SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74129; File No. SR-BX-2014-049)

January 23, 2015

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving Proposed Rule Change Relating to Directed Market Makers

I. Introduction

On November 25, 2014, NASDAQ OMX BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),[1] and Rule 19b-4 thereunder,[2] to establish a directed order process for orders submitted to the Exchange. The proposed rule change was published in the Federal Register on December 12, 2014.[3] The Commission received one comment letter on the proposal.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to establish a program that will permit BX Market Makers to act as Directed Market Makers (“DMMs”) in their appointed options classes, provided the BX Market Maker meets certain obligations and quoting requirements as described in more detail below.[5] As proposed, DMMs will be permitted to receive “Directed Orders,” which will be defined as orders to buy or sell which have been directed (pursuant to the Exchange’s

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 73784 (December 8, 2014), 79 FR 73930 (“Notice”).

4 See Email from Anonymous, to Secretary, Commission, dated January 2, 2015 (“Comment Letter”).

5 See Notice, supra note 3 at 73930.

instructions on how to direct an order) to a particular market maker (the DMM with respect to that Directed Order).[6] Limit Orders, Minimum Quantity Orders, Market Orders, Price Improving Orders, All-or-None Orders, Post-Only Orders, Immediate or Cancel, Good-till-Cancelled Day or WAIT orders will be eligible to be designated as Directed Orders.[7] Directed Orders will be available only in certain options.

DMM Participation Entitlement

BX proposes to permit a DMM to receive up to a 40% participation entitlement if a Directed Order is directed to that DMM when the Exchange's disseminated price is the NBBO at the time of receipt of the Directed Order, and the DMM is quoting at or improving the Exchange's disseminated price.[8] If the DMM participation entitlement is not awarded at the time of receipt of the Directed Order, the DMM participation entitlement will not apply to the Directed Order and the Directed Order will be handled as though it were not a Directed Order.[9]

BX also proposes to require that DMMs provide continuous two-sided quotations throughout the trading day in all options issues in which the DMM is assigned for 90% of the time the Exchange is open for trading in each issue.[10] Such quotations will be required to meet the legal quote width requirements of BX Rules Chapter VII, Section 6. These obligations will be applied collectively to all series in all of the issues, rather than on an issue-by-issue basis once the market maker has indicated to the Exchange that the market maker will be receiving Directed

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6 Proposed BX Chapter VI, Section 1(e)(1).

7 Proposed BX Chapter VI, Section 6(a)(1) and (2).

8 Proposed BX Chapter VI, Section 10(1)(C)(1)(c) and Section 10(1)(C)(2)(ii).

9 Proposed BX Chapter VII, Section 15(ii).

10 Proposed BX Chapter VII, Section 15(iii). Pursuant to BX Ch. VII, Section 6(d), BX market makers must quote 60% of the trading day (as a percentage of the total number of minutes in such trading day) or such higher percentage as BX may announce in advance.

Orders.[11] However, these obligations will not apply to DMMs with respect to Quarterly Options Series, adjusted option series, or any series with a time to expiration of nine months or greater.[12] Nevertheless, a DMM will remain eligible to receive a participation entitlement in such series if it elects to quote in such series and otherwise satisfies the requirements of BX Chapter VI, Section 10.[13]

DMM Price/Time and Size Pro-Rata Participation Entitlement

If the Price/Time algorithm applies for the option and a Directed Order is sent to a DMM, BX proposes that the DMM will receive, the greater of: (1) after Public Customer orders are executed, the contracts the DMM would have received if the allocation was based on time priority;[14] (2) a DMM participation entitlement of 40% of the remaining interest after Public Customer orders are executed;[15] or (3) the Lead Market Maker ("LMM") participation entitlement, if the DMM is also the LMM.[16]

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11 Proposed BX Chapter VII, Section 15(iii). While the Market Maker's quoting requirement is a daily obligation, the Exchange will determine compliance with these obligations on a monthly basis. BX Regulation may consider exceptions to the requirement to quote 90% (or higher) of the trading day based on demonstrated legal or regulatory requirements or other mitigating circumstances.

If a technical failure or limitation of a system of the Exchange prevents a DMM from maintaining, or prevents a DMM from communicating to the Exchange, timely and accurate electronic quotes in an issue, the duration of such failure shall not be considered in determining whether the DMM has satisfied the 90% quoting standard with respect to that option issue. Id.

12 Proposed BX Chapter VII, Section 15(iii).

13 Id.

14 BX Chapter VI, Section 10(1)(C)(1)(c).

15 BX Chapter VI, Section 10(1)(C)(1)(c). If this calculation results in a non-integer, the Exchange will round up or down to the nearest integer. Id. at Section 10(1)(C)(1)(b)(1).

16 Proposed BX Chapter VI, Section 10(1)(C)(1)(c)(3). BX's current Chapter VI, Section 10(1)(C)(1)(b) provides that an LMM, upon receipt of an order will be afforded a participation entitlement, provided the LMM's bid/offer is at the Exchange's disseminated price. The LMM is not entitled to receive a number of contracts that is

If the Size Pro-Rata algorithm applies for the option and a Directed Order is sent to a DMM, BX proposes that the DMM will receive the greater of: (1) after Public Customer orders are executed, the DMM's Size Pro-Rata share; (2) a DMM participation entitlement of 40% of the remaining interest,[17] after Public Customer orders are executed; or (3) the LMM participation entitlement (if the DMM is also the LMM).[18]

If a DMM has multiple quotes at the same price which are at or improve the NBBO when the Directed Order is received, BX proposes that the DMM participation entitlement will apply only to the quote with the highest time priority at the last price executed upon receipt of the Directed Order which is equal to or better than the NBBO.[19] Additional DMM quotes at such price will receive no further allocation of the Directed Order.[20]

The Exchange also proposes to amend the LMM priority rules so that the LMM participation entitlement will not apply to a Directed Order when the (1) DMM's bid/offer is at or improves the NBBO, (2) LMM is at the same price level and (3) LMM is not the DMM at the time the Directed Order is received.[21] If the LMM is also the DMM, the LMM shall receive the DMM participation entitlement applicable to that algorithm if the DMM participation entitlement is greater than the LMM's participation entitlement.[22] Finally, the proposed rule change removes

greater than the displayed size associated with such LMM. LMM participation entitlements are considered after the opening process.

17 If this calculation results in a non-integer, the Exchange will round up or down to the nearest integer. BX Chapter VI, Section 10(1)(C)(2)(ii)(1).

18 Proposed BX Chapter VI, Section 10(1)(C)(2)(iii)(3).

19 Proposed BX Chapter VI, Section 10(1)(C)(1)(c) and Section 10(1)(C)(2)(iii).

20 Id.

21 Proposed BX Chapter VI, Section 10(1)(C)(1)(b)(1) and Section 10(1)(C)(2)(ii)(1).

22 Proposed BX Chapter VI, Section 10(1)(C)(1)(b)(1)(e) and Section 10(1)(C)(2)(ii)(1)(e).

the allocation to the LMM of orders for five contracts or fewer if the order for five contracts or fewer is directed to a DMM who is quoting at the NBBO.[23]

BX also proposes to provide discretion to the Exchange in applying designated Participant priority overlays when the Size Pro-Rata execution algorithm is in effect. Specifically, the current rule provides that the Exchange will apply the following priority overlays when the Size Pro-Rata execution algorithm is in effect: (1) public customer priority, (2) LMM priority, and (3) market maker priority.[24] Under the proposed rule, Public Customer priority will always be in effect for Size Pro-Rata executions, but the Exchange will have the discretion to determine whether LMM priority, DMM priority and market maker priorities will be in effect for an options class.[25]

III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and comment letter, and finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[26] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b) of the Act,[27] in general, and furthers the objectives of Section 6(b)(5) of the Act.[28] Section 6(b)(5) requires, among other things, that the rules of the national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and

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23 Proposed BX Chapter VI, Section 10(1)(C)(1)(b)(2) and Section 10(1)(C)(2)(ii)(2).

