

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101411; File No. SR-BX-2024-041)

October 23, 2024

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Allow Unlimited External Distribution of Derived Data from BX Options Trade Outline

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 October 9, 2024, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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 the Exchange’s fees to allow unlimited external distribution of Derived Data from BX Options Trade Outline.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, 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 proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 purpose of the proposed rule change is to allow unlimited external distribution of Derived Data from BX Options Trade Outline for a monthly fee of \$3,000.³

BX Options Trade Outline

BX Options Trade Outline provides aggregate quantity and volume information for trades on the Exchange for all series⁴ during a trading session.⁵ Information is provided on an End of Day, Intra-Day, and historical basis in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position,⁶ characterized by origin type (Customers,⁷

³ This proposal was initially filed on September 27, 2024, as SR-BX-2024-039. On October 9, 2024, that filing was withdrawn and replaced with the instant filing to provide further clarification.

⁴ Every options series trades as a distinct symbol; the terms “series” and “symbol” are therefore synonyms.

⁵ See Securities Exchange Act Release No. 100792 (August 21, 2024), 89 FR 68676 (August 27, 2024) (SR-BX-2024-028).

⁶ This would include the aggregate number of “opening purchase transactions,” defined as a BX Options Transaction that creates or increases a long position in an options contract, see Options 1, Section 1(a)(35), and the aggregate number of “opening writing transactions,” defined as a BX Options Transaction that creates or increases a short position in an options contract. See Options 1, Section 1(a)(36).

⁷ The term “Customer” applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(a)(48)). See Options 7, Section 1(a).

Broker-Dealers,⁸ BX Options Market Makers,⁹ Firms,¹⁰ and Professionals¹¹); and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position,¹² characterized by origin type (Customers, Broker-Dealers, BX Options Market Makers, Firms, and Professionals).¹³

End of Day Information

The BX Trade Outline End of Day file provides opening buy, closing buy, opening sell and closing sell information, including option first trade price, option high trade price, option low trade price, and option last trade price. The End of Day file is updated during an overnight process with additional fields¹⁴ and is available the following morning, providing aggregate data for the entire trading session.

⁸ The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(a).

⁹ The term “BX Options Market Maker” is a Participant that has registered as a Market Maker on BX Options pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive Market Maker pricing in all securities, the Participant must be registered as a BX Options Market Maker in at least one security. See Options 7, Section 1(a).

¹⁰ The term “Firm” applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC. See Options 7, Section 1(a).

¹¹ The term “Professional” means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants. See Options 7, Section 1(a).

¹² This would include the aggregate number of “closing purchase transactions” in the affected series, defined as a BX Options Transaction that reduces or eliminates a short position in an options contract, see Options 1, Section 1(a)(19), and the aggregate number of “closing writing transactions,” defined as a BX Options Transaction that reduces or eliminates a long position in an options contract. See Options 1, Section 1(a)(20).

¹³ These are the same types of information available on PHOTO, and the other trade outline products offered by Nasdaq exchanges.

¹⁴ The additional fields are: First Trade Price, High Trade Price, Low Trade Price, Last Trade Price, Underlying Close, Moneyness, Total Exchange volume, Total Industry Volume for the Series, and Open Interest.

Intra-Day Information

Intra-Day information is released in scheduled “snapshots” available every 10 minutes for all options series over the course of the trading day. These snapshots are updated to reflect whatever activity occurred, or to indicate that no activity occurred.¹⁵

Historical Information

Historical data is available through ad hoc requests for information in both End of Day and Intra-Day formats for all option series traded for every calendar month after December 2014, based on specific request.¹⁶

BX Options Trade Outline includes proprietary Exchange trading data and does not disseminate any intra-day trading data from any other exchange.¹⁷

The information provided, both in End of Day and Intra-Day formats, is not a real-time data feed.

BX Options Trade Outline is a completely voluntary product in that the Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so.

