of disciplinary actions, the Exchange Review Council will also have jurisdiction to review membership decisions (proposed Rule 302) and appeals regarding limitations placed on Members or their employees that are subject to a statutory disqualification (BX Rule 9524). Additionally, the Exchange Review Council may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and Associated Persons, and enforcement policies, including policies with respect to fines and other sanctions. Thus, the Exchange Review Council will provide the Exchange and market participants with a fair and impartial body overseeing disciplinary matters, as well as the rules and policies concerning the disciplinary process. For these reasons, the Exchange believes that adoption of the

Exchange Review Council is consistent with the Act.

The Exchange believes that eliminating the BCC, the OEP (as provided for under Existing Rule 720), and the Review Panel (as provided for under Existing Rule 720A) is consistent with Sections 6(b)(5) and 6(b)(6) of the Act,<sup>140</sup> because the Exchange Review Council and the New Hearing Panels will assume the responsibilities of the BCC and the Panels. In particular, the functions of the Current Hearing Panels of the BCC will be handled by the New Hearing Panels, which the OHO shall convene. Going forward, the BCC's (and the CRO's) responsibility for approving settlements will be assumed by the Exchange Review Council and, in certain instances, the ODA. The BCC's responsibilities for hearing appeals of Exchange decisions on membership or association with a Member will be assumed by the Exchange Review Council. The responsibilities of the OEP and the Review Panel to hear appeals of Exchange determinations to nullify or adjust transactions that involve obvious errors or that result from system disruptions and malfunctions also will be assumed by the Exchange Review Council. The Exchange believes that the proposal will provide for the Exchange Review Council, the New Hearing Panels, and the ODA to execute the responsibilities of the BCC and the Panels in a manner that the Commission, within the context of the BX Rules, has already deemed to be consistent with the Act.<sup>141</sup> For example, the Exchange proposes to replace its existing process for handling appeals of membership decisions, as set forth in Existing Rule 302 and Chapter 17, with a process that BX already employs in BX Rules 1015 and 1016. Moreover, most Exchange Members and Associated Persons will already be

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<sup>140</sup> 15 U.S.C. 78f(b)(5)-(6).

<sup>141</sup> See Securities Exchange Act Release No. 34-59154 (Dec. 23, 2008), 73 FR 80468 (Dec. 31, 2008) (SR-BSE-2008-048).

familiar with the proposed responsibilities and procedures of the Exchange Review Council, the New Hearing Panels, and the ODA from their experiences as members of BX and other self-regulatory organizations whose rules provide for similar assignments of responsibilities and processes.

The Exchange believes that its proposal furthers the objectives of Section 6(b)(7) of the Act<sup>142</sup> in that it is designed to provide a fair procedure for the disciplining of members and Associated Persons, 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. Specifically, the Exchange believes that the proposed investigatory, disciplinary, and adjudicatory processes are consistent with Section 6(b)(7) of the Act<sup>143</sup> because they are based on the existing processes used by BX. The BX processes are well-established as consistent with the Act.<sup>144</sup>

Last, the Exchange believes that its proposal to phase-in the implementation of the new investigatory, disciplinary, and adjudicatory processes is consistent with Section 6(b)(7)<sup>145</sup> of the Act because both the current and proposed processes are consistent with the Act, providing fair procedures for investigating, disciplining, and adjudicating the rights of Members and Associated Persons. The Exchange is proposing to provide

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<sup>142</sup> 15 U.S.C. 78f(b)(7).

<sup>143</sup> Id.

<sup>144</sup> See n.141, supra.

<sup>145</sup> 15 U.S.C. 78f(b)(7).

advanced notice of the implementation date of the new processes, and will apply the new processes to new matters that are initiated on or after that implementation date. Any matters initiated prior to the implementation date will be completed using the current processes. As a consequence, the Exchange will delete the applicable portions of Chapters 15-17 from the Exchange's Rulebook, but it will maintain a transitional Rulebook on the Exchange's public rules website (<http://nasdaqISE.cchwallstreet.com/>), which will contain the Exchange Rules as they are at the time of filing this rule change.<sup>146</sup> These transitional Rules will apply exclusively to the matters initiated prior to the implementation date. Upon conclusion of the last matter to which the transitional rules apply, the Exchange will remove the defunct transitional rules from its public rules website. Thus, the transition will be conducted in a fair, orderly, and transparent manner.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change is not intended to address competitive issues, but it should reduce burdens on Members, and Associated Persons. Specifically and as described in detail above, the Exchange believes that this change will bring efficiency and consistency in application of the investigative, disciplinary, and adjudicatory processes, thereby reducing the burden on Members and Associated Persons who are also members of BX.

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<sup>146</sup> The posting of the transitional rules on the public rules website will make it clear what disciplinary proceedings are governed by the transitional rules (i.e., matters initiated prior to the implementation date).

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>147</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>148</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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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.

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<sup>147</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>148</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.

#### 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2018-59 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-ISE-2018-59. 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 Web site (<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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-ISE-2018-59 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.<sup>149</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>149</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are bracketed.

**BY-LAWS OF NASDAQ ISE, LLC**

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**Article I DEFINITIONS**

When used in these By-Laws, unless the context otherwise requires, the terms set forth below shall have the following meanings:

- (a) - (m) No change
- (n) "Industry member" means an Exchange Review Council member or a member of any committee appointed by the Board 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 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 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 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Company or any affiliate thereof or to FINRA (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years.
- (o) – (r) No change.

(s) "Member Representative member" means an Exchange Review Council member or a member of any other committee appointed by the Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to these By-Laws.

(t) – (w) No change.

(x) "Non-Industry member" means an Exchange Review Council member or a member of any other committee appointed by the Board who is (i) a Public member; (ii) an officer or employee of an issuer of securities listed on the national securities exchange operated by the Company; or (iii) any other individual who would not be an Industry member.

(y) – (z) No change.

(aa) "Public member" means an Exchange Review Council member or a member of any other committee appointed by the Board who has no material business relationship with a broker or dealer, the Company or its affiliates, or FINRA.

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### **Article III BOARD OF DIRECTORS**

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#### **Section 6. Committees Not Composed Solely of Directors**

(a) The Board shall appoint an Exchange Review Council as provided in Article VI of the By-Laws[Reserved].

(b) The Board shall appoint a Nominating Committee and a Member Nominating Committee. The Member Nominating Committee shall nominate candidates for each Member Representative Director position on the Board that is to be elected by Exchange Members or the Sole LLC Member under the terms of the LLC Agreement and these By-Laws, and shall nominate candidates for appointment by the Board for each vacant or new position on [any ]the Exchange Review Council or any other committee that is to be filled with a Member Representative member under the terms of these By-Laws. The Nominating Committee shall nominate candidates for all other vacant or new Director positions on the Board, and candidates for all other vacant or new positions on the Exchange Review Council.

(i) – (v) No change.

(c) No change.

Section 7. Conflicts of Interest; Contracts and Transactions Involving Directors

(a) A Director or a committee member, including a member of the Exchange Review Council or any other committee, shall not directly or indirectly participate in any adjudication of the interests of any party if that Director or [committee ]Exchange Review Council member or other committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Director or [committee ]Exchange Review Council member or other committee member shall recuse himself or herself or shall be disqualified.

(b) No change.

Section 8. Compensation of Board, Council, and Committee Members

The Board may provide for reasonable compensation of the Chair of the Board, the Directors, Exchange Review Council members, and the [committee ]members of other committees. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of the Company.

\* \* \* \* \*

**Article VI EXCHANGE REVIEW COUNCIL[RESERVED.]**

Section 1. Appointment and Authority

The Board shall appoint an Exchange Review Council. The Exchange Review Council may be authorized to act for the Board in a manner consistent with these By-Laws and the Rules with respect to an appeal or review of a disciplinary proceeding, a statutory disqualification proceeding, or a membership proceeding; a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; the exercise of exemptive authority; and such other proceedings or actions as may be authorized by the Rules. The Exchange Review Council also may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members and associated persons and enforcement policies, including policies with respect to fines and other sanctions, may advise the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices and may advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Exchange Members' conduct and trading activities in the national securities exchange operated by the Company. The Board may delegate such other powers and duties to the Exchange Review Council as the Board deems appropriate.

Section 2. Number of Members and Qualifications

The Exchange Review Council shall consist of no fewer than 8 and no more than 12 members. The Exchange Review Council shall include a number of Member Representative members that is equal to at least 20 percent of the total number of members of the Exchange Review Council. The number of Non-Industry members, including at least three Public members, shall equal or exceed the sum of the number of Industry members and Member Representative members. As soon as practicable following the appointment of members, the Exchange Review Council shall elect a Chair from among its members. The Chair shall have such powers and duties as may be determined from time to time by the Exchange Review Council. The Board, by resolution adopted by a majority of Directors then in office, may remove the Chair from such position at any time for refusal, failure, neglect, or inability to discharge the duties of Chair. No more than 50 percent of the members of the Exchange Review Council shall be engaged in market making activity or employed by an Exchange Member firm whose revenues from market making activity exceed 10 percent of its total revenues.

### Section 3. Nomination Process

The Secretary of the Company shall collect from each nominee for the office of member of the Exchange Review Council such information as is reasonably necessary to serve as the basis for a determination of the nominee's qualifications and classification as an Industry, Member Representative, Non-Industry, or Public member, and the Secretary shall certify to the Nominating Committee or the Member Nominating Committee (as applicable) each nominee's qualifications and classification. After appointment to the Exchange Review Council, each member shall update such information at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such information.

### Section 4. Term of Office

- (a) Except as otherwise provided in this Article, each Exchange Review Council member shall hold office for a term of three years or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, disqualification, or other reason.
- (b) The Exchange Review Council shall be divided into three classes. The term of office of those of the first class shall expire one year after the date of their appointment, the term of office of those of the second class shall expire two years after the date of their appointment, and the term of office of those of the third class shall expire three years after the date of their appointment. After the expiration of the term of office of those in the first class, members shall be appointed for terms of three years to replace those whose terms expire.

(c) No member may serve more than two consecutive terms, except that if a member is appointed to fill a term of less than one year, such member may serve up to two consecutive three-year terms following the expiration of such member's initial term.

#### Section 5. Resignation

A member of the Exchange Review Council may resign at any time upon written notice to the Board. Any such resignation shall take effect at the time specified therein, or if the time is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

#### Section 6. Removal

Any or all of the members of the Exchange Review Council may be removed from office at any time for refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the Board.

#### Section 7. Disqualification

Notwithstanding Article VI, Section 4, the term of office of an Exchange Review Council member shall terminate immediately upon a determination by the Board, by a majority vote, (a) that the member no longer satisfies the classification (Industry, Member Representative, Non-Industry, or Public) for which the member was elected; and (b) that the member's continued service as such would violate the compositional requirements of the Exchange Review Council set forth in Article VI, Section 2. If the term of office of an Exchange Review Council member terminates under this Section, and the remaining term of office of such member at the time of termination is not more than six months, during the period of vacancy the Exchange Review Council shall not be deemed to be in violation of Article VI, Section 2 by virtue of such vacancy.

#### Section 8. Filling of Vacancies

If a position on the Exchange Review Council becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the Nominating Committee or the Member Nominating Committee (as applicable) shall nominate, and the Board shall appoint a person satisfying the qualifications for the position as provided in Article VI, Section 2 to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

#### Section 9. Quorum and Voting

At all meetings of the Exchange Review Council, a quorum for the transaction of business shall consist of a majority of the Exchange Review Council, including not less than 50 percent of the Non-Industry members of the Exchange Review Council and at

least one Member Representative member of the Exchange Review Council; provided, however, that a quorum for the transaction of business with regard to an appeal of proceedings involving Exchange Rules 720, 720A, and 804 shall consist of three members of the Exchange Review Council. In the absence of a quorum, a majority of the members present may adjourn the meeting until a quorum is present.

