SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84821; File No. SR–NYSE–2018–54]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Sections 312.03 and 312.04 of the Listed Company Manual To Amend the Price Requirements for Certain Exceptions From the Shareholder Approval Rules

December 14, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 3, 2018, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''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 amend Sections 312.03 and 312.04 of the Listed Company Manual (the ''Manual'') to amend the price requirements companies must meet in order to avail themselves of certain exceptions from the shareholder approval requirements set forth in Section 312.03. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization 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 those 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 parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

1. Purpose

The Exchange proposes to amend Sections 312.03 and 312.04 of the Manual to modify the circumstances in which listed companies are exempt from obtaining shareholder approval for share issuances subject to those rules. The Exchange notes that the proposed amendments are substantially similar to amendments NASDAQ recently made to its own shareholder approval requirements.[4]

Section 312.03(b) of the Manual provides that shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to:

(1) A director, officer or substantial security holder of the company (each a ''Related Party'');

(2) a subsidiary, affiliate or other closely-related person of a Related Party; or

(3) any company or entity in which a Related Party has a substantial direct or indirect interest;

if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance. However, Section 312.03(b) sets forth exceptions to this shareholder approval requirement. One of these exceptions is applicable where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder and the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market value of the issuer's common stock. Where these conditions are met, shareholder approval will not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

Section 312.03(c) generally requires shareholder approval prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) The common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or

(2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

Among the exceptions to the shareholder approval requirements of Section 312.03(c) is one applicable to ''bona fide private financings,'' as such term is defined in Section 312.04(g). A bona fide private financing is exempt from the shareholder approval requirements of Section 312.03(c), if such financing involves a sale of:

- Common stock, for cash, at a price at least as great as each of the book and market value of the issuer's common stock; or
- securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least as great as each of the book and market value of the issuer's common stock.

Section 312.04(g) defines a bona fide private financing as a sale in which either:

- A registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or
- the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than five percent of the shares of the issuer's common stock or more than five percent of the issuer's voting power before the sale.

For purposes of the exceptions from the shareholder approval requirements of Sections 312.03(b) and (c) set forth above, the Exchange utilizes for the pricing test the definition of ''market value'' set forth in Section 312.04(i). Section 312.04(i) defines the ''market value'' of an issuer's common stock as the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities.

The Exchange proposes to replace the definition of market value in Section 312.04(i) with a new definition to be

[4] *See* footnote 4 [sic] *infra.*

known as the ''Minimum Price,'' which will be used as the pricing test for the exceptions in Sections 312.03(b) and (c) for which the market value definition in Section 312.04(i) is currently used. This proposed amendment is substantially similar to an amendment NASDAQ recently made to its own shareholder approval requirements.[5] Minimum Price will be defined as a price that is the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. ''Official Closing Price'' of an issuer's common stock will be defined in Section 312.04 as meaning the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.[6] Section 312.04(i) in its current form has a provision stating that ''[f]or example, if the transaction is entered into after the close of the regular session at 4:00 p.m. Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is entered into at any time between the close of the regular session on Monday and the close if the regular session on Tuesday, then Monday's official closing price is used.'' The Exchange proposes to retain this clarifying text as part of the proposed definition of the ''Official Closing Price.'' In addition, all references to ''entering into'' agreements in this text and elsewhere in the proposed definition will be replaced by references to ''signing'' agreements.[7] The Exchange also proposes to delete text from the current form of Section 312.04(i) which notes that an average price over a period of time is not acceptable as ''market value'' for purposes of Section 312.03, as it will no longer be accurate if the proposed amendment is approved.

It is a widespread practice in commercial transactions involving the issuance of securities to use a five day average in determining the market price for purposes of calculating pricing provisions of agreements, as the use of a single day's closing price can result in unanticipated and inequitable results due to unexpected price volatility. There are also potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five day average price will always be above the current market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price rather than by buying shares from the company at the agreed-upon price. Conversely, in a rising market, the five day average price will be lower than the closing price. In addition, if material news is announced during the five-day period, the average could be significantly different from the market value of the securities as reflected by the closing price after the news is disclosed. Nonetheless, the Exchange believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under the Exchange's rules, such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of possible unfavorable price movements borne by both the issuer and the purchaser of the securities during the time between when the agreement is executed and the closing of the transaction. The Exchange believes these concerns about the appropriateness of using a five-day average are justified and as such, the Exchange's proposed Minimum Price definition utilizes the lower of the most recent closing price or the average of closing prices on the five most recent trading days.

The Exchange also proposes to eliminate from Sections 312.03(b) and (c) the requirement that the price paid in any transaction qualifying for the exemptions under those rules must not be less than book value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, listed companies have argued to the Exchange on many occasions, and the Exchange agrees, that book value is not a meaningful measure to be used in determining whether a transaction is dilutive or should otherwise require shareholder approval. The Exchange has also observed that when the market price is below the book value, issuers are often extremely surprised when confronted with the effect it has on their proposed transactions. In that regard, the existing book value test can have anomalous effects in transactions that appear to be clearly commercially reasonable for the issuer and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. In these situations, companies are precluded for purely technical accounting reasons from quickly raising capital on terms that are clearly at or above the market price. Furthermore, the Exchange is not aware of any evidence that shareholders consider book value to be a material factor when they are asked to vote to approve a proposed transaction.

The Exchange notes that the existence of any exception from the shareholder approval requirements of any subsection of Section 312.03 does not relieve listed companies of their obligation to comply with any separate shareholder approval requirement under Section 303A.08[8] or under other applicable subsections of Section 312.03.[9] Section 303A.08 provides that any issuance of common stock to any employee, director or other service provider of a listed company as compensation for services is generally treated as equity compensation for purposes of that rule and must either be approved by the shareholders or be drawn from a shareholder-approved equity compensation plan. Section 303A.08 provides an exception from this requirement for plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value. For purposes of that exception, the Exchange has always interpreted fair market value as identical to the Official Closing Price definition proposed to be adopted in Section 312.04. To avoid any potential confusion, the Exchange intends to submit a separate rule filing to amend Section 303A.08 to include

[5] *See* Exchange Act Release No. 34–84287 (September 26, 2018) (SR–NASDAQ–2018–008); 83 FR 49599 (October 2, 2018). NASDAQ does not have a provision in its rules which is comparable to the limitations on cash sales to related parties under Section 312.03(b) and the related exception available to related parties which have that status solely because they are substantial securityholders. However, the rationale NASDAQ applied in adjusting its pricing test where applicable is relevant to the application of the pricing test in Section 312.03(b).

[6] The manner in which the official closing price as reported to the Consolidated Tape is determined is set forth in NYSE Rule 123C(1)(e). The proposed definition of ''Official Closing Price'' will be numbered as 312.04(j) and the current text of Sections 312.04(j) and (k) will be redesignated as Sections 312.04(k) and (l) respectively.

[7] This proposed change is solely for the purpose of conforming the language used throughout the rule and does not have any substantive effect.

[8] This is stated in Section 312.03(a).

[9] Section 312.04(a) states that ''[s]hareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs.''

the definition of Official Closing Price in that rule solely for purposes of qualifying for the exemption under Section 303A.08 for cash sales for fair market value described above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,[11] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Definition of Market Value

The proposed rule change will modify the minimum price for the relevant exceptions to the shareholder approval requirements of Sections 312.03(b) and (c) to the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. Allowing share issuances to be priced at the five-day average of the closing price will better align the Exchange's requirements with how many transactions that are not designed to comply with the applicable exceptions in Sections 312.03(b) and (c) are structured, such as transactions not subject to Sections 312.03(b) and (c) because the issuance is for less than 20% of the common stock and the parties rely on the five day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Limiting the allowable average to a five-day period also protects investors by ensuring the period is not too long, thereby avoiding any distortion of the average price by the inclusion in the average historical pricing data that reflects market factors that are no longer relevant. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. This protects investors by ensuring that the average price will at least partially reflect the benefits of the more favorable recent market price. Further, aside from Exchange requirements, when selecting the appropriate price for a transaction company officers and directors have to consider their state law requirements, including fiduciary responsibilities intended to protect shareholder interests.

The Exchange believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. This flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of Sections 312.03(b) and (c).

Book Value

The Exchange also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Sections 312.03(b) and (c). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as not being a meaningful measure to use in analyzing the current value of a stock. The Exchange has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book value. Similarly, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. Because book value is not a meaningful measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Sections 312.03(b) and (c).

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2018–54 on the subject line.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

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–NYSE–2018–54. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2018–54, and should be submitted on or before January 10, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2018–27510 Filed 12–19–18; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84823; File No. SR–BOX–2018–37]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of a Proposed Rule Change To Amend the Fee Schedule on the BOX Market LLC ("BOX") Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

December 14, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2018, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Item II below, which Item has been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is, pursuant to Section 19(b)(3)(C) of the Act, hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule on the BOX Market LLC (''BOX'') options facility. The fees became operative on December 1, 2018. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

II. Self-Regulatory Organization's Description of the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend Section VI. (Technology Fees) of the BOX Fee Schedule to establish BOX Connectivity Fees for Participants and non-Participants who connect to the BOX network. Connectivity fees will be based upon the amount of bandwidth that will be used by the Participant or non-Participant. Further, BOX Participants or non-Participants connected as of the last trading day of each calendar month will be charged the applicable Connectivity Fee for that month. The Connectivity Fees will be as follows:

Connection type	Monthly fees
Non-10 Gb Connection.	$1,000 per connection
10 Gb Connection	$5,000 per connection

The Exchange also proposes to amend certain language and numbering in Section VI.A to reflect the changes discussed above. Specifically, BOX proposes to add the title ''Third Party Connectivity Fees'' under Section VI.A. Further, the Exchange proposes to add Section VI.A.2, which details the proposed BOX Connectivity Fees discussed above.

Participants and non-Participants with ten (10) Gigabit (''Gb'') connections will be charged a monthly fee of $5,000 per connection. Participants and non-Participants with non-10 Gb connections will be charged a monthly fee of $1,000 per connection. The Exchange notes that another exchange in the industry has similar connectivity fees[5] and that several other exchanges

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Miami International Securities Exchange LLC (''MIAX'') Fee Schedule. MIAX charges its Members and non-Members a monthly fee of $1,100 for each 1 Gigabit connection and $5,500 for each 10 Gigabit connection to MIAX's Primary/Secondary Facility. The Exchange notes a minor difference between MIAX's connectivity fees and BOX's proposal. MIAX prorates their connectivity fees when a Member makes a change to their connectivity (by adding or deleting connections). BOX notes that, like the Exchange's Port Fees and

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