Nasdaq’s experience is that investment banks, market makers, asset managers and other buy-side investors purchase trade outline products.

¹⁵ Subscribers will receive the first snapshot at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:40 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, and continuing over the course of the trading day. The final Intra-Day snapshot will be distributed at 4:15 p.m.

¹⁶ Market participants generally use historical files for model testing and research, and the period of time required by a particular market participant will depend on its unique testing and research needs as well as whether it is using End of Day or Intra-Day information. Some customers, for example, may request years of data, while others only months, or even a single month. The same principle applies to End of Day vs. Intra-Day information.

¹⁷ The End of Day report includes a field that presents Total Industry Volume for the Series.

Proposed Fees

The Exchange proposes to allow unlimited external distribution of Derived Data from BX Options Trade Outline for a monthly fee of \$3,000. This will encourage Distributors to create and sell analytic products to the general investing public. External distribution of Derived Data is not currently permitted. The same Derived Data license is also offered by the Nasdaq PHLX, LLC (“Phlx”),¹⁸ Nasdaq ISE, LLC (“ISE”),¹⁹ and Nasdaq GEMX, LLC (“GEMX”)²⁰ exchanges and the Nasdaq Stock Market LLC (“Nasdaq Options Market” or “NOM”).²¹ A Derived Data license is also being proposed for the MRX exchange concurrently with this proposal.

Derived Data is “any information generated in whole or in part from Exchange Information²² such that the information generated cannot be reverse engineered to recreate Exchange Information, or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.”

Fees for external distribution of Derived Data from BX Options Trade Outline are in addition to fees for the End of Day product or the Intraday product, or both, as applicable.

The proposal is designed to promote the dissemination of a variety of analytical insights—generally used only by investment banks, market makers, asset managers and other buy-side investors—to the general investing public by creating an incentive for market data

¹⁸ See Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58).

¹⁹ See ISE Options 7, Section 10(A).

²⁰ See GEMX Options 7, Section 7(D).

²¹ See Nasdaq Options 7, Section 4.

²² “Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) eligible securities or other financial instruments, markets, products, vehicles, indicators, or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

vendors to identify, develop, and sell sentiment indicators and other products. The proposal will spur competition among not only exchanges, but vendors as well, thereby promoting innovation and improving the dissemination of information to the general investing public.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁴ 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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade profile products offered by multiple exchanges are substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

Products similar to Trade Outline are offered by many exchanges, including Nasdaq affiliates such as Phlx,²⁵ ISE,²⁶ GEMX,²⁷ and NOM,²⁸ and options markets not affiliated with

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(4) and (5).

²⁵ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

²⁶ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intraday).

²⁷ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intraday Trade Profile).

²⁸ See Nasdaq Rules, Options 7, Section 4 (Nasdaq Options Trade Outline (“NOTO”)).

Nasdaq such as Cboe Options Exchange (“Cboe”),²⁹ NYSE American Options (“NYSE American”),³⁰ NYSE Arca Options (“NYSE Arca”),³¹ BOX Options Market LLC (“BOX”),³² and MIAX Pearl Options Exchange (“Pearl”).³³

All of the trade outline products offered by the Nasdaq-affiliated exchanges include a license for the unlimited external distribution of Derived Data.³⁴ As noted above, MRX will be proposing the same license together with this proposal. All of these Derived Data licenses are direct substitutes.

The underlying trade outline data provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator among trade outline products depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of the data. Customers generally purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing

²⁹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-Day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price, and transaction type).

³⁰ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³¹ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³² See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

³³ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

³⁴ See *supra* notes 24-27.

returns. Because customers can substitute trade outline products among exchanges, customers can also substitute the proposed Derived Data license for BX with the Derived Data licenses of any of its affiliates.