#### Section 10. Meetings

The members of the Exchange Review Council may participate in a meeting through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

#### Section 11. Review Subcommittee

The Exchange Review Council shall appoint a Review Subcommittee to determine whether disciplinary and membership proceedings decisions should be called for review by the Exchange Review Council under the Rules and to perform any other function authorized by the Rules. The Review Subcommittee shall be composed of no fewer than two and no more than four members of the Exchange Review Council. The number of Non-Industry members of the Review Subcommittee shall equal or exceed the sum of the number of Industry members and Member Representative members of the Review Subcommittee, and the Review Subcommittee shall include at least one Member Representative member. At all meetings of the Review Subcommittee, a quorum for the transaction of business shall consist of not less than 50 percent of the members of the Review Subcommittee, including not less than 50 percent of the Non-Industry members of the Review Subcommittee and one Member Representative member of the Review Subcommittee.

\* \* \* \* \*

### **Nasdaq ISE Rules**

#### **1. Definitions**

##### **Rule 100.**

##### **Definitions**

- (a) The following terms, when used in these Rules, shall have the meanings specified in this Chapter 1, unless the context indicates otherwise. Any terms defined in the Limited Liability Company Agreement (the "LLC Agreement") or the By-Laws of Nasdaq ISE, LLC (the "By-Laws") and not otherwise defined in this Chapter shall have the meaning assigned in the LLC Agreement or the By-Laws.

(1) – (13) No change.

(13A) The term “Code of Procedure” means the procedural rules contained in Chapter 90.

(14) – (19) No change.

(20) The term “Exchange Act” or the “Act” means the Securities Exchange Act of 1934 and the rules and regulations thereunder, as amended from time to time.

(20A) The term “Exchange Review Council” means the committee authorized and directed to act for the Board of Directors of the Exchange in a manner consistent with the Exchange Rules with respect to (1) an appeal or review of a disciplinary proceeding; (2) a statutory disqualification decision; (3) a review of a membership proceeding; (4) a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; (5) the exercise of exemptive authority; (6) an appeal of proceedings involving Exchange Rules 302, 307, 720, 720A, and 804; and (7) such other proceedings or actions authorized by the Exchange Rules.

(21) - (57) No change.

(58) The terms “SEC” and “Commission” mean[s] the United States Securities and Exchange Commission.

(59) – (66) No change.

\* \* \* \* \*

## **Rule 210.**

### **Reserved[Liability for Payment of Fees**

(a) A Member that does not pay any dues, fees, assessments, charges, fines or other amounts due to the Exchange within thirty (30) days after they have become payable shall be reported to the President, who may, after giving reasonable notice to the Member of such arrearages, suspend the Member’s trading privileges until payment is made. Should payment not be made within six (6) months after payment is due, the Membership may be disposed of by the Exchange in accordance with Rule 307(b).

(b) A person associated with a Member who fails to pay any fine or other amounts due to the Exchange within thirty (30) days after such amount has become payable and after reasonable notice of such arrearages, may be suspended from association with a Member until payment is made.]

\* \* \* \* \*

### **Rule 302. Denial of and Conditions to Becoming a Member**

(a) – (e) No change.

(f) If a Member or person associated with a Member that becomes subject to a statutory disqualification under the Exchange Act wants to continue as a Member of the Exchange or in association with a Member, the Member or associated person must[, within thirty (30) days of becoming subject to a statutory disqualification,] submit an application to the Exchange seeking to continue as a Member or in association with a Member notwithstanding the statutory disqualification, as set forth in Rule 9522. Failure to timely file such an application is a factor that may be taken into consideration by the Exchange in making determinations pursuant to paragraph (e) of this Rule.

#### (g) Review by the Exchange Review Council

Subject to Chapter [15 (Summary Suspension)]90 of the Rules, any applicant whose application to become a Member is denied[ Membership] or conditioned by the Exchange's Membership Department (“the Department”), or any person whose association with a Member is denied or conditioned by the Department pursuant to paragraph (b) or (c) of this Rule, and any Member or person associated with a Member who is not permitted by the Department pursuant to paragraph (e) of this Rule to continue as a Member or to be associated with a Member or which continuance as a Member or association is conditioned by the Department, may appeal the [Exchange's]Department's decision [under Chapter 17 (Hearings and Review) of the Rules.]to the Exchange Review Council, as set forth below.

##### (1) Initiation of Review by Applicant

Within 25 days after service of a decision under Rule 302, an applicant (“Applicant”) may file a written request for review with the Exchange Review Council. A request for review shall state with specificity why the Applicant believes that the Department's decision is inconsistent with the bases for denial set forth in Rule 302, or otherwise should be set aside, and state whether a hearing is requested. The Applicant simultaneously shall file by first-class mail a copy of the request with the Department.

##### (2) Transmission of Documents

Within ten days after the filing of a request for review, the Department shall:

(A) transmit to the Exchange Review Council copies of all documents that were considered in connection with the Department's decision and an index to the documents; and

(B) serve on the Applicant a copy of such documents (other than those documents originally submitted by Applicant) and a copy of the index.

(3) Membership Application Docket

The Department shall promptly record in the Exchange's membership application docket each request for review filed with the Exchange Review Council under this Rule and each material subsequent event, filing, and change in the status of a membership proceeding.

(4) Appointment of Subcommittee

The Exchange Review Council or the Review Subcommittee defined in Rule 9120 shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more persons who shall be current or past members of the Exchange Review Council or former Directors.

(5) Powers of Subcommittee

If a hearing is requested, the Subcommittee shall conduct the hearing. If a hearing is not requested, the Subcommittee may serve a notice directing that a hearing be held. If a hearing is not requested or directed, the Subcommittee shall conduct its review on the basis of the record developed before the Department and any written submissions made by the Applicant or the Department in connection with the request for review.

(6) Hearing

(A) Notice

If a hearing is requested or directed, the hearing shall be held within 45 days after the filing of the request with the Exchange Review Council or service of the notice by the Subcommittee. The Exchange Review Council shall serve written notice of the date and time of the hearing to the Applicant by facsimile or overnight courier not later than 14 days before the hearing.

(B) Counsel

The Applicant and the Department may be represented by counsel at a hearing conducted pursuant to this Rule.

(C) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than five days before the hearing, the Applicant and the Department shall exchange copies of their proposed hearing exhibits and witness lists and provide copies of the same to the Exchange Review Council. If the Applicant or the Department fails to provide copies of

its proposed hearing exhibits or witness list within such time, the Subcommittee shall exclude the evidence or witnesses from the proceeding, unless the Subcommittee determines that good cause is shown for failure to comply with the production date set forth in this subparagraph.

(D) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. A transcript of the hearing shall be available for purchase from the court reporter at prescribed rates. The Applicant, the Department, or a witness may seek to correct the transcript. A proposed correction of the transcript shall be submitted to the Subcommittee within a reasonable period of time prescribed by the Subcommittee. Upon notice to the Applicant and the Department, the Subcommittee may direct the correction to the transcript as requested or sua sponte.

(7) Additional Information, Briefs

At any time during its consideration, the Subcommittee or the Exchange Review Council may direct the Applicant or the Department to file additional information or briefs. Any additional information or brief filed shall be provided to all parties before the Exchange Review Council renders its decision.

(8) Abandonment of Request for Review

If an Applicant fails to specify the grounds for its request for review under Rule 302 (g)(1), appear at a hearing for which it has notice, or file information or briefs as directed, the Exchange Review Council or the Review Subcommittee may dismiss the request for review as abandoned, and the decision of the Department shall become the final action of the Exchange. Upon a showing of good cause, the Exchange Review Council or the Review Subcommittee may withdraw a dismissal entered pursuant to this paragraph.

(9) Subcommittee Recommendation

The Subcommittee shall present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing held pursuant to subparagraph (g)(6), and not later than seven days before the meeting of the Exchange Review Council at which the membership proceeding shall be considered.

(10) Decision

(A) Proposed Written Decision

After considering all matters presented in the review and the Subcommittee's recommended written decision, the Exchange Review Council may affirm, modify, or reverse the Department's decision or remand the membership proceeding with

instructions. The Exchange Review Council shall prepare a proposed written decision pursuant to subparagraph (g)(10)(B).

(B) Contents

The decision shall include:

- (i) a description of the Department's decision, including its rationale;
- (ii) a description of the principal issues raised in the review;
- (iii) a summary of the evidence on each issue; and
- (iv) a statement whether the Department's decision is affirmed, modified, or reversed, and a rationale therefor that references the bases for denial in Rule 302.

(C) Issuance of Decision After Expiration of Call for Review Periods

The Exchange Review Council shall provide its proposed written decision to the Exchange Board. The Exchange Board may call the membership proceeding for review pursuant to Rule 302(h). If the Exchange Board does not call the membership proceeding for review, the proposed written decision of the Exchange Review Council shall become final. The Exchange Review Council shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that the final written decision will be served within 15 days after such date. The Exchange Review Council shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Review Council remands the membership proceeding.

(D) Failure to Issue Decision

If the Exchange Review Council fails to serve its final written decision within the time prescribed in subparagraph (g)(10)(C), the Applicant may file a written request with the Exchange Board requesting that the Exchange Board direct the Exchange Review Council to serve its decision immediately or to show good cause for an extension of time. Within seven days after the filing of such a request, the Board shall direct the Exchange Review Council to serve its written decision immediately or to show good cause for an extension of time. If the Exchange Review Council shows good cause for an extension of time, the Exchange Board may extend the 15-day time limit by not more than 15 days.

(h) Discretionary Review by the Exchange Board

(1) Call for Review by Director

A Director may call a membership proceeding for review by the Exchange Board if the call for review is made within the period prescribed in subparagraph (h)(2).

(2) 15 Day Period; Waiver

A Director shall make his or her call for review at the next meeting of the Exchange Board that is at least 15 days after the date on which the Exchange Board receives the proposed written decision of the Exchange Review Council. By unanimous vote of the Exchange Board, the Exchange Board may shorten the period to less than 15 days. By an affirmative vote of the majority of the Exchange Board then in office, the Exchange Board may, during the 15 day period, vote to extend the period to more than 15 days.

(3) Review At Next Meeting

If a Director calls a membership proceeding for review within the time prescribed in subparagraph (h)(2), the Exchange Board shall review the membership proceeding not later than the next meeting of the Exchange Board. The Exchange Board may order the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

(4) Decision of the Exchange Board, Including Remand

After review, the Exchange Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council. Alternatively, the Exchange Board may remand the membership proceeding with instructions. The Exchange Board shall prepare a written decision that includes all of the elements described in Rule 302(g)(10)(B).

(5) Issuance of Decision

The Exchange Board shall serve its written decision on the Applicant within 15 days after the meeting at which it conducted its review. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Board remands the membership proceeding.

\* \* \* \* \*

**Rule 305.**

**Documents Required of Applicants and Members**

(a) No change.

(b) [Every Member shall file with the Exchange and keep current an address where notices may be served.] Every Member shall report to the Exchange all

contact information required by the Exchange via the FINRA Contact system. Each Member shall update its required contact information promptly, but in any event not later than 30 days following any change in such information. In addition, each Member shall review and, if necessary, update its required contact information, via such means as the Exchange may specify, within 17 business days after the end of each calendar year. Each member shall comply with any Exchange request for such information promptly, but in any event not later than 15 days following the request, or such longer period that may be agreed to by Exchange staff.

(c) No change.

(d) Reserved. [Members shall keep and maintain a current copy of the By-Laws and Rules in a readily accessible place. Members that are approved to do business with the public pursuant to Rule 600 shall make the By-Laws and Rules available for examination by customers.]

\* \* \* \* \*

### **Rule 307. Sale and Transfer of Market Maker Rights**

(a) – (b) No change.

(c) Pursuant to paragraph (a) above, the Exchange's Membership Department shall either approve or disapprove an executed transfer agreement between an owner and an approved applicant within thirty (30) days of receipt of the agreement. A transfer agreement may be disapproved under the following circumstances: (i) the contract attempts to transfer only part of the rights associated with a Market Maker Right; or (ii) the transfer would result in the transferee exceeding the ownership concentration limits contained in the Rules, or would otherwise violate the Exchange's Rules.

(d) The owner or an approved applicant that is a party to an executed transfer agreement that is denied approval (the "Applicant") may appeal the Membership Department's decision to the Exchange Review Council, as set forth below.

#### (1) Initiation of Review by Applicant

Within 25 days after service of a decision under paragraph (c), an Applicant that is denied approval may file a written request for review with the Exchange Review Council. A request for review shall state with specificity why the Applicant believes that the Membership Department's decision is inconsistent with the bases for denial set forth in Rule 307(c), or otherwise should be set aside, and state whether a hearing is requested. The Applicant simultaneously shall file by first-class mail a copy of the request with the Exchange.

#### (2) Transmission of Documents

Within ten days after the filing of a request for review, the Exchange shall:

(A) transmit to the Exchange Review Council copies of all documents that were considered in connection with the Exchange's decision and an index to the documents; and

(B) serve on the Applicant a copy of such documents (other than those documents originally submitted by the Applicant) and a copy of the index.

(3) Appointment of Subcommittee

The Exchange Review Council or the Review Subcommittee defined in Rule 9120 shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more persons who shall be current or past members of the Exchange Review Council or former Directors.

(4) Powers of Subcommittee

If a hearing is requested, the Subcommittee shall conduct the hearing. If a hearing is not requested, the Subcommittee may serve a notice directing that a hearing be held. If a hearing is not requested or directed, the Subcommittee shall conduct its review on the basis of the record developed before the Membership Department and any written submissions made by the Applicant or the Membership Department in connection with the request for review.

(5) Hearing

(A) Notice

If a hearing is requested or directed, the hearing shall be held within 45 days after the filing of the request with the Exchange Review Council or service of the notice by the Subcommittee. The Exchange Review Council shall serve written notice of the date and time of the hearing to the Applicant by facsimile or overnight courier not later than 14 days before the hearing.

(B) Counsel

The Applicant and the Membership Department may be represented by counsel at a hearing conducted pursuant to this Rule.

(C) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than five days before the hearing, the Applicant and the Membership Department shall exchange copies of their proposed hearing exhibits and witness lists and provide copies of the same

to the Exchange Review Council. If the Applicant or the Membership Department fails to provide copies of its proposed hearing exhibits or witness list within such time, the Subcommittee shall exclude the evidence or witnesses from the proceeding, unless the Subcommittee determines that good cause is shown for failure to comply with the production date set forth in this subparagraph.

(D) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. A transcript of the hearing shall be available for purchase from the court reporter at prescribed rates. The Applicant, the Membership Department, or a witness may seek to correct the transcript. A proposed correction of the transcript shall be submitted to the Subcommittee within a reasonable period of time prescribed by the Subcommittee. Upon notice to the Applicant and the Membership Department, the Subcommittee may direct the correction to the transcript as requested or sua sponte.

(6) Additional Information, Briefs

At any time during its consideration, the Subcommittee or the Exchange Review Council may direct the Applicant or the Membership Department to file additional information or briefs. Any additional information or brief filed shall be provided to all parties before the Exchange Review Council renders its decision.

(7) Abandonment of Request for Review

If an Applicant fails to specify the grounds for its request for review under Rule 307 (d)(1), appear at a hearing for which it has notice, or file information or briefs as directed, the Exchange Review Council or the Review Subcommittee may dismiss the request for review as abandoned, and the decision of the Membership Department shall become a final Exchange action. Upon a showing of good cause, the Exchange Review Council or the Review Subcommittee may withdraw a dismissal entered pursuant to this paragraph.

(8) Subcommittee Recommendation

The Subcommittee shall present a recommended decision in writing to the Exchange Review Council within 60 days after the date of the hearing held pursuant to subparagraph (d)(5), and not later than seven days before the meeting of the Exchange Review Council at which the membership proceeding shall be considered.

(9) Decision

(A) Proposed Written Decision

After considering all matters presented in the review and the Subcommittee's recommended written decision, the Exchange Review Council may affirm, modify, or

reverse the Membership Department's decision or remand the proceeding with instructions. The Exchange Review Council shall prepare a proposed written decision pursuant to subparagraph (d)(9)(B).

(B) Contents

The decision shall include:

- (i) a description of the Exchange Review Council's decision, including its rationale;
- (ii) a description of the principal issues raised in the review;
- (iii) a summary of the evidence on each issue; and
- (iv) a statement whether the Membership Department's decision is affirmed, modified, or reversed, and a rationale therefor that references the bases for denial in Rule 307(c).

(C) Issuance of Decision After Expiration of Call for Review Periods

The Exchange Review Council shall provide its proposed written decision to the Exchange Board. The Exchange Board may call the proceeding for review pursuant to Rule 307(d)(10). If the Exchange Board does not call the proceeding for review, the proposed written decision of the Exchange Review Council shall become final. The Exchange Review Council shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that the final written decision will be served within 15 days after such date. The Exchange Review Council shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Review Council remands the membership proceeding.

(D) Failure to Issue Decision

If the Exchange Review Council fails to serve its final written decision within the time prescribed in subparagraph (d)(9)(C), the Applicant may file a written request with the Exchange Board requesting that the Exchange Board direct the Exchange Review Council to serve its decision immediately or to show good cause for an extension of time. Within seven days after the filing of such a request, the Board shall direct the Exchange Review Council to serve its written decision immediately or to show good cause for an extension of time. If the Exchange Review Council shows good cause for an extension of time, the Exchange Board may extend the 15-day time limit by not more than 15 days.

(10) Discretionary Review by the Exchange Board

(A) Call for Review by Director

A Director may call a proceeding for review by the Exchange Board if the call for review is made within the period prescribed in subparagraph (d)(10)(B).

(B) 15 Day Period; Waiver

A Director shall make his or her call for review at the next meeting of the Exchange Board that is at least 15 days after the date on which the Exchange Board receives the proposed written decision of the Exchange Review Council. By unanimous vote of the Exchange Board, the Exchange Board may shorten the period to less than 15 days. By an affirmative vote of the majority of the Exchange Board then in office, the Exchange Board may, during the 15 day period, vote to extend the period to more than 15 days.

(C) Review At Next Meeting

If a Director calls a proceeding for review within the time prescribed in subparagraph (d)(10)(B), the Exchange Board shall review the proceeding not later than the next meeting of the Exchange Board. The Exchange Board may order the Applicant and the Membership Department to file briefs in connection with review proceedings pursuant to this paragraph.

(D) Decision of the Exchange Board, Including Remand

After review, the Exchange Board may affirm, modify, or reverse the proposed written decision of the Exchange Review Council. Alternatively, the Exchange Board may remand the proceeding with instructions. The Exchange Board shall prepare a written decision that includes all of the elements described in subparagraph (d)(9)(B).

(5) Issuance of Decision

The Exchange Board shall serve its written decision on the Applicant within 15 days after the meeting at which it conducted its review. The decision shall constitute the final action of the Exchange for purposes of SEC Rule 19d-3, unless the Exchange Board remands the proceeding.

*[Supplementary Material to Rule 307]*

.01 Pursuant to paragraph (a) above, the Exchange shall either approve or disapprove an executed transfer agreement between an owner and an approved applicant within thirty (30) days of receipt of the agreement. A transfer agreement may be disapproved under the following circumstances: (i) the contract attempts to transfer only part of the rights associated with a Market Maker Right; or (ii) the transfer would result in the transferee exceeding the ownership concentration limits contained in the Rules, or would otherwise violate the Exchange's Rules. The owner

or an approved applicant that is a party to an executed transfer agreement that is denied approval may appeal the Exchange's decision under Chapter 17 (Hearings and Review).]

\* \* \* \* \*

**Rule 310.****Dissolution and Liquidation of Members**

Every Member shall promptly notify the Exchange in writing upon the adoption of a plan of liquidation or dissolution. Upon receipt of such notice, the Member's trading privileges may be suspended in accordance with Rule 9558[Chapter 15 (Summary Suspension) of these Rules].

\* \* \* \* \*

**Rule 313. Registration Requirements**

(a) – (e) No change.

*Supplementary Material to Rule 313*

.01- .04 No change.

.05 Pursuant to the Rule 9600 Series, [T]the Exchange may, in exceptional cases and where good cause is shown, waive the applicable qualification examination and accept other standards as evidence of an applicant's qualifications for registration. Advanced age or physical infirmity will not individually of themselves constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the securities business may constitute sufficient grounds to waive a qualification examination.

.06 - .08 No change.

\* \* \* \* \*

**Rule 410.****Other Restrictions on Members**

Whenever the Exchange shall find that a Member has failed to perform on his or its contracts or is insolvent or is in such financial or operational condition or is otherwise conducting business in such a manner that it cannot be permitted to continue in business with safety to customers or creditors or the Exchange, the Exchange may summarily suspend the Member in accordance with Rule 9558[Chapter 15 (Summary Suspension)] or may impose such conditions and restrictions upon the Member as considered reasonably necessary for the protection of the Exchange and the customers of such Member.

\* \* \* \* \*

**Rule 413.****Exemptions from Position Limits**

(a) No change.

(b) *Market Maker Exemption.* The provisions set forth below apply only to market makers seeking an exemption to the standard position limits in all options traded on the Exchange for the purpose of assuring that there is sufficient depth and liquidity in the marketplace, and not to confer a right upon the market maker applying for an exemption.

(1) In light of the procedural safeguards, the purpose of this exemption process, and the prohibition against the granting of retroactive exemptions, decisions granting or denying exemptions are not subject to review[ under Chapter 17 (Hearing and Review) of the Exchange Rules regarding Hearings and Review].

(2) – (7) No change.

(c) – (d) No change.

\* \* \* \* \*

**Rule 720.****Nullification and Adjustment of Options Transactions including Obvious Errors**

The Exchange may nullify a transaction or adjust the execution price of a transaction in accordance with this Rule. However, the determination as to whether a trade was executed at an erroneous price may be made by mutual agreement of the affected parties to a particular transaction. A trade may be nullified or adjusted on the terms that all parties to a particular transaction agree, provided, however, that such agreement to nullify or adjust must be conveyed to the Exchange in a manner prescribed by the Exchange prior to 8:30 a.m. Eastern Time on the first trading day following the execution. It is considered conduct inconsistent with just and equitable principles of trade for any Member to use the mutual adjustment process to circumvent any applicable Exchange rule, the Act or any of the rules and regulations thereunder.

(a) – (j) No change.

(k) *Appeals.* If a Member affected by a determination made under this Rule so requests within the time permitted below, [the Obvious Error Panel (“Obvious Error Panel”)]an Exchange Review Council panel will review decisions made by the Official under this Rule, including whether an obvious error occurred and whether the correct determination was made.

[(1) The Obvious Error Panel will be comprised of representatives from four (4) Members. Two (2) of the representatives must be directly engaged in market making (any such representative, a “MM Representative”) and the other two (2) representatives must be employed by an Electronic Access Member (any such representative, a “Non-MM Representative”). To qualify as a representative of a Member other than a Member engaged in market making, a person must:

(A) be employed by a Member whose revenues from options market making activity do not exceed ten percent (10%) of its total revenues; or

(B) have as his or her primary responsibility the handling of Public Customer orders or supervisory responsibility over persons with such responsibility, and not have any responsibilities with respect to market making activities.]

[(2)](1) An Exchange Review Council panel will be comprised minimally of representatives of one (1) member engaged in market making and two (2) industry representatives not engaged in market making. At no time should a review panel have more than 50% members engaged in market making. [The Exchange shall designate at least ten (10) MM Representatives and at least ten (10) Non-MM Representatives to be called upon to serve on the Obvious Error Panel as needed. In no case shall an Obvious Error Panel include a person affiliated with a party to the trade in question. To the extent reasonably possible, the Exchange shall call upon the designated representatives to participate on an Obvious Error Panel on an equally frequent basis.]