24 Proposed BX Chapter VI, Section 10(1)(C)(2).

25 Id.

26 In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

27 15 U.S.C. 78f(b).

28 15 U.S.C. 78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Commission received one comment letter expressing support for the proposal.[29]

The Commission has previously approved rules of other national securities exchanges that provide for directed order participation entitlements.[30] The Commission has closely scrutinized such exchange rule proposals where the percentage of enhanced participation would rise to a level that could have a material adverse impact on quote competition within a particular exchange.[31]

BX's proposal to permit DMMs to receive a 40% participation entitlement will not increase the overall percentage of an order that is guaranteed to the DMM beyond the currently acceptable threshold.[32] Under the proposal, the remaining portion of each order will be available for allocation based on the competitive bidding of market participants. Therefore, the Commission does not believe that the proposal will negatively impact quote competition on BX.

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29 See Comment Letter, supra note 4. The comment letter stated "Good idea!"

30 See Securities Exchange Act Release No. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR-Phlx-2004-91) ("Phlx Order"); see also e.g., Securities Exchange Act Release Nos. 47628 (April 3, 2003), 68 FR 17697 (April 10, 2003) (SR-CBOE-00-55) ("CBOE Order"); 52331 (August 24, 2005), 70 FR 51856 (August 31, 2005) (SR-ISE-2004-16) ("ISE Order"); 52506 (September 23, 2005), 70 FR 57340 (September 30, 2005) (SR-CBOE-2005-58); 59472 (February 27, 2009) 74 FR 9843 (March 6, 2009) (SRNYSEALTR-2008-14)("NYSEALTR Order"); 60469 (August 10, 2009), 74 FR 41478 (August 17, 2009)(SR-NYSEArca-2009-73) ("NYSE Arca Notice"); and 68070 (October 18, 2012), 77 FR 65037 (October 18, 2012) (SR-C2-2012-24) ("C2 Order").

31 See Phlx Order, supra note 30 at 32861.

32 Id. See also CBOE Order, supra note 30 at 17708 (citing Securities Exchange Act Release No. 45936 (May 15, 2002), 67 FR 36279, 26280 (May 23, 2002); Securities Exchange Act Release No. 42835 (May 26, 2000), 65 FR 35683, 35685–66 (June 5, 2000); Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388, 11398 (March 2, 2000); Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778, 48787–88 (August 9, 2000)).

A DMM on BX will have to be quoting at, or better than, the NBBO at the time a Directed Order is received in order to obtain the guarantee. The Commission believes that it is critical that a DMM must not be permitted to step up and match the NBBO after it receives a directed order in order to receive the participation entitlement. In this regard, BX's proposal prohibits notifying a DMM of an intention to submit a Directed Order so that such DMM could change its quotation to match the NBBO immediately prior to submission of the Directed Order, and then fade its quote. BX submitted a letter to the Commission representing that it will provide the necessary protections against that type of conduct, and will proactively conduct surveillance for, and enforce against, such violations.[33]

BX's proposed rules will require DMMs to quote at a higher level than other market makers who are not DMMs. Market makers on BX are required to quote 60% of the trading day. In order to receive the participation entitlement, DMMs will be required to quote 90% of the trading day. The Commission believes that requiring heightened quoting by a market maker in order to be eligible to receive a participant entitlement is consistent with what other exchanges have required as part of their directed order programs.[34]

The Commission emphasizes that approval of this proposal does not affect a broker-dealer's duty of best execution. A broker-dealer has a legal duty to seek to obtain best execution of customer orders, and any decision to preference a particular DMM must be consistent with this duty.[35] A broker-dealer's duty of best execution derives from common law agency

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33 See Letter from Joseph Cusick, Chief Regulatory Officer, Nasdaq, to David Hsu, Assistant Director, Commission, dated November 25, 2014.

34 See note 30, supra.

35 See, e.g., Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 269-70, 274 (3d Cir.), cert. denied, 525 U.S. 811 (1998); Certain Market Making Activities on Nasdaq, Securities Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing Sinclair v. SEC, 444 F.2d 399 (2d Cir. 1971); Arleen Hughes, 27 SEC 629, 636 (1948),

principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws.[36] The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, i.e., at the best reasonably available price.[37] The duty of best execution requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.[38] Broker-dealers must examine their procedures for seeking to obtain

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aff'd sub nom. Hughes v. SEC, 174 F.2d 969 (D.C. Cir. 1949)). See also Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) ("Order Handling Rules Release"); 51808 (June 9, 2005), 70 FR 37496, 37537-8 (June 29, 2005).

36 Order Handling Rules Release, 61 FR at 48322. See also Newton, 135 F.3d at 270. Failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in agreeing to execute a customer's order, makes an implied representation that it will execute it in a manner that maximizes the customer's economic gain in the transaction. See Newton, 135 F.3d at 273 ("[T]he basis for the duty of best execution is the mutual understanding that the client is engaging in the trade – and retaining the services of the broker as his agent – solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal."); Marc N. Geman, Securities Exchange Act Release No. 43963 (Feb. 14, 2001) (citing Newton, but concluding that respondent fulfilled his duty of best execution). See also Payment for Order Flow, Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006, 55009 (Nov. 2, 1994) ("Payment for Order Flow Final Rules"). If the broker-dealer intends not to act in a manner that maximizes the customer's benefit when he accepts the order and does not disclose this to the customer, the broker-dealer's implied representation is false. See Newton, 135 F.3d at 273-274.

37 Newton, 135 F.3d at 270. Newton also noted certain factors relevant to best execution - order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. Id. at 270 n. 2 (citing Payment for Order Flow, Securities Exchange Act Release No. 33026 (Oct. 6, 1993), 58 FR 52934, 52937-38 (Oct. 13, 1993) (Proposed Rules)). See In re E.F. Hutton & Co. ("Manning"), Securities Exchange Act Release No. 25887 (July 6, 1988). See also Payment for Order Flow Final Rules, 59 FR at 55008-55009.

38 Order Handling Rules Release, 61 FR at 48322-48333 ("In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from different markets or market makers trading a security."). See also Newton, 135 F.3d at 271; Market 2000: An

best execution in light of market and technology changes and modify those practices if necessary to enable their customers to obtain the best reasonably available prices.[39] In doing so, broker-dealers must take into account price improvement opportunities, and whether different markets may be more suitable for different types of orders or particular securities.[40]

For these reasons, the Commission believes that the proposal is consistent with the requirements of Section 6(b)(5) of the Act.[41]

Examination of Current Equity Market Developments V-4 (SEC Division of Market Regulation January 1994) ("Without specific instructions from a customer, however, a broker-dealer should periodically assess the quality of competing markets to ensure that its order flow is directed to markets providing the most advantageous terms for the customer's order."); Payment for Order Flow Final Rules, 59 FR at 55009.

39 Order Handling Rules, 61 FR at 48323.

40 Order Handling Rules, 61 FR at 48323. For example, in connection with orders that are to be executed at a market opening price, "[b]roker-dealers are subject to a best execution duty in executing customer orders at the opening, and should take into account the alternative methods in determining how to obtain best execution for their customer orders." Disclosure of Order Execution and Routing Practices, Securities Exchange Act Release No. 43590 (Nov.17, 2000), 65 FR 75414, 75422 (Dec. 1, 2000) (adopting new Exchange Act Rules 11Ac1-5 and 11Ac1-6 and noting that alternative methods offered by some Nasdaq market centers for pre-open orders included the mid-point of the spread or at the bid or offer).

41 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[42] that the proposed rule change (SR-BX-2014-049) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Brent J. Fields
Secretary

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[42] 15 U.S.C. 78s(b)(2).

[43] 17 CFR 200.30-3(a)(12).