

September 5, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F. Street NE.
Washington, DC 20549

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Adopt an OTTO Protocol; SR-BX-2024-019

Dear Ms. Countryman:

Nasdaq BX, Inc. (“BX”) respectfully responds to the Order Instituting Proceedings (“OIP”) regarding its proposal (“Proposal”) to adopt a new protocol, “Ouch to Trade Options” or “OTTO”, and establish pricing for this new protocol.¹ BX’s Proposal offers its Participants a new order entry protocol, which is in demand on its market, and offers to lower each Participant’s existing cost to submit orders to BX. Additionally, BX’s proposed pricing is identical to a Nasdaq MRX, LLC (“MRX”) rule proposal² that was noticed months earlier. The Commission’s disregard of the MRX Precedent combined with the suspension of its Proposal, which allows it to effectively compete with other options exchanges’ offerings, creates an undeniable intermarket burden on competition. The Commission is effectively stalling BX’s efforts to innovate and offer a new product to Participants in a manner that is inconsistent with the language and spirit of the Exchange Act, and the SEC rules adopted under the Exchange Act. The Commission should immediately approve BX’s Proposal.

Timeline

- On November 20, 2023, BX pre-filed a rule change with the Commission to offer a new order entry protocol called OTTO. The OTTO protocol is identical to the OTTO protocol currently offered by other Nasdaq affiliated options markets.³ BX’s initial Proposal provided each BX Participant the first OTTO Port at no cost.

¹ See Securities Exchange Act Release No. 100810 (August 23, 2024), 89 FR 70234 (August 29, 2024) (SR-BX-2024-019) (Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Adopt an OTTO Protocol).

² See Securities Exchange Act Release No. 96941 (February 16, 2023), 88 FR 11490 (February 23, 2023) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Options 7, Section 7) (“MRX Precedent”).

³ MRX, Nasdaq ISE, LLC (“ISE”) and Nasdaq GEMX, LLC (“GEMX”) offer the identical OTTO protocol for order entry.

- On February 15, 2024, BX filed an amended version of its Proposal as SR-BX-2024-006.⁴ The amendments reflected comments from Commission staff including data requested by staff regarding port usage. No comments were received as a result of the publication of the Proposal.
- On March 19, 2024, at the Commission's request, BX withdrew SR-BX-2024-006 and filed SR-BX-2024-011,⁵ an amended version of its Proposal. The amendments reflected comments from Commission staff and removed the cap for the OTTO Ports in reaction to comments from Commission staff. No comments were received as a result of the publication of the Proposal.
- On May 8, 2024, at the Commission's request, BX withdrew SR-BX-2024-011 and filed SR-BX-2024-016,⁶ an amended version of its proposal. The Exchange amended its Proposal to more closely mirror the MRX Precedent. At this time, identical to MRX Precedent, BX offered the first FIX Port at no cost to each BX Participant and otherwise mirrored the MRX Precedent including the monthly port cap. Finally, because the staff noted that MRX had low market share, BX's low market share was noted in the Proposal.⁷ These amendments reflected comments from Commission staff. No comments were received as a result of the publication of the Proposal.
- On June 26, 2024, at the Commission's request, BX withdrew SR-BX-2024-016 and filed SR-BX-2024-019,⁸ an amended version of its Proposal. The amendments reflected comments from Commission staff and explained in more detail that BX's proposed monthly cap also includes BX Depth Ports and BX Top Ports in addition to the other ports that MRX also offers in its port cap. No comments were received as a result of the publication of the Proposal.
- On August 23, 2024, the Commission issued an OIP,⁹ despite the various amendments filed by BX at its request. The OIP does not satisfy the requirements of

⁴ See Securities Exchange Act Release No. 99598 (February 26, 2024), 89 FR 15242 (March 1, 2024) (SR-BX-2024-006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt an OTTO Protocol).

⁵ See Securities Exchange Act Release No. 99840 (March 22, 2024), 89 FR 21618 (March 28, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt an OTTO Protocol).

⁶ See Securities Exchange Act Release No. 100211 (May 22, 2024), 89 FR 46493 (May 29, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt an OTTO Protocol).

⁷ Of note, at the time the MRX Precedent was filed, MRX had a market share of 1.62%. BX's market share at the time of filing was 3.27%. Prior to filing SR-BX-2024-019, Commission staff noted that market share was not a factor.

⁸ See Securities Exchange Act Release No. 100479 (July 9, 2024), 89 FR 57485 (July 15, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt an OTTO Protocol).

⁹ See supra note 1.

the Exchange Act or the Commission's Rules of Practice. Specifically, the OIP does not provide a brief summary of the grounds for disapproval under consideration, nor does it specify the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change pursuant to the Rules of Practice,¹⁰ rather the Commission simply recites boilerplate sections of the Exchange Act. Further, the nebulous OIP language does not provide proper notice so that meaningful written views may be gathered.

BX worked diligently and in good faith with Commission staff to address the concerns they raised at each interval regarding its Proposal. At a certain point, BX amended its pricing to align its Proposal identically to prior MRX Precedent¹¹ under the assumption that the Commission would not apply different standards to exchanges when reviewing their rule changes. Commission staff messaged different concerns throughout the review of the Proposal, at times noting the concern was related to BX's market share and then shifting to concerns about the availability of data and port consumption. BX repeatedly noted the existing MRX precedent, that it recently finalized with Commission staff, throughout the review process. BX believed that its final version of the Proposal, which tied identically to the MRX Precedent and was viewed favorably by Commission staff, was a favorable turn of events as the Commission appeared to recognize the MRX Precedent. The issuance of the OIP after filing the final version of BX's Proposal is baffling as the Commission appears to ignore its own legal reasoning from months prior. Equally stunning is the unwillingness to lower costs for Participants, an action completely unaligned with their interests. Finally, the OIP provides no notice as to what specific outstanding concerns exist, which makes it difficult, if not impossible, for us to address these concerns. No market participants have commented on the Proposal and the OIP is not designed to engage any such comment.

Today, BX Participants may enter orders into BX through one order entry protocol, the "Financial Information eXchange" or "FIX. Today, other options markets offer more than one order entry protocol.¹² BX's Proposal would provide each BX Participant the first FIX order entry port at no cost. As a result, because each BX Participant is subscribed to at least one FIX Port today in order to submit orders to the Exchange, each BX Participant's cost would be immediately reduced with this Proposal.¹³

¹⁰ 17 CFR §201.700(b)(2).

¹¹ Initially, BX offered the first OTTO Port at no cost as compared to the first FIX Port in its Proposal. BX reintroduced the monthly cap in the amended Proposal to align its Proposal identically to MRX Precedent to ensure the application of the MRX Precedent.

¹² MRX, ISE and GEMX offer both a FIX and an OTTO protocol for order entry.

¹³ Today, BX assesses Participants a FIX Port fee of \$650 per port, per month, per account number. See Options 7, Section 3(i). BX proposes to assess OTTO Port Fee of \$650 per port, per month, per account.

OTTO would be an additional, optional order entry protocol for BX Participants in addition to FIX. Because only one FIX order protocol is required¹⁴ for a BX Participant to submit orders into BX and to meet its regulatory requirements,¹⁵ and BX is offering each Participant one FIX Port at no cost, additional order entry ports are not necessary to meet a Participant's regulatory obligations.¹⁶ A Participant does not need to subscribe to both FIX and OTTO Ports to conduct business on BX. The proposed fee for BX OTTO is identical to the current fee for MRX OTTO, an identical protocol. Therefore, the MRX Precedent should permit BX to establish the same pricing as another exchange to compete effectively with that market.

Denying BX the ability to compete on similar pricing terms as another exchange burdens competition and creates an environment where the Commission is affecting market dynamics among exchange providers. The OTTO protocol is a protocol of Nasdaq, Inc. BX's Proposal innovates and modernizes its technology so that it may continue to compete among options markets. The ability to innovate with technology and offer new products to market participants is essential to the continued growth and stability of an exchange. Offering a new protocol such as OTTO allows BX to remain competitive in the options space which currently has added a new options market since the filing of this Proposal, bringing the total to eighteen options markets. BX's ability to offer OTTO will enable it to compete with other options markets that provide its market participants a choice as to the type of order entry protocols that may be utilized. BX's ability to offer and price new and innovative products and continue to modernize its technology, similar to other options markets, supports intermarket competition.

The Commission should adhere to its own precedent and act 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 by allowing BX to offer an innovative product to BX Participants while simultaneously lowering their cost to submit orders.

¹⁴ BX Participants may send all orders, proprietary and agency, through one port to BX. Participants may elect to obtain multiple account numbers to organize their business, however only one account number and one port for orders is necessary for a BX Participant to trade on BX.

¹⁵ BX Participants have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations.

¹⁶ Participants may choose to purchase a greater number of order entry ports, depending on their business model. For example, a Participant may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Participant.

If you have any additional questions, please do not hesitate to contact us.

Respectfully,



Angela Dunn

cc: Haoxiang Zhu, Director, Trading and Markets
David Shillman, Associate Director, Trading and Markets