[(3)](2) A request for review on appeal must be made in writing via e-mail or other electronic means specified from time to time by the Exchange in a circular distributed to Members within thirty (30) minutes after the party making the appeal is given notification of the initial determination being appealed. The [Obvious Error Panel]Exchange Review Council panel shall review the facts and render a decision as soon as practicable, but generally on the same trading day as the execution(s) under review. On requests for appeal received after 3:00 p.m. Eastern Time, a decision will be rendered as soon as practicable, but in no case later than the trading day following the date of the execution under review.

[(4)](3) The [Obvious Error Panel]Exchange Review Council panel may overturn or modify an action taken by the Official under this Rule. All determinations by the [Obvious Error Panel]Exchange Review Council panel shall constitute final action by the Exchange on the matter at issue.

[(5)](4) If the [Obvious Error Panel]Exchange Review Council panel votes to uphold the decision made pursuant to paragraph (k)[(1)] above, the Exchange will assess a \$5,000.00 fee against the Member(s) who initiated the request for appeal. In addition, in instances where the Exchange, on behalf of a Member, requests a determination by another market center that a transaction is clearly erroneous, the Exchange will pass any resulting charges through to the relevant Member.

[(6)](5) Any determination by an Official or by the [Obvious Error Panel]Exchange Review Council panel shall be rendered without prejudice as to the rights of the parties to the transaction to submit their dispute to arbitration.

***Supplementary Material to Rule 720***

No change.

**Rule 720A. Erroneous Trades due to System Disruptions and Malfunctions**

(a) No change.

(b) *Procedures for Review of Decisions Made Pursuant to Rule 720A(a).*

(1) If a party to a ruling by Market Control made pursuant to subsection (a) of this Rule requests within the time permitted below, [a Review Panel,] an Exchange Review Council panel will be utilized to review decisions made by Market Control under this Rule.

(i) An Exchange Review Council panel will be comprised minimally of representatives of one (1) member engaged in market making and two (2) industry representatives not engaged in market making. At no time should a review panel have more than 50% members engaged in market making. [The Review Panel will be comprised of representatives from four (4) Member firms. Two (2) of the representatives must be directly engaged in market making activity and two (2) of the representatives must be employed by an Electronic Access Member. To qualify as a representative of an Electronic Access Member on a Review Panel, a person must (i) be employed by a Member whose revenues from options market making activity do not exceed ten percent (10%) of its total revenues; or (ii) have as his or her primary responsibility the handling of Public Customer orders or supervisory responsibility over persons with such responsibility, and not have any responsibilities with respect to market making activities.]

[(ii) The Exchange shall designate at least five (5) market maker representatives and at least five (5) Electronic Access Member representatives to be called upon to serve on the Review

Panel as needed. In no case shall a Review Panel include a person related to a party to the trade in question. To the extent reasonably possible, the Exchange shall call upon the designated representatives to participate on a Review Panel on an equally frequent basis.]

[(iii)][(ii)] A request for review on appeal must be made via facsimile or e-mail within thirty (30) minutes after the party making the appeal is given notification of the initial determination being appealed. The [Review Panel]Exchange Review Council panel shall review the facts and render a decision within the time frame prescribed by the Exchange.

[(iv)][(iii)] The [Review Panel]Exchange Review Council panel may overturn or modify an action taken by the Exchange under this Rule. All determinations by the [Review Panel]Exchange Review Council panel shall constitute final action by the Exchange on the matter at issue.

\* \* \* \* \*

**Rule 804.****Market Maker Quotations**

(a) – (e) No change.

(f) *Temporary Withdrawal of Quotations by Primary Market Makers.* A Primary Market Maker may apply to the Exchange to withdraw temporarily from its Primary Market Maker status in an options class. The Primary Market Maker must base its request on demonstrated legal or regulatory requirements that necessitate its temporary withdrawal, or provide the Exchange an opinion of counsel certifying that such legal or regulatory basis exists. The Exchange will act promptly on such a request, and, if the request is granted, the Exchange will temporarily reassign the options class to another Primary Market Maker.

(1) The Exchange Review Council shall have jurisdiction over proceedings brought by Primary Market Makers seeking review of the denial of an excused withdrawal pursuant to this Rule or the conditions imposed on their reentry.

(g) – (h) No change.

**Supplementary Material to Rule 804**

No change.

\* \* \* \* \*

## **10. Closing Transactions**

### **Rule 1000.**

### **Contracts of Suspended Members**

(a) When a Member, other than a Clearing Member, is suspended pursuant to [Chapter 15 (Summary Suspension)]Chapter 90, all open short positions of the suspended Member in options contracts and all open positions resulting from exercise of options contracts, other than positions that are secured in full by a specific deposit or escrow deposit in accordance with the rules of the Clearing Corporation, shall be closed without unnecessary delay by all Members carrying such positions for the account of the suspended Member; provided that the Exchange may cause the foregoing requirement to be temporarily waived for such period as it may determine if it shall deem such temporary waiver to be in the interest of the public or the other Members of the Exchange.

(b) No change.

(c) When a Clearing Member is suspended pursuant to [Chapter 15 (Summary Suspension) of these Rules]Chapter 90, the positions of such Clearing Member shall be closed out in accordance with the rules of the Clearing Corporation.

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## **14. Records, Reports and Audits**

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### **Rule 1406.**

### **Regulatory Cooperation**

(a) – (c) No change.

(d) Whenever information is requested by the Exchange pursuant to this Rule, the Member or person associated with a Member from whom the information is requested shall have the same rights and procedural protections in responding to such request as such Member or person would have in the case of any other request for information initiated by the Exchange pursuant to Rule [1601(b)]8210.

\* \* \* \* \*

## **15. Reserved[Summary Suspension]**

### **Rule 1500.**

### **Reserved[Imposition of Suspension]**

(a) A Member or person associated with a Member that has been expelled or suspended from any SRO or barred or suspended from being associated

with a member of any SRO, or a Member that is in such financial or operating difficulty that the Board or a committee or Exchange official designated by the Board determines that the Member cannot be permitted to continue to do business as a Member with safety to investors, creditors, other Members, or the Exchange, may be summarily suspended.

(b) The Board or a committee or Exchange official designated by the Board may limit or prohibit any person with respect to access to services offered by the Exchange if any of the criteria of the foregoing sentence is applicable to such person or, in the case of a person who is a Member, if the Exchange determines that such person does not meet the qualification requirements or other prerequisites for such access with safety to investors, creditors, Members or the Exchange.

(c) In the event a determination is made to take summary action pursuant to this Rule, notice thereof will be sent to the SEC.

(d) Any person aggrieved by any summary action taken under this Rule shall be promptly afforded an opportunity for a hearing by the Exchange in accordance with the provisions of Chapter 17 (Hearing and Review).

(e) A summary suspension or other action taken pursuant to this Chapter shall not be deemed to be disciplinary action under Chapter 16 (Discipline). The provisions of Chapter 16 shall be applicable regardless of any action taken pursuant to this Chapter.]

**Rule 1501.****Reserved[Investigation Following Suspension]**

(a) Every Member or person associated with a Member against which action has been taken in accordance with the provisions of this Chapter shall immediately afford every facility required by the Exchange for the investigation of his or its affairs and shall forthwith file with the Secretary a written statement covering all information requested, including a complete list of creditors and the amount owing to each and a complete list of each open long and short position in Exchange options contracts maintained by the Member and each of his or its customers.

(b) Paragraph (a) includes, without limitation, the furnishing of such books and records of the Member or person associated with a Member and the giving of such sworn testimony as may be requested by the Exchange.]

**Rule 1502.****Reserved[Reinstatement]**

(a) *General.*

(1) A Member, person associated with a Member or other person suspended or limited or prohibited with respect to access to services offered by

the Exchange under the provisions of this Chapter may apply for reinstatement within the time period set forth below.

(2) Notice of an application for reinstatement shall be given by the Secretary to the Membership and shall be posted by the Exchange at least five (5) business days prior to the consideration by the Exchange of said application.

(3) The Exchange may approve an application for reinstatement if it finds that the applicant is operationally and financially able to conduct his business with safety to investors, creditors, Members, and the Exchange.

(b) *Suspension Due to Operating Difficulty.*

(1) An applicant that, by reason of operating difficulty, has been suspended or limited or prohibited with respect to Exchange services, must file any application for reinstatement within six months from the date of such action. Such application must include a statement of all actions taken by the applicant to remedy the operational difficulty in question.

(2) If the applicant fails to receive reinstatement, or if the application is not acted upon ninety (90) days of its submission, the applicant shall be afforded an opportunity for a hearing in accordance with the provisions of Chapter 17 (Hearing and Review).

(c) *Suspension Due to Financial Difficulty.*

(1) An applicant who, by reason of financial difficulty, has been suspended or limited or prohibited with respect to Exchange services, must file any application for reinstatement within thirty (30) days of such action.

(2) Such application must include a list of all creditors of the applicant a statement of the amount originally owing and the nature of the settlement in each case, and such other information as may be requested by the Exchange.

(3) The Membership of a Member summarily suspended by reason of financial difficulty may not be disposed of by the Exchange until that Member has been afforded an opportunity for a hearing respecting such summary suspension pursuant to the provisions of Chapter 17 (Hearing and Review).]

**Rule 1503.**

**Reserved[Failure to Obtain Reinstatement**

If a Member suspended under the provisions of this Chapter fails or is unable to apply for reinstatement in accordance with Rule 1502, or fails to obtain reinstatement as therein provided, his or its Membership shall be disposed of by the Exchange in accordance with Rule 307(b), unless such Member sells or

leases such Membership.]

**Rule 1504.****Reserved[Termination of Rights by Suspension]**

A Member suspended under the provisions of this Chapter shall be deprived during the term of his or its suspension of all rights and privileges of being a Member of the Exchange.]

**16. Disciplinary Jursidiction and Minor Rule Violation Fines[Discipline]****Rule 1600.****Disciplinary Jurisdiction**

(a) A Member or a person associated with a Member who is alleged to have violated or aided and abetted a violation of any provision of the Exchange Act, the rules and regulations promulgated thereunder, or any provision of the By-Laws or Rules of the Exchange or any interpretation thereof or resolution of the Board of the Exchange regulating the conduct of business on the Exchange, shall be subject to the disciplinary jurisdiction of the Exchange under this Chapter, and after notice and opportunity for a hearing may be appropriately disciplined by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a Member or any other fitting sanction, in accordance with provisions of the Chapter.

(b) Persons associated with a Member may be charged with any violation committed by employees under his supervision or by the Member as though such violation were his own. A Member may be charged with any violation committed by its employees or other person who is associated with such Member, as though such violation were its own.

(c) Any Member or person associated with a Member shall continue to be subject to the disciplinary jurisdiction of the Exchange following such Member's termination or the person's termination of association with a Member with respect to matters that occurred prior to such termination; provided that written notice of the commencement of an inquiry into such matters is given by the Exchange to such former Member or former associated person within one (1) year of receipt by the Exchange, or such other exchange or association recognized for purposes of Rule 602, of the latest written notice of the termination of such person's status as a Member or person associated with a Member. The foregoing notice requirement does not apply to a person who at any time after a termination again subjects himself to the disciplinary jurisdiction of the Exchange by becoming a Member or a person associated with a Member.

**Rule 1601.****Reserved[Requirement to Furnish Information]**

Each Member and person associated with a Member shall be obligated upon request by the Exchange (including by another SRO acting on behalf of the Exchange pursuant to Rule 1615) to appear and testify, and to respond in writing to interrogatories and furnish documentary materials and other information requested in connection with (i) an investigation initiated pursuant to Rule 1602, (ii) a hearing or appeal conducted pursuant to this Chapter or preparation by the Exchange in anticipation of such a hearing or appeal, or (iii) an Exchange inquiry resulting from an agreement entered into by the Exchange pursuant to Rule 1406.

(a) A Member or person associated with a Member is entitled to be represented by counsel during any such Exchange investigation, proceeding or inquiry.

(b) No Member or person associated with a Member shall impede or delay an Exchange investigation or proceeding conducted pursuant to this Chapter or an Exchange inquiry pursuant to Rule 1406, nor refuse to comply with a request made by the Exchange pursuant to this paragraph.