The proposed Derived Data license is also subject to potential competition from exchanges not affiliated with Nasdaq. Although the Exchange is not aware of any exchanges offering a Derived Data license for trade outline other than its own affiliates, any exchange that wishes to allow distribution of a Derived Data product based on options trading information would be able to do so with an immediately effective fee filing similar to this proposal.

All trade outline products are optional. Customers can, and do, choose to forego the information from Trade Outline or any of its competitor products when making a trade, and the same holds for Derived Data from trade outline products.

As the Commission and courts³⁵ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”³⁶ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁷ The Commission and the courts have repeatedly

³⁵ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” Id. (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74771 (December 9, 2008) (SR-NYSEArca-2006-21)).

³⁶ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

³⁷ See id.

expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”³⁸

Because the proposed Derived Data license is currently subject to competition from other Nasdaq exchanges, and potentially subject to competition from other exchanges, the Exchange will be limited in what it is able to charge for the license, and the proposed fee is therefore a reasonable allocation of dues, fees and other charges.

Comparability

The proposed fees for the Derived Data license are comparable to the fees charged by similarly situated exchanges for the same license.

All of the Nasdaq-affiliated exchanges offer a Derived Data license for their trade outline products. As explained above, the value of any trade outline product is determined in part by the number of underlying transactions reflected in the data.

The proposed fees for the Derived Data license are the same as the fees charged by similarly situated exchanges. BX has a market share of approximately 2 percent, similar to that of GEMX (at approximately 3 percent).³⁹ The proposed monthly fee of \$3,000 for the unlimited external distribution of Derived Data is identical to the fee charged by GEMX.⁴⁰

³⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

³⁹ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

⁴⁰ See GEMX Options 7, Section 7(D).

The volume of trading on the BX exchange is also similar to that on the MRX exchange, which has a market share of approximately 4 percent.⁴¹ Together with this filing, MRX will propose the same monthly fee of \$3,000 as BX for the unlimited external distribution of Derived Data.

The Nasdaq-affiliated exchanges with larger market shares have comparably higher fees for the unlimited external distribution of Derived Data. Nasdaq Options Market, with a market share of approximately 5 percent,⁴² has a fee of \$4,000 per month for the unlimited external distribution of Derived Data.⁴³ ISE, with a market share of approximately 7 percent,⁴⁴ has a fee of \$4,500 per month for the unlimited external distribution of Derived Data.⁴⁵ PHLX, with a market share of approximately 9 percent,⁴⁶ has a fee of \$5,000 per month for the unlimited external distribution of Derived Data.⁴⁷

The proposed fees are therefore comparable to those charged by similarly situated exchanges and consistent with the fees for Derived Data licenses in the market overall. If the Exchange is wrong in its assessment of fees, it will lose sales as a result.

The Proposal Does Not Permit Unfair Discrimination

The proposed Derived Data license is available to all market participants, including members and non-members, and all current and potential distributors, on the same terms.

⁴¹ See supra note 38.

⁴² See id.

⁴³ See Nasdaq Options 7, Section 4.

⁴⁴ See supra note 38.

⁴⁵ See ISE Options 7, Section 10(A).

⁴⁶ See supra note 38.

⁴⁷ See PHLX Options 7, Section 10.

Nothing in the proposal treats any category of market participant any differently from any other category.

It is reasonable and not unfair discrimination to charge an external distributor of Derived Data a \$3,000 licensing fee that is not charged for internal usage. External distribution is fundamentally different than internal use. Vendors ordinarily charge a fee to their downstream customers for this service, and, even if the vendor is not charging a specific fee for this particular service, Derived Data products from the Exchange will be part of a suite of offerings that generally promote sales. It is not unfair discrimination to charge a licensing fee for a product that generates downstream revenue.

It is also not unfair discrimination to allow the redistribution of Derived Data, but not the underlying information. Neither exchanges nor vendors ordinarily allow redistribution of analytic products—such products are typically designed solely for the use of direct customers, not for redistribution to the customers of customers in the manner of a data feed.

The proposed licensing structure provides an incentive for vendