

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59999; File No. SR-BX-2009-026)

May 28, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Order Routing

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 May 21, 2009, NASDAQ OMX BX, Inc. (the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is proposing to modify the terms and conditions under which the Exchange is affiliated with NASDAQ Options Services, LLC (“NOS”). The Exchange proposes to implement the proposed rule change when NASDAQ OMX PHLX, Inc. (“PHLX”) implements its XL II trading system.<sup>4</sup> There is no proposed rule language.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Securities Exchange Act Release No. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR-Phlx-2009-32); Securities Exchange Act Release No. 59779 (April 16, 2009), 74 FR 18600 (April 23, 2009) (SR-Phlx-2009-32, Amendment No. 1).

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 NASDAQ OMX Group, Inc. (“NASDAQ OMX”) acquired the Exchange in August 2008. Prior to the acquisition, the Exchange owned a 21.87% interest in Boston Options Exchange Group, LLC (“BOX LLC”), the operator of the Boston Options Exchange facility (“BOX”). BOXR is a wholly-owned subsidiary of the Exchange, to which the Exchange has delegated, pursuant to a delegation plan, certain self-regulatory responsibilities related to the BOX.

At the closing of the acquisition by NASDAQ OMX, the Exchange transferred its interest in BOX LLC to MX US, a wholly-owned subsidiary of the Montreal Exchange Inc. Although the Exchange no longer holds an ownership interest in BOX LLC, it continues to hold self-regulatory obligations with respect to BOX. The Exchange, together with BOXR, retains regulatory control over BOX and the Exchange, and remains responsible for ensuring compliance with the federal securities laws and all applicable rules and regulations.

In its order approving certain proposed rule changes necessary to allow the acquisition of the Exchange by NASDAQ OMX, the Commission approved the adoption of Chapter XXXIX,

Section 2 of the Exchange's rules, which provides that, subject to certain exceptions, the Exchange may not become an affiliate of one of its members unless the terms and conditions of such affiliation are the subject of an effective filing with the Commission.<sup>5</sup> Also in the Acquisition Approval Order, the Commission approved the Exchange becoming an affiliate of Nasdaq Options Services, LLC ("NOS"), which is an indirect subsidiary NASDAQ OMX, a registered broker-dealer, a member of the Exchange, and a BOX market participant.<sup>6</sup>

The NASDAQ Options Market ("NOM") is an options market operated by The NASDAQ Stock Market (the "NASDAQ Exchange"), and NOS is the approved outbound routing facility of the NASDAQ Exchange for NOM. The Commission has approved NOS's affiliation with the Exchange subject to the conditions that: (i) NOS remains a facility of the NASDAQ Exchange; (ii) use of NOS's routing function by NASDAQ Exchange members continues to be optional; and (iii) NOS does not provide routing of orders in options from NOM to the Exchange or any trading facilities thereof, unless such orders first attempt to access any liquidity on the NOM book. In addition, the Commission noted in the Acquisition Approval Order that NOS is a member of a self-regulatory organization that is unaffiliated with the NASDAQ Exchange and that serves as NOS's designated examining authority.

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<sup>5</sup> Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02, -23, -25; SR-BSECC- 2008-01) (the "Acquisition Approval Order").

<sup>6</sup> In connection with the adoption of new rules to govern trading of cash equity securities on the Exchange, the Exchange adopted Equity Rule 2140, which, like Chapter XXXIX, Section 2, restricts affiliation between the Exchange and its members. Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48). In the same filing, the Exchange designated Chapter XXXIX, Section 2 for inclusion in the "Grandfathered Rules" of the Exchange, which are rules in effect prior to the acquisition of the Exchange by NASDAQ OMX that continue to apply to BOX market participants, while designating Rule 2140 as an "Equity Rule" applicable to members of the Exchange. Because NOS is both an Exchange member and a BOX market participant, this filing should be construed to relate both to Rule 2140 and Chapter XXXIX, Section 2.

In SR-PHLX-2009-32,<sup>7</sup> PHLX, another exchange subsidiary of NASDAQ OMX, has proposed establishing NOS as PHLX's routing facility (the "Routing Facility"). The sole use of the Routing Facility by the PHLX's new proposed Phlx XL II system will be to route orders in options listed and open for trading on the Phlx XL II system to away markets pursuant to PHLX rules on behalf of PHLX. Proposed PHLX Rule 1080(m)(iii)(B) would provide that the use of NOS to route orders to other market centers is optional. Parties that do not desire to use NOS must designate orders as not available for routing (*i.e.*, a Do Not Route Order, as described in proposed PHLX Rule 1080(m)(iv)(A)).

Proposed PHLX Rule 1080(m)(iii)(C) would provide that PHLX will establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between PHLX and the Routing Facility, and any other entity, including any affiliate of the Routing Facility, and, if the Routing Facility or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the Routing Facility or affiliate that provides the other business activities and the routing services. In SR-PHLX-2009-32, PHLX further noted that NOS is a member of a self-regulatory organization that is unaffiliated with PHLX and that serves as NOS's designated examining authority.<sup>8</sup>

Finally, proposed PHLX Rule 1080(m)(iii)(D) would state that the books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of PHLX, will be deemed to be the books, records, premises, officers, directors, agents, and

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<sup>7</sup> Securities Exchange Act Release No. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR-Phlx-2009-32); Securities Exchange Act Release No. 59779 (April 16, 2009), 74 FR 18600 (April 23, 2009) (SR-Phlx-2009-32, Amendment No. 1).

<sup>8</sup> The Financial Industry Regulatory Authority ("FINRA") serves as NOS's designated examining authority. FINRA is unaffiliated with the Exchange, PHLX, the NASDAQ Exchange, and BOX.

employees of PHLX for purposes of and subject to oversight pursuant to the Act. The books and records of the Routing Facility, as a facility of PHLX, will be subject at all times to inspection and copying by PHLX and the Commission.

PHLX has also adopted a rule restricting affiliation between PHLX and its members, comparable to the Exchange's rules. See PHLX Rule 985(b). In SR-Phlx-2009-32, PHLX has requested that the Commission allow PHLX to use NOS to provide routing services for orders routed to all destinations, provided they first attempt to access liquidity on PHLX's systems before routing to other exchanges. Thus, the terms and conditions of PHLX's order routing would be substantially similar to those already approved with respect to routing by NOM through NOS.

Because orders from PHLX may be routed to BOX through NOS, it is necessary for the Exchange to submit this filing to establish that BOX may receive such routed orders. Accordingly, the Exchange proposes that NOS be permitted to route orders from PHLX to BOX subject to the following: (i) NOS is approved as and remains a facility of PHLX; (ii) use of NOS's Routing Facility function by PHLX members continues to be optional; (iii) NOS does not provide routing of orders in options from PHLX to the Exchange or any trading facilities thereof, unless such orders first attempt to access any liquidity on the PHLX book, and (iv) NOS is a member of a self-regulatory organization that is unaffiliated with PHLX and the Exchange and that serves as NOS's designated examining authority. The terms and conditions under which BOX would receive orders from PHLX through NOS are the same as the terms and conditions under which it has been approved to receive them from NOM through NOS.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, 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. The proposed rule change would permit inbound routing of orders from PHLX to BOX through NOS in accordance with the terms and conditions governing order routing that have been approved by the Commission with respect to routing of orders from NOM through NOS.

### 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.

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

Written comments on the proposed rule change were neither solicited nor received.

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

Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the

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<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(5).

Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>13</sup> However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that the Exchange's proposal is substantially similar to the proposal of another national securities exchange previously approved by the Commission and does not raise any new substantive issues.<sup>15</sup> The Exchange proposes to implement the proposed rule change when PHLX implements its XLII trading system, and states that waiving the operative delay will ensure that the Exchange is able to implement the proposed rule change at such time.<sup>16</sup> For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>14</sup> Id.

<sup>15</sup> See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31).

<sup>16</sup> See SR-BX-2009-026, Items 2 and 7.

protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-2009-026 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-BX-2009-026. 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

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<sup>17</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).



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 inspection and copying 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-2009-026 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>18</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).