(c) Failure to furnish testimony, documentary evidence or other information requested by the Exchange in the course of an Exchange inquiry, investigation, hearing or appeal conducted pursuant to this Chapter, or in the course of preparation by the Exchange in anticipation of such a hearing or appeal, on the date or within the time period the Exchange specifies shall be deemed to be a violation of this Rule.]

**Rule 1602.****Reserved[Investigation**

The Exchange's regulatory staff (including regulatory staff of another SRO acting on the Exchange's behalf pursuant to Rule 1615), which is obligated to act independently from the economic interests of the Members regulated by the Exchange, has sole discretion to investigate possible violations within the disciplinary jurisdiction of the Exchange on its own initiative or based upon a complaint alleging possible violations submitted by any person, Exchange committee or the Board. All complaints shall be in writing signed by the complainant and shall specify in reasonable detail the facts constituting the violation, including the specific statutes, by-laws, rules, interpretations or resolutions allegedly violated.]

**Rule 1603.****Reserved[Letters of Consent**

In lieu of the procedures set forth in Rules 1604 through 1606 (Charges, Answer and Hearing), a matter may be disposed of through a letter of consent.

(a) A matter can only be disposed of through a letter of consent if

regulatory staff and the Member or person(s) who is the subject of the investigation (the “Subject”) are able to agree upon terms of a letter of consent. Such letter must be signed by the Subject and must set forth a stipulation of facts and findings concerning the Member’s conduct, the violation(s) committed by the Member and the sanction(s) therefor.

(b) In the event that the Subject and the regulatory staff are able to agree upon a letter of consent, the staff shall submit the letter to the Chief Regulatory Officer. If the letter of consent is acceptable to the Chief Regulatory Officer, it shall be submitted to the Business Conduct Committee. In the event that the Member and the regulatory staff are unable to agree upon a letter of consent or if a proposed letter is not acceptable to the Chief Regulatory Officer, the staff may institute an action according to the procedures contained in Rule 1604. The Chief Regulatory Officer’s decision to reject a letter of consent shall be final, and a Subject may not seek review thereof.

(c) If a letter of consent is submitted to and accepted by the Business Conduct Committee, the Exchange shall take no further action against the Subject respecting the matters that are the subject of the letter. If the letter of consent is rejected by the Business Conduct Committee, the matter shall proceed as though the letter had not been submitted. The Business Conduct Committee’s decision to accept or reject a letter of consent shall be final, and a Subject may not seek review thereof.]

**Rule 1604.****Reserved[Charges]**

(a) *Initiation of Charges.* Whenever it shall appear that there is probable cause for finding a violation within the disciplinary jurisdiction of the Exchange and that further proceedings are warranted, the regulatory staff shall prepare a statement of charges against the Member or associated person alleged to have committed a violation (the “Respondent”) specifying the acts in which the Respondent is charged to have engaged and setting forth the specific provisions of the Exchange Act, rules and regulations promulgated thereunder, provisions of the By-Laws or Rules of the Exchange, or interpretations or resolutions of which such acts are in violation. If the statement of charges is approved by the Chief Regulatory Officer, a copy of the charges shall be served upon the Respondent in accordance with Rule 1612. The complainant, if any, shall be notified if further proceedings are warranted.

(b) *Access to Documents.* Provided that a Respondent has made a written request for access to documents described hereunder with sixty (60) calendar days after a statement of charges has been served upon the Respondent in accordance with Rule 1612, the Respondent shall have access to all documents concerning the case that are in the investigative file of the Exchange except for regulatory staff investigation and examination reports and any other materials prepared by the Exchange staff in connection with such reports or in anticipation of a disciplinary hearing. In providing such documents, the Exchange may protect the identity of a

complainant.]

**Rule 1605.****Reserved[Answer]**

(a) The Respondent shall have twenty-five (25) calendar days after service of the charges to file with the Secretary of the Exchange a written answer thereto. The answer shall specifically admit or deny each allegation contained in the charges, and the Respondent shall be deemed to have admitted any allegation not specifically denied. The answer may also contain any defense that the Respondent wishes to submit and may be accompanied by documents in support of his answer or defense. In the event the Respondent fails to file an answer, the charges shall be considered to be admitted.

(b) Upon review of the Respondent's answer, the Chief Regulatory Officer may modify the statement of charges, and a copy of the modified charges shall be served upon the Respondent in accordance with Rule 1612. If such modification asserts any new or materially different charges from those contained in the initial statement, Respondent shall have an additional twenty-five (25) calendar days after service of the modified statement of charges to file a written answer thereto in accordance with paragraph (a) above.]

**Rule 1606.****Reserved[Hearing]**

(a) *Appointment of Hearing Panel.* Subject to Rule 1608 (Summary Proceedings), a hearing on the charges shall be held before a professional hearing officer and two members of the Business Conduct Committee (the "Panel"). The professional hearing officer shall serve as the chairman of the Panel (the "Panel Chairman").

(1) Promptly after the Respondent files a written answer to the statement of charges, the Chairman of the Business Conduct Committee shall select from among the persons on the Business Conduct Committee two (2) persons to serve on the Panel. In making such selection, the Chairman of the Business Conduct Committee shall, to the extent practicable, choose individuals whose background, experience and training qualify them to consider and make determinations regarding the subject matter to be presented to the Panel. He shall also consider such factors as the availability of individuals, the extent of their prior service on Panels and any relationship between an individual and the Respondent that might make it inappropriate for such person to serve on the Panel.

(2) If in the opinion of the Chairman of the Business Conduct Committee, there are not a sufficient number of persons on the Business Conduct Committee from which to select persons having the appropriate background, experience and training to consider and make determinations

regarding the subject matter to be presented to that particular Panel, he shall request that the President temporarily appoint additional persons to the Business Conduct Committee from whom he may select for that Panel.

(3) If at any time a person serving on a Panel has a conflict of interest or bias or circumstances otherwise exist where his fairness might reasonably be questioned, the person must withdraw from the Panel. In the event that a person selected from the Business Conduct Committee withdraws, is incapacitated, or otherwise is unable to continue service after being selected, the Panel Chairman may, in the exercise of discretion, request that the Chairman of the Business Conduct Committee select a replacement. In the event that both persons selected from the Business Conduct Committee withdraw, are incapacitated, or otherwise are unable to continue service, the Chairman of the Business Conduct Committee shall select two replacements.

(b) *Parties.* The Exchange and the Respondent shall be the parties to the hearing. Where a Member is a party, it shall be represented at the hearing by an associated person.

(c) *Notice and List of Documents.* Parties shall be given at least twenty- eight (28) calendar days notice of the time and place of the hearing. Not less than ten (10) calendar days in advance of the scheduled hearing date, each party shall furnish to the Panel and to the other parties copies of all documentary evidence such party intends to present at the hearing. Where time and the nature of the proceeding permit, the parties shall meet with the Panel Chairman in a pre-hearing conference for the purpose of clarifying and simplifying issues and otherwise expediting the proceeding. At such pre-hearing conference, the parties shall attempt to reach agreement respecting authenticity of documents, facts not in dispute, and any other items that will serve to expedite the hearing of the matter.

(d) *Intervention.* Any person not otherwise a party may intervene as a party to the hearing upon demonstrating to the satisfaction of the Panel Chairman that he has an interest in the subject of the hearing and that the disposition of the matter may, as a practical matter, impair or impede his ability to protect that interest. Also, the Panel Chairman may in his discretion permit a person to intervene as a party to the hearing when the person's claim or defense and the main action have questions of law or fact in common. Any person wishing to intervene as a party to a hearing shall file with the Panel Chairman a notice requesting the right to intervene, stating the grounds therefor, and setting forth the claim or defense for which intervention is sought. The Panel Chairman, in exercising his discretion concerning intervention shall take into consideration whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(e) *Conduct of Hearing.* The Panel Chairman shall determine the time and place of all meetings, and shall make all determinations with regard to procedural or evidentiary matters, as well as prescribe the time within which all documents,

exhibits, briefs, stipulations, notices or other written materials must be filed where such is not specified in this Chapter. The Panel Chairman shall generally regulate the course of the hearing, and shall have the authority to, among other things, order the parties to present oral arguments, reopen a hearing prior to the issuance of a decision by the Panel, create and maintain the official record of proceeding, and draft a decision that represents the views of the majority of the Panel. Formal rules of evidence shall not apply to hearings conducted by the Panel. The charges shall be presented by a representative of the Exchange who, along with Respondent and any other party, may present evidence and produce witnesses who shall testify under oath and are subject to being questioned by the Panel and the other parties. The Panel may request the production of documentary evidence and witnesses. No Member or person associated with a Member shall refuse to furnish relevant testimony, documentary materials or other information requested by the Panel during the course of the hearing. The Respondent and intervening parties are entitled to be represented by counsel who may participate fully in the hearing. A transcript of the hearing shall be made and shall become part of the record. Interlocutory Board review of any decision made by the Panel prior to completion of the hearing is generally prohibited. Such interlocutory review shall be permitted only if the Panel agrees to such review after determining that the issue is a controlling issue of rule or policy and that immediate Board review would materially advance the ultimate resolution of the case.

(f) *Ex Parte Communication.* No Member or person associated with a Member shall make or knowingly cause to be made an ex parte communication with any member of the Panel, Business Conduct Committee or Board concerning the merits of any matter pending under this Chapter. No member of the Panel, Business Conduct Committee or Board shall make or knowingly cause to be made an ex parte communication with any Member or any person associated with a Member concerning the merits of any matter pending under this Chapter.

(1) “Ex parte communication” means an oral or written communication made without notice to all parties, that is, regulatory staff and Subjects of investigations or Respondents in proceedings.

(2) A written communication is ex parte unless a copy has been previously or simultaneously delivered to all interested parties. An oral communication is ex parte unless it is made in the presence of all parties except those who, on adequate prior notice, declined to be present.]

**Rule 1607.****Reserved[Decision]**

(a) Following a hearing conducted pursuant to Rule 1606, the Panel shall by majority opinion, issue a decision in writing, based solely on the record, determining whether the Respondent has committed a violation and imposing the sanction, if any, therefor.

(b) The decision shall include a statement of findings and

conclusions, with the reasons therefor, upon all material issues presented on the record. Where a sanction is imposed, the decision shall include a statement specifying the acts or practices in which the Respondent has been found to have engaged and setting forth the specific provisions of the Exchange Act, rules and regulations promulgated thereunder, provisions of the By-Laws or Rules of the Exchange, interpretations or resolutions of the Exchange of which the acts are deemed to be in violation.

- (c) The Respondent shall be sent a copy of the decision promptly after it is rendered.]

**Rule 1608.****Reserved[Summary Proceedings**

Notwithstanding the provision of Rule 1606 (Hearing), a Panel may make a determination without a hearing and may impose a penalty as to violations that the Respondent has admitted or has failed to answer or that otherwise do not appear to be in dispute.

(a) Notice of such summary determination, specifying the violations and penalty, shall be served upon the Respondent, who shall have ten (10) calendar days from the date of service to notify the Panel Chairman that he desires a hearing upon all or a portion of any charges not previously admitted or upon the penalty. Failure to so notify the Panel Chairman shall constitute admission of the violations and acceptance of the penalty as determined by the Panel and a waiver of all rights of review.

(b) If the Respondent requests a hearing, the matters that are the subject of the hearing shall be handled as if the summary determination had not been made.]

**Rule 1609.****Reserved[Offers of Settlement**

(a) *Submission of Offer.* At any time during a period not to exceed 120 calendar days immediately following the date of service of a statement of charges upon the Respondent in accordance with Rule 1612, the Respondent may submit to the Panel, if one has been formed, a written offer of settlement, signed by him, which shall contain a proposed stipulation of facts and consent to a specified sanction. The Respondent may submit a written statement in support of the offer. If a Panel has not yet been appointed, a written offer of settlement may be submitted to the Chief Regulatory Officer.

(1) A Respondent shall be entitled to submit a maximum of two (2) written offers of settlement in connection with the statement of charges issued to that Respondent pursuant to Rule 1604, unless a Panel, in its discretion, permits a Respondent to submit additional offers of settlement.

(2) The 120-day period shall be tolled for the number of days in excess of seven (7) calendar days that it takes the Exchange regulatory staff to respond to a Respondent's request for access to documents provided that the request for access is made pursuant to the provisions and within the time frame provided in Rule 1604(b).

(b) *Acceptance or Rejection of Offer.* Where the Panel or Chief Regulatory Officer accepts an offer of settlement, it or he shall issue a decision, including findings and conclusions and imposing a sanction, consistent with the terms of such offer. Where the Panel or Chief Regulatory Officer rejects an offer of settlement, it or he shall notify the Respondent and the matter shall proceed as if such offer had not been made, and the offer and all documents relating thereto shall not become a part of the record. Subject to Rule 1608 (Summary Proceedings), following the end of the 120- day period in paragraph (a) above or after a rejection of a Respondent's second offer of settlement, a hearing will proceed in accordance with the provisions of Rule 1606. A decision of the Panel or Chief Regulatory Officer issued upon acceptance of an offer of settlement, as well as the determination whether to accept or reject such an offer, shall be final, and the Respondent may not seek review thereof.]

**Rule 1610.****Reserved[Review**

(a) *Petition.* The Respondent or regulatory staff shall have fifteen (15) calendar days after service of notice of a decision made pursuant to Rule 1607 of this Chapter to petition for review thereof by the Board. Such petition shall be in writing and shall specify the findings and conclusions to which exceptions are taken, together with reasons for such exceptions. Any objections to a decision not specified by written exception shall be considered to have been abandoned. Petitions shall be filed with the Secretary of the Exchange.

(b) *Motion of Board.* The Board may on its own initiative order review of a decision made pursuant to Rule 1607 or 1608 (Summary Proceeding) within thirty (30) calendar days after notice of the decision has been served on the Respondent.

(c) *Conduct of Review.* The review shall be conducted by the Board or a committee of the Board composed of at least three Directors whose decision must be ratified by the Board.

(1) Any Director who participated in a matter may not participate in review of that matter by the Board.

(2) Unless the Board shall decide to open the record for the introduction of evidence or to hear argument, such review shall be based solely upon the record and the written exceptions filed by the parties.

(3) New issues may be raised by the Board, and in such event, Respondents and regulatory staff shall be given notice of an opportunity to address any such new issues.

(d) *Determination.* The Board may affirm, reverse or modify, in whole or in part, the decision of the Panel. Such modification may include an increase or decrease of the sanction. The decision of the Board shall be in writing, shall be promptly served on the Respondent, and shall be final.]

**Rule 1611.****Reserved[Judgment and Sanction]**

(a) *Sanctions.* Members and persons associated with Members shall (subject to any rule or order of the SEC) be appropriately disciplined for violations under these Rules by expulsion, suspension, limitation of activities, functions and operations, fine, censure, being suspended or barred from being associated with a Member, or any other fitting sanction.

(b) *Effective Date of Judgment.* Sanctions imposed under this Chapter shall not become effective until the Exchange review process is completed or the decision otherwise becomes final. Pending effectiveness of a decision imposing a sanction on the Respondent, the person, committee or panel issuing the decision (the “adjudicator”) may impose such conditions and restrictions on the activities of the Respondent as it considers reasonably necessary for the protection of investors and the Exchange.

(c) *Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay.*

(1) *Payment to Chief Financial Officer.* All fines and other monetary sanctions shall be paid to the Chief Financial Officer of the Exchange.

(2) *Summary Suspension or Expulsion.* After seven (7) calendar days notice in writing, the Exchange may summarily suspend a Member that fails to: (i) pay promptly a fine, other monetary sanction or cost imposed pursuant to this Chapter when such fine, monetary sanction or cost becomes finally due and payable; or (ii) terminate immediately the association of a person who fails to pay promptly a fine, other monetary sanction or cost imposed pursuant to this Chapter when such fine, monetary sanction or cost becomes finally due and payable.

(d) *Costs of Proceedings.* A Member or person associated with a Member disciplined pursuant to this Chapter shall bear such costs of the proceeding as the adjudicator deems fair and appropriate under the circumstances.]

**Rule 1612.****Reserved[Procedural Matters]**

**(a) Service of Notice.** Any charges, notices or other documents may be served upon a Member or associated person either personally or by leaving the same at his place of business, by registered or certified mail or overnight commercial carrier addressed to the Member or associated person at the Member's address as it appears on the books and records of the Exchange.

**(b) Extension of Time Limits.** Any time limits imposed under this Chapter for the submission of answers, petitions or other materials may be extended by permission of the authority to whom such materials are to be submitted.]

**Rule 1613.****Reserved[Reporting to the Central Registration Depository]**

**(a)** With respect to formal Exchange disciplinary proceedings, the Exchange shall report to the CRD the issuance of a statement of charges pursuant to Exchange Rule 1604 and all significant changes in the status of such proceedings while such proceedings are pending.

**(b)** For purposes of reporting to the CRD:

**(1)** A formal Exchange disciplinary proceeding shall be considered to be pending from the time that a statement of charges is issued in such proceeding pursuant to Exchange Rule 1604 until the outcome of the proceeding becomes final.

**(2)** An Exchange disciplinary proceeding shall be considered to be a formal disciplinary proceeding if it is initiated by the Exchange pursuant to Rule 1602.

**(3)** Significant changes in the status of a formal Exchange disciplinary proceeding shall include, but not be limited to, the scheduling of a disciplinary hearing, the issuance of a decision by a Panel, the filing of an appeal to the Board, and the issuance of a decision by the Board.]

**Rule 1614.****Imposition of Fines for Minor Rule Violations**

**(a) General.** In lieu of commencing a disciplinary proceeding, the Exchange may, subject to the requirements set forth herein, impose a fine, not to exceed \$5,000, on any Member, or person associated with or employed by a Member, with respect to any Rule violation listed in section ([d]b) of this Rule. Any fine imposed pursuant to this Rule that (i) does not exceed \$2,500 and (ii) is not contested, shall be reported on a periodic basis, except as may otherwise be required by Rule 19d-1 under the Exchange Act or by any other regulatory authority. The Exchange is not required to impose a fine pursuant to this Rule with respect to the

violation of any Rule included herein, and the Exchange may, whenever it determines that any violation is not minor in nature, proceed under the formal disciplinary process set forth in Chapter 90 of the Exchange's Rules[ 1603 or 1604], rather than under this Rule.

**[(b)** *Notice.* Any person against whom a fine is imposed under this Rule (the "Subject") shall be served with a written statement setting forth (i) the Rule(s) allegedly violated; (ii) the act or omission constituting each such violation; (iii) the fine imposed for each violation; and (iv) the date by which such determination becomes final and such fine must be paid or contested as provided below, which date shall be not less than thirty (30) calendar days after the date of service of such written statement.]

**[(c)***Review.* A Subject may contest the Exchange's determination by filing with the Office of the Secretary of the Exchange a written answer as provided in Exchange Rule 1605 on or before the date such fine must be paid.

**(1)** Upon the receipt of an answer by the Exchange the matter becomes subject to review by the Business Conduct Committee, or a subcommittee thereof consisting of at least three (3) members of the Business Conduct Committee.

**(2)** The answer must include a request for a hearing, if a hearing is desired. Formal rules of evidence shall not apply to hearings conducted by the Business Conduct Committee under this Rule. The Business Conduct Committee shall determine the time and place of the hearing and make all determinations with regard to procedural or evidentiary matters, as well as prescribe the time within which all documents or written materials must be submitted. The regulatory staff and the Subject may present evidence and produce witnesses who shall testify under oath and are subject to being questioned by the Business Conduct Committee and the other party. No Member or person associated with a Member shall refuse to furnish relevant testimony, documentary materials or other information requested by the Business Conduct Committee during the course of the hearing. The Subject is entitled to be represented by counsel who may participate fully in the hearing.

**(3)** If a hearing is not requested, the review will be based on written submissions and will be conducted in a manner to be determined by the Business Conduct Committee.

**(4)** If, after a hearing or review based on written submissions, the Business Conduct Committee determines that the Subject is guilty of the rule violation(s) alleged, the Committee may impose any one or more of the disciplinary sanctions authorized by the Exchange's By-Laws and Rules. Unless the sole disciplinary sanction imposed by the Committee for such rule violation(s) is a fine that is less than the total fine initially

imposed by the Exchange for the subject violation(s), the person charged shall pay a forum fee in the amount of \$100 if the determination was reached without a hearing and \$300 if a hearing was conducted.

**(5)** The regulatory staff, the Subject or the Board on its own motion may require a review by the Board of any determination by the Business Conduct Committee under this Rule by proceeding in the manner described in Rule 1610.

**(6)** In the event that a fine imposed pursuant to this Rule is subsequently upheld by the Business Conduct Committee or, if applicable, on appeal to the Board, such fine, plus all interest that has accrued thereon since the fine was due and any forum fee imposed pursuant to subparagraph (4) above, shall be immediately payable.]

**[(d)](b)** *Violations Subject to Fines.* The following is a list of the rule violations subject to, and the applicable sanctions that may be imposed by the Exchange pursuant to[, this Rule] Rule 9216:

**(1)** Position Limits (Rule 412)

Number of Cumulative Violations Within Any Twenty-four Month Rolling Period*	Sanction(Imposed on Exchange Members or violations occurring in all other accounts)
First Offense	\$500
Second Offense	\$1,000
Third Offense	\$2,500
Fourth and Each Subsequent Offense	\$5,000

\* A violation that consists of (i) a 1 trade date overage, (ii) a consecutive string of trade date overage violations where the position does not change or where a steady reduction in the overage occurs, or (iii) a consecutive string of trade date overage violations resulting from other mitigating circumstances, may be deemed to constitute one offense, provided that the violations are inadvertent.

**(2)** Focus Reports (Rule 1403).Each Member shall file with the Exchange a report of financial condition on SEC Form X-17A-5 as required by Rule 17a-10 under the Exchange Act. Any Member who fails to file in a timely manner such report of financial condition pursuant to Exchange Act Rule 17a-10 shall be subject to the following fines:

Calendar Days Late	Sanction
1 to 30	\$200
31 to 60	\$400
61 to 90	\$800
Over 90	Formal Disciplinary Action

**(3) Requests for Trade Data (Rule 1404).** Any Member who fails to respond within ten (10) business days to a request by the Exchange for submission of trade data shall be subject to the following fines:

Business Days Late	Sanction
1 to 9	\$200
10 to 15	\$500
16 to 30	\$1,000
Over 30	Formal Disciplinary Action

Any Member who violates this Rule more than one (1) time in any calendar year shall be subject to the following fines, which fines shall be imposed in addition to any sanction imposed pursuant to the schedule above:

Number of Violations Within One Calendar Year	Sanction
2 <sup>nd</sup> Offense	\$500
3 <sup>rd</sup> Offense	\$1,000
4 <sup>th</sup> Offense	\$2,500
Subsequent Offenses	Formal Disciplinary Action

**([5]4) Order Entry (Rule 717).** Violations of Rule 717(d) and (e) regarding limitations on orders entered into the System by Electronic Access Members will be subject to the fines listed below.

Number of Violations Within One Calendar Year	Sanction

1 to 5	Letter of Caution
6 to 10	\$500
11 to 15	\$1000
16 to 20	\$2000
Over 20	Formal Disciplinary Action

**([6]5)(a)** Pre-Opening Quotation Parameters (Rule 803). Violations of Rule 803(b)(4) regarding pre-opening quote spread parameters for market maker quotations, as well as violations of Rule 805(b)(1)(i) regarding orders entered by market makers, shall be subject to the fines listed below.

