

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77053; File No. SR-BX-2016-007)

February 4, 2016

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt an Options Regulatory Fee

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 January 21, 2016, NASDAQ OMX BX, Inc. (“BX” 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 institute a new transaction based “Options Regulatory Fee” or “ORF.”

While fee changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2016.

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

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

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

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 BX Options Rule at Chapter XV, Section 5, which is currently reserved, to adopt an ORF.<sup>3</sup>

In order to offset the cost of the Exchange's regulatory programs, the Exchange proposes to [sic] an ORF of \$0.0003 per contract. The ORF would be assessed by the Exchange to each BX Participant for all options transactions executed or cleared by the BX Participant that are cleared by The Options Clearing Corporation ("OCC") in the Customer range, *i.e.*, transactions that clear in the Customer account of the BX Participant's clearing firm at OCC, regardless of the marketplace of execution. The Exchange would impose the ORF on all options transactions executed by a BX Participant, even if the transactions do not take place on BX.<sup>4</sup>

The ORF would also be assessed on transactions that are not executed by a BX Participant [sic] but are ultimately cleared by a BX Participant. For example, if a BX Participant executed a transaction and a BX Participant cleared the transaction, the ORF would be assessed to the BX Participant who executed the transaction. Also, if a non-BX Participant

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<sup>3</sup> The Exchange does not currently assess a registered representative fee to its members.

<sup>4</sup> The ORF would apply to all customer orders executed by a BX Participant on BX. Exchange rules require each BX Participant to submit trade information in order to allow the Exchange to properly prioritize and match orders and quotations and report resulting transactions to the OCC. See Exchange Rules Chapter V, Section 7. The Exchange represents that it has surveillances in place to verify that BX Participants comply with the Rule.

executed a transaction and a BX Participant cleared the transaction, the ORF would be assessed to the BX Participant who cleared the transaction.

The Exchange believes it is appropriate to charge the ORF only to transactions that clear as Customer at OCC. The Exchange believes that its broad regulatory responsibilities with respect to BX Participants' activities supports applying the ORF to transactions cleared but not executed by a BX Participant. The Exchange's regulatory responsibilities are the same regardless of whether a BX Participant executes a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, front-running, contrary exercise advice violations and insider trading.<sup>5</sup> These activities span across multiple exchanges.

The Exchange believes the initial level of the fee is reasonable because it relates to the recovery of the costs of supervising and regulating BX Participants. The proposed amount of the ORF is fair and reasonably allocated because it represents less than the Exchange's actual costs in administering its regulatory program. The ORF would be collected indirectly from BX Participants through their clearing firms by OCC on behalf of the Exchange. The Exchange expects that BX Participants will pass-through the ORF to their Customers in the same manner

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<sup>5</sup> The Exchange also participates in The Options Regulatory Surveillance Authority ("ORSA") national market system plan and in doing so shares information and coordinates with other exchanges designed to detect the unlawful use of undisclosed material information in the trading of securities options. ORSA is a national market system comprised of several self-regulatory organizations whose functions and objectives include the joint development, administration, operation and maintenance of systems and facilities utilized in the regulation, surveillance, investigation and detection of the unlawful use of undisclosed material information in the trading of securities options. The Exchange compensates ORSA for the Exchange's portion of the cost to perform insider trading surveillance on behalf of the Exchange. The ORF will cover the costs associated with the Exchange's arrangement with ORSA.

that firms pass-through to their Customers the fees charged by Self-Regulatory Organizations (“SROs”) to help the SROs meet their obligations under Section 31 of the Exchange Act.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of BX Participants, including performing routine surveillances, investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange’s other regulatory fees, will cover a material portion, but not all, of the Exchange’s regulatory costs. The Exchange notes that its regulatory responsibilities with respect to BX Participant compliance with options sales practice rules have been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of options sales practice regulation.

The Exchange would monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other BX regulatory fees and fines, does not exceed the Exchange’s total regulatory costs. The Exchange expects to monitor BX regulatory costs and revenues at a minimum on an annual basis. If the Exchange determines BX regulatory revenues exceed regulatory costs, the Exchange would adjust the ORF by submitting a fee change filing to the Commission. The Exchange would notify BX Participants of adjustments to the ORF via a Regulatory Information Circular.

The Exchange believes the proposed ORF is equitably allocated because it would be charged to all BX Participants on all their Customer options business. The amount of resources required by the Exchange to regulate non-Customer trading activity is significantly less than the amount of resources the Exchange must dedicate to regulate Customer trading activity. The ORF seeks to recover the costs of supervising and regulating members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking,

interpretive, and enforcement activities. The Exchange believes the proposed ORF is reasonable because it will raise revenue related to the amount of Customer options business conducted by BX Participants and thus the amount of Exchange regulatory services required by those BX Participants.<sup>6</sup>

As a fully-electronic exchange without a trading floor, the amount of resources required by the Exchange to regulate non-Customer trading activity is significantly less than the amount of resources the Exchange must dedicate to regulate Customer trading activity. This is because regulating Customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-Customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component (e.g., market maker) of its regulatory program.

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for options transactions regardless of the exchange on which the transactions occur. The Exchange has a statutory obligation to enforce compliance by BX Participants and their associated persons with the Exchange Act and the Rules of the Exchange and to surveil for other manipulative conduct by market participants (including non-BX Participants) trading on the Exchange. The Exchange cannot effectively surveil for such conduct without looking at and evaluating activity across all options markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such

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<sup>6</sup> The Exchange expects that implementation of the proposed ORF will result generally in many traditional brokerage firms paying less regulatory fees while Internet and discount brokerage firms will pay more.

as surveillance for position limit violations, manipulation, front-running and contrary exercise advice violations/expiring exercise declarations.<sup>7</sup> Also, the Exchange and the other options exchanges are required to populate a consolidated options audit trail (“COATS”) system in order to surveil BX Participant activities across markets.<sup>8</sup>

In addition to its own surveillance programs, the Exchange works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (“ISG”),<sup>9</sup> the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. The Exchange’s participation in ISG helps it to satisfy the Exchange Act requirement that it have coordinated surveillance with markets on which security futures are traded and markets on which any security underlying security futures are traded to detect manipulation and insider trading.<sup>10</sup>

The Exchange believes that charging the ORF across markets will avoid having BX Participants direct their trades to other markets in order to avoid the fee and to thereby avoid paying for their fair share of regulation. If the ORF did not apply to activity across markets then

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<sup>7</sup> The Exchange and other options SROs are parties to a 17d-2 agreement allocating among the SROs regulatory responsibilities relating to compliance by the common members with rules for expiring exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See Securities Exchange Act Release No. 63430 (December 3, 2010), 75 FR 76758 (December 9, 2010). The Commission notes that the current effective version of this 17d-2 plan is reflected in Securities Exchange Act Release No. 76310 (Oct. 29, 2015), 80 FR 68354 (Nov. 4, 2015).

<sup>8</sup> COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct the market promptly to effectively surveil certain rules.

<sup>9</sup> ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG’s information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

<sup>10</sup> See Exchange Act Section 6(h)(3)(I).

BX Participants would send their orders to the lowest cost, least regulated exchange. Other exchanges could impose a similar fee on their member's activity, including the activity of those members on BX. In addition to the ORF that is currently in place at other exchanges,<sup>11</sup> the Exchange notes that there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee.<sup>12</sup> While the Exchange does not have all the same regulatory responsibilities as FINRA, the Exchange believes that, like the other exchanges that assess an ORF, its broad regulatory responsibilities with respect to BX Participants' activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike FINRA's Trading Activity Fee, the ORF would apply only to a BX Participant's Customer options transactions.

While fee changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2016.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act<sup>14</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates

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<sup>11</sup> See other options exchanges such as the Chicago Board Options Exchange, Incorporated ("CBOE"), C2 Options Exchange, Inc. ("C2"), NASDAQ OMX PHLX, LLC ("Phlx"), the International Securities Exchange, LLC ("ISE"), NYSE Arca, Inc. ("NYSEArca") and [sic] NYSE AMEX LLC ("NYSEAmex"), BATS Exchange, Inc. ("BATS") and The NASDAQ Options Market LLC ("NOM").

<sup>12</sup> See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 3402 [sic] (June 6, 2003).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4) and (5).

or controls, and is not designed to permit unfair discrimination between Customers, issuers, brokers, or dealers.

The Exchange believes the ORF is objectively allocated to BX Participants because it would be charged to all BX Participants on all their transactions that clear as Customer at the OCC. The Exchange believes it is appropriate to charge the ORF only to transactions that clear as Customer at the OCC because the Exchange is assessing higher fees to those Participants that require more Exchange regulatory services based on the amount of Customer options business they conduct. As a fully-electronic exchange without a trading floor, the amount of resources required by the Exchange to regulate non-Customer trading activity is significantly less than the amount of resources the Exchange must dedicate to regulate Customer trading activity. This is because regulating Customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-Customer trading activity, which tends to be more automated and less labor-intensive.

Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those BX Participants that require more Exchange regulatory services based on the amount of Customer options business they conduct. The ORF seeks to recover the costs of supervising and regulating Options Participants including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange's regulatory responsibilities are the same regardless of whether a BX Participant executes a transaction or clears a transaction executed on its behalf. The Exchange believes that this proposal is reasonable, equitable and not unfairly [sic] for the foregoing reasons.



The Commission has addressed the funding of an SRO's regulatory operations in the Concept Release Concerning Self-Regulation<sup>15</sup> and the release on the Fair Administration and Governance of Self-Regulatory Organizations.<sup>16</sup> In the Concept Release, the Commission states that: "Given the inherent tension between an SRO's role as a business and [sic] a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation."<sup>17</sup> In order to address this potential conflict, the Commission proposed in the Governance Release rules that would require an SRO to direct monies collected from regulatory fees, fines, or penalties exclusively to fund the regulatory operations and other programs of the SRO related to its regulatory responsibilities.<sup>18</sup> The Exchange has designed the ORF to generate revenues that would recover a material portion of BX's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more

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<sup>15</sup> See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) ("Concept Release").

<sup>16</sup> See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) ("Concept Release") [sic].

<sup>17</sup> Concept Release at 71268.

<sup>18</sup> Governance Release at 71142.

favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In terms of intra-market competition, the ORF already exists on various options exchanges.<sup>19</sup> Also, the ORF would be objectively allocated to all BX Participants on all their transactions that clear as Customer at the OCC. The Exchange believes it is appropriate to charge the ORF only to transactions that clear as Customer at the OCC because the Exchange is assessing higher fees to those Participants that require more Exchange regulatory services based on the amount of Customer options business they conduct. As a fully-electronic exchange without a trading floor, the amount of resources required by the Exchange to regulate non-Customer trading activity is significantly less than the amount of resources the Exchange must dedicate to regulate Customer trading activity. This is because regulating Customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-Customer trading activity, which tends to be more automated and less labor-intensive.

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.

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<sup>19</sup> See note 11 above.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>20</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.

### 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-BX-2016-007 on the subject line.

#### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2016-007. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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 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-BX-2016-007 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>21</sup>

Robert W. Errett  
Deputy Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).