Number of Violations Within a Twenty-Four Month Rolling Period*	Sanction
First Offense	Letter of Caution
Second Offense	\$1,000
Third Offense	\$2,500
Fourth Offense	\$5,000
Fifth Offense	Formal Disciplinary Action

\* Violations occurring during a calendar month are aggregated and sanctioned as a single offense.

**(b)** Post-Opening Quotation Parameters (Rule 803). Violations of Rule 803(b)(4) regarding post-opening quote spread parameters for market maker quotations, as well as violations of Rule 805(b)(1)(i) regarding orders entered by market makers, shall be subject to the fines listed below. For purposes of this Rule, the spread parameters in Rule 803(b)(4) will not be violated upon a change in a bid (offer) if a market maker takes immediate action to adjust its offer (bid) to comply with the maximum allowable spread. Except in unusual market conditions, immediate shall mean within ten (10) seconds of a change in the market makers bid or offer.

Number of Violations Within a Twenty-Four Month Rolling Period*	Sanction
First Offense	Letter of Caution
Second Offense	\$1,000
Third Offense	\$2,500

Fourth Offense	\$5,000
Fifth Offense	Formal Disciplinary Action

\* Violations occurring during a calendar month are aggregated and sanctioned as a single offense.

**([7]6)** Execution of Orders in Appointed Options (Rule 805). Violations of Rule 805(b)(2) and (3) requiring market makers to execute in appointed options classes a minimum percentage of the total number of contracts executed during a quarter shall be subject to the following sanctions:

Number of Violations Within Rolling Twelve Month Period	Sanction
1 <sup>st</sup> Offense	Letter of Caution
2 <sup>nd</sup> Offense	\$500
3 <sup>rd</sup> Offense	\$1,000
4 <sup>th</sup> Offense	\$2,500
Subsequent Offenses	Formal Disciplinary Action

**([8]7)** Mandatory Systems Testing (Rule 419). Failure to conduct or participate in the testing of computer systems, or failure to provide required reports or maintain required documentation, shall be subject to the fines listed below.

Violations Within One Calendar Year	Sanction
First Violation	\$250
Second Violation	\$500
Third Violation	\$1000
Fourth Violation	\$2000
Fifth Violation or more	Formal Disciplinary Action

**([9]8)** Exercise of Options Contracts (Rule 1100). Any member who fails to submit to the Exchange in a timely manner pursuant to Rule 1100 or a Regulatory Information Circular issued pursuant to Rule 1100, "AdviceCancel", or exercise instruction relating to the exercise or non-exercise of a noncash-settled equity option shall be subject to the following fines:

Number of Cumulative Violations Within Any Twenty-Four Month Rolling Period	Individual	Member [Organization]
1 <sup>st</sup> Offense	\$500	\$1,000
2 <sup>nd</sup> Offense	\$1,000	\$2,500
Subsequent Offenses	\$2,500	\$5,000

**([10]9) Failure to Accurately Report Position and Account Information (Rule 415)**

A fine shall be imposed upon a member who violates Rule 415. Such fines shall be imposed on the basis of the following schedule:

Number of Violations Within Any Twenty-four Month Rolling Period*	Sanction(Imposed on Exchange Members or violations occurring in all other accounts)
First Offense	\$500
Second Offense	\$1,000
Third Offense	\$2,500
Fourth and Each Subsequent Offense	\$5,000

**([11]10) Continuous Quotes (Rule 804(e)).** A market maker must enter continuous quotations for the options classes to which it is appointed. Failure to comply shall be subject to the fines listed below.

Number of Violations (PMMs and/or CMMs) Within a Twenty-four Month Rolling Period*	Sanction
First Offense	Letter of Caution
Second Offense	\$1,000
Third Offense	\$2,500
Fourth Offense	\$5,000
Fifth Offense	Formal Disciplinary Action

\* Violations occurring during a calendar month are aggregated and sanctioned as a single offense.

**Rule 1615.****Reserved[Disciplinary Functions]**

The Exchange may contract with another SRO to perform some or all of the Exchange's disciplinary functions. In that event, the Exchange shall specify to what extent the Rules in this Chapter shall govern Exchange disciplinary actions and to what extent the rules of the other SRO shall govern such actions. Notwithstanding the fact that the Exchange may contract with another SRO to perform some or all of the Exchange's disciplinary functions, the Exchange shall retain ultimate legal responsibility for and control of such functions.]

**[Supplementary Material to Rule 1615**

.01 The Exchange has entered into a contract with FINRA to provide professional hearing officers and to act as an agent of the Exchange with respect to the disciplinary procedures contained in this Chapter. All of the Rules in this Chapter shall govern Exchange disciplinary actions. Under Rule 1606(a), the professional hearing officer is designated as the Chairman of the Panel. Under Rule 1606(e), the Panel Chairman has the sole responsibility to determine the time and place of all meetings of the Panel, and make all determinations with regard to procedural or evidentiary matters, as well as prescribe the time within which all documents, exhibits, briefs, stipulations, notices or other written materials must be filed where such is not specified in the Rules. In the course of discharging his responsibilities hereunder, the professional hearing officer shall apply the standards contained in the FINRA's Code of Procedure, and policies, practices and interpretations thereof, so long as the Rules in this Chapter are not in conflict.]

**Rule 1616.****Reserved[Expedited Client Suspension Proceeding]****(a) Initiation of Proceeding**

(1) *Scope of Authority.* With the prior written authorization of the Chief Regulatory Officer ("CRO") or such other senior officers as the CRO may designate, the Exchange may initiate an expedited suspension proceeding with respect to alleged violations of Rule 403 (Disruptive Quoting and Trading Activity Prohibited).

(2) *Service of Notice.* The Exchange shall initiate the proceeding by serving a notice on a Member or associated person of a Member (hereinafter "Respondent"). The Exchange shall serve the notice by personal service or overnight commercial courier. The notice shall be effective upon service.

(3) *Content of Notice.* The notice shall state whether the Exchange is requesting the Respondent to be required to take action or to refrain from taking action. The notice shall be accompanied by:

(A) a declaration of facts, signed by a person with knowledge of the facts contained therein, that specifies the acts that constitute the alleged violation; and

(B) a proposed order that contains the required elements of a suspension order (except the date and hour of the order's issuance), which are set forth in sub-paragraph (d)(2) of this Rule).

(b) Appointment of Hearing Officers and Hearing Panel

(1) As soon as practicable after the Exchange initiates a suspension proceeding, a Hearing Panel shall be assigned in accordance with paragraph (a) of Rule 1606.

(2) If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, or if a Party files a motion to disqualify a Hearing Officer, the recusal and disqualification proceeding shall be conducted in accordance with Rules 1606(a)(3), except that:

(A) a motion seeking disqualification of a Hearing Officer must be filed no later than 5 days after the announcement of the Hearing Panel; and

(B) the Exchange may file a brief in opposition to the Respondent's motion no later than 5 days after service thereof.

(c) Hearing

(1) *When Held.* The hearing shall be held not later than 15 days after service of the notice initiating the suspension proceeding, unless otherwise extended by the Chairman of the Hearing Panel with the consent of the Parties for good cause shown. If a Hearing Officer is recused or disqualified, the hearing shall be held not later than five days after a replacement Hearing Officer is appointed.

(2) *Service of Notice of Hearing.* A notice of date, time, and place of the hearing shall be served on the Parties not later than seven days before the hearing, unless otherwise ordered by the Chairman of the Hearing Panel. Service shall be made by personal service or overnight commercial courier. The notice shall be effective upon service.

(3) *Authority of Hearing Officers.* A Hearing Officer shall have authority to do all things necessary and appropriate to discharge his or her duties as set forth in Rule 1606.

(4) *Witnesses.* A person who is subject to the jurisdiction of the Exchange shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

(5) *Additional Information.* At any time during its consideration, the Hearing Panel may direct a Party to submit additional information. Any additional information submitted shall be provided to all Parties at least one day before the Hearing Panel renders its decision.

(6) *Transcript.* The hearing shall be recorded by a court reporter and a written transcript thereof shall be prepared. A transcript of the hearing shall be available to the Parties for purchase from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Panel within a reasonable time determined by the Hearing Panel. Upon notice to all the Parties to the proceeding, the Hearing Panel may order corrections to the transcript as requested or *sua sponte*.

(7) *Record and Evidence Not Admitted.* The record shall consist of the notice initiating the proceeding, the declaration, and the proposed order described in sub-paragraph (a)(3) above; the transcript of the hearing; all evidence considered by the Hearing Panel; and any other document or item accepted into the record by the Hearing Panel. The Exchange shall be the custodian of the record. Proffered evidence that is not accepted into the record by the Hearing Panel shall be retained by the custodian of the record until the date when the Exchange's decision becomes final or, if applicable, upon the conclusion of any review by the SEC or the federal courts.

(8) *Failure to Appear at a Hearing.* If a Respondent fails to appear at a hearing for which it has notice, the allegations in the notice and accompanying declaration may be deemed admitted, and the Hearing Panel may issue a suspension order without further proceedings. If the Exchange fails to appear at a hearing for which it has notice, the Hearing Panel may order that the suspension proceeding be dismissed.

(d) Issuance of Suspension Order by Hearing Panel

(1) *Basis for Issuance.* The Hearing Panel shall issue a written decision stating whether a suspension order shall be imposed. The Hearing Panel shall issue the decision not later than ten days after receipt of the hearing transcript, unless otherwise extended by the Chairman of the Hearing Panel with the consent of the Parties for good cause shown. A suspension order shall be imposed if the Hearing Panel finds:

(A) by a preponderance of the evidence that the alleged

violation specified in the notice has occurred; and

(B) that the violative conduct or continuation thereof is likely to result in significant market disruption or other significant harm to investors.

(2) *Content, Scope, and Form of Order.* A suspension order shall:

(A) be limited to: (i) ordering a Respondent to cease and desist from violating Rule 403, and/or (ii) ordering a Respondent to cease and desist from providing access to the Exchange to a client of Respondent that is causing violations of Rule 403;

(B) set forth the alleged violation and the significant market disruption or other significant harm to investors that is likely to result without the issuance of an order;

(C) describe in reasonable detail the act or acts the Respondent is to take or refrain from taking and to suspend the Respondent unless and until such action is taken or refrained from; and

(D) include the date and hour of its issuance.

(3) *Duration of Order.* A suspension order shall remain effective and enforceable unless modified, set aside, limited, or revoked pursuant to paragraph (e), below.

(4) *Service.* The Hearing Panel's decision and any suspension order shall be served by personal service or overnight commercial courier. The suspension order shall be effective upon service.

(e) *Review by Hearing Panel.* At any time after the Respondent is served with a suspension order, a Party may apply to the Hearing Panel to have the order modified, set aside, limited, or revoked. The application shall set forth with specificity the facts that support the request. The Hearing Panel shall respond to the request in writing within ten days after receipt of the request, unless otherwise extended by the Chairman of the Hearing Panel with the consent of the Parties for good cause shown. The Hearing Panel's response shall be served on the Respondent via personal service or overnight commercial courier. The filing of an application under this Rule shall not stay the effectiveness of the suspension order.

(f) *Application to SEC for Review.* Sanctions imposed pursuant to this Rule constitute final and immediately effective disciplinary sanctions imposed by the Exchange. The right to have any action under this Rule reviewed by the SEC is governed by Section 19 of the Exchange Act. The filing of an application for review

shall not stay the effectiveness of a suspension order unless the SEC otherwise orders.]

## **17. Reserved[Hearings and Review]**

### **Rule 1700.**

#### **Reserved[Scope of Chapter]**

This Chapter provides the procedure for persons economically aggrieved by Exchange action, including, but not limited to, those organizations whose application to become a Member have been denied, persons who have been barred from becoming associated with a Member, or organizations and persons that have been prohibited or limited with respect to Exchange services, or the services of any Exchange Member, taken pursuant to any contractual arrangement, the By-Laws or the Rules of the Exchange, to apply for an opportunity to be heard and to have the complained of action reviewed. Review of disciplinary actions and arbitrations are not subject to review under this Chapter.]

### **Rule 1701.**

#### **Reserved[Submission of Application to Exchange]**

(a) *The Application.* A person who is aggrieved by any action of the Exchange within the scope of this Chapter and who desires to have an opportunity to be heard with respect to such action shall file a written application within thirty (30) days after such action has been taken. The application shall state the action complained of and the specific reasons why the applicant takes exception to such action and the relief sought. The application should indicate whether the applicant intends to submit any documents, statements, arguments or other material in support of the application, and describe any such materials.

(b) *Extensions of Time to File Applications.* An application that is not filed within the time specified in paragraph (a) of this Rule shall not be considered by the Business Conduct Committee unless the applicant files his application within such extension of time as allowed by the Chairman of such Committee. In order to obtain an extension of time within which to file an appeal, the applicant must, within the time specified in paragraph (a) of this Rule, file an application for an extension of time within which to submit the application. Such an application for an extension will be ruled upon by the Chairman of the Business Conduct Committee, and his ruling will be given in writing. Rulings on applications for extensions of time are not subject to appeal.]

### **Rule 1702.**

#### **Reserved[Procedure Following Applications for Hearing]**

(a) *Panel.* Applications for hearing and review shall be referred to the Business Conduct Committee, which shall appoint a hearing panel of no less than three (3) members of such Committee. A record of the proceedings shall be kept.

(b) *Documents.* The panel so appointed will set a hearing date and shall be furnished with all material relevant to the proceeding at least seventy-two (72) hours prior to the date of the hearing. Each party shall have the right to inspect and copy the other party's material prior to the hearing.

(c) *Notice.* Parties to the proceeding shall be informed of the composition of the panel at least seventy-two (72) hours prior to the scheduled hearing.]

**Rule 1703.****Reserved[Hearing]**

(a) *Participants.* The parties to the hearing shall consist of the applicant and a representative of the Exchange who shall present the reasons for the action taken by the Exchange that allegedly aggrieved the applicant. In addition, any other person may intervene as a party in the hearing when the person claims an interest in the transaction that is the subject of the action and is so situated that the disposition of the action may, as a practical matter impair or impede that person's ability to protect that interest unless it is adequately represented by existing parties. Also, the panel may, in its discretion, permit a person to intervene in the action as a party when the person's claim or defense and the main action have a question of law and fact in common. The applicant is entitled to be accompanied, represented and advised by counsel at all stages of the proceeding.

(b) *Procedure for Intervention.* The person seeking intervention shall serve a motion to intervene on the Secretary, which will be transmitted to the panel. The motion shall state the grounds therefor and shall set forth the claim or defense upon which the intervention is sought.

(c) *Conduct of Hearing.* The panel shall determine all questions concerning the admissibility of evidence and shall otherwise regulate the conduct of the hearing. Each of the parties shall be permitted to make an opening statement, present witnesses and documentary evidence, cross-examine opposing witnesses and present closing arguments orally or in writing as determined by the panel. The panel shall also have the right to question all parties and witnesses to the proceeding and a record shall be kept. The formal rules of evidence shall not apply.

(d) *Decision.* The hearing panel's decision shall be made in writing and shall be sent to the parties to the proceedings. Such decision shall contain the reasons supporting the conclusions of the panel.]

**Rule 1704.****Reserved[Review]**

(a) *Petition.* The decision of the hearing panel shall be subject to review by the Board, either on its own motion within thirty (30) days after issuance, upon written request submitted by the applicant below, by the President of the Exchange, within fifteen (15) days after issuance of the decision. Such petition shall be in writing

and shall specify the findings and conclusions to which exceptions are taken together with the reasons for such exceptions. Any objection to a decision not specified by written exception shall be considered to have been abandoned and may be disregarded. Parties may petition to submit a written argument to the Board and may request an opportunity to make an oral argument before the Board. The Board, or a committee of the Board, will have sole discretion to grant or deny either request.

(b) *Conduct of Review.* The review shall be conducted by the Board or a Committee of the Board composed of at least three (3) Directors. Any Director who participated in a matter before it was appealed to the Board shall not participate in any review action by the Board concerning that matter. The review shall be made upon the record and shall be made after such further proceedings, if any, as the Board or its designated committee may order. An applicant shall be given notice of and a chance to address any issues raised by the Board on its own initiative.

(c) *Decision.* Based upon the record, the Board or its designated Committee may affirm, reverse or modify in whole or in part, the decision of the hearing panel. The decision of the Board or its designated committee shall be in writing, shall be sent to the parties to the proceeding, and shall be final.]

**Rule 1705.****Reserved[Miscellaneous Provisions]**

(a) *Service of Notice.* Any notices or other documents may be served upon the applicant either personally or by leaving the same at his place of business or by deposit in the United States post office, postage prepaid via registered or certified mail addressed to the applicant at his last known business or residence address.

(b) *Extension of Time Limits.* Any time limits imposed under this Chapter for the submission of answers, petitions or other materials may be extended by permission of the Secretary of the Exchange. All papers and documents relating to review by the Business Conduct Committee, the Board or its designated committee must be submitted to the Secretary of the Exchange.]

**Rule 1706.****Reserved[Hearing and Review Functions]**

The Exchange may contract with another SRO to perform some or all of the functions specified in this Chapter. In that event, the Exchange shall specify to what extent the Rules in this Chapter shall govern review of Exchange actions and hearings under this Chapter and to what extent the rules of the other SRO shall govern such activities. Notwithstanding the fact that the Exchange may contract with another SRO to perform some or all these functions, the Exchange shall retain ultimate legal responsibility for and control of such functions.]

**18. Arbitration**

**Rule 1800.****Arbitration**

(a) – (d) No change.

(e) *Payment of Awards.* Any Member, or person associated with a Member, who fails to honor an award of arbitrators appointed in accordance with the Rules in this Chapter 18 shall be subject to disciplinary proceedings in accordance with Rule 9554[Chapter 16 (Discipline)].

(f) No change.

\* \* \* \* \*

**23.-79. Reserved**

\* \* \* \* \*

**80. Investigations and Sanctions**

Series 8000 of the Nasdaq BX, Inc. Rules, as such rules may be in effect from time to time (the "BX Rule 8000 Series"), are hereby incorporated by reference into this Nasdaq ISE Rules Chapter 80, and are thus Nasdaq ISE Rules and thereby applicable to Nasdaq ISE Members, Associated Persons, and other persons subject to the Exchange's jurisdiction. Nasdaq ISE Members, Associated Persons, and other persons subject to the Exchange's jurisdiction shall comply with the BX Rule 8000 Series as though such rules were fully set forth herein. All defined terms, including any variations thereof, contained in the BX Rule 8000 Series shall be read to refer to the Nasdaq ISE-related meaning of such term. The defined terms "Exchange" or "Nasdaq BX" in the BX Rule 8000 Series shall be read to refer to the Nasdaq ISE Exchange; the defined terms "Rule" or "BX Rule" in the BX Rule 8000 Series shall be read to refer to the Nasdaq ISE Rules; the defined terms "Board" or "Exchange Board" in the BX Rule 8000 Series shall be read to refer to the Nasdaq ISE Board of Directors; the defined term "Member" in the BX Rule 8000 Series shall be read to refer to a Nasdaq ISE Member; the defined term "Associated Person" shall be read to refer to a Nasdaq ISE Associated Person; the defined terms "BX Regulatory Department" or "Regulation Department" shall be read to refer to the Nasdaq ISE Regulatory Department; the defined terms "BX Regulation" shall be read to refer to "Nasdaq ISE Regulation"; the defined term "Chief Regulatory Officer" shall be read to refer to the Chief Regulatory Officer of Nasdaq ISE; and "Equity Rule" shall be read to refer to a Nasdaq ISE Rule.

Additionally, references in the BX Rule 8000 Series to "Rule 0120" shall be read to refer to Nasdaq ISE Rule 100. References in the BX Rule 8000 Series to "Rule 1015" shall be read to refer to Nasdaq ISE Rule 302.

**81.-89. Reserved****90. Code of Procedure**

Series 9000 of the Nasdaq BX, Inc. Rules, as such rules may be in effect from time to time (the "BX Rule 9000 Series"), are hereby incorporated by reference into this Nasdaq ISE Rules Chapter 90, and are thus Nasdaq ISE Rules and thereby applicable to Nasdaq ISE Members, Associated Persons, and other persons subject to the Exchange's jurisdiction. Nasdaq ISE Members, Associated Persons, and other persons subject to the Exchange's jurisdiction shall comply with the BX Rule 9000 Series as though such rules were fully set forth herein. All defined terms, including any variations thereof, contained in the BX Rule 9000 Series shall be read to refer to the Nasdaq ISE-related meaning of such term. Solely by way of example, and not in limitation or in exhaustion: the defined terms "Exchange" or "Nasdaq BX" in the BX Rule 9000 Series shall be read to refer to the Nasdaq ISE Exchange; the defined terms "Rule" or "BX Rule" in the BX Rule 9000 Series shall be read to refer to the Nasdaq ISE Rules; the defined terms "Board" or "Exchange Board" in the BX Rule 9000 Series shall be read to refer to the Nasdaq ISE Board of Directors; the defined term "Member" in the BX Rule 9000 Series shall be read to refer to a Nasdaq ISE Member; the defined term "Associated Person" shall be read to refer to a Nasdaq ISE Associated Person; the defined terms "BX Regulatory Department" or "Regulation Department" shall be read to refer to the Nasdaq ISE Regulatory Department; the defined terms "BX Regulation" shall be read to refer to "Nasdaq ISE Regulation"; the defined term "Chief Regulatory Officer" shall be read to refer to the Chief Regulatory Officer of Nasdaq ISE; and "Equity Rule" shall be read to refer to a Nasdaq ISE Rule.

Additionally, references in the BX Rule 9000 Series to the following rules shall be read to refer to the following Nasdaq ISE Rules: "Rule 0120" shall be read to refer to Nasdaq ISE Rule 100; "Rule 1013" shall be read to refer to Nasdaq ISE Rules 305 and 306; "Rule 1070" shall be read to refer to the Supplementary Material to Nasdaq ISE Rule 313; "Rule 1160" shall be read to refer to Nasdaq ISE Rule 305(b); "Equity Rule 2110" shall be read to refer to Nasdaq ISE Rule 400; "Equity Rule 2120" shall be read to refer to Nasdaq ISE Rule 405; "Rule 2140" shall be read to refer to Nasdaq ISE Rule 312; "Equity Rule 2150" shall be read to refer to Nasdaq ISE Chapter 6; "Rule 2170" shall be read to refer to Nasdaq ISE Rule 403; "Rule 4110A" shall be read to refer to Nasdaq ISE Chapter 13; "Rule 4120A" shall be read to refer to Nasdaq ISE Chapter 13; "Rule 10000 Series" shall be read to refer to Nasdaq ISE Rules Chapter 18; and "Chapter III, Section 16" shall be read to refer to Nasdaq ISE Rule 403.

**Notwithstanding the above, IM-9216 (“Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)”) in the BX Rule 9000 Series shall not apply to the Nasdaq ISE Exchange or to its Members, Associated Persons, or other persons subject to the jurisdiction of the Exchange. Instead, the Nasdaq ISE Rule that governs such violations shall be Nasdaq ISE Rule 1614(b) and references in the BX Rule 9000 Series to IM-9216 shall be read to refer to Nasdaq ISE Rule 1614(b). Moreover, the procedures set forth in BX Rule 9216(b) and 9143(e)(3), which shall govern the handling of violations of Rules listed in Nasdaq ISE Rule 1614(b) that are subject to a plan approved by the Commission pursuant to SEC Rule 19d-1(c)(2) (the “Minor Rule Violation Plan” or “MRVP”) and the issuance of MRVP letters, shall also apply to the Exchange’s handling of violations of Rules listed in Nasdaq ISE Rule 1614(b) that are not subject to the MRVP (“minor rule violations”) and the issuance of minor rule violation letters, except that the Exchange shall promptly report any final disciplinary action to the Commission, in accordance with SEC Rule 19d-1(c)(1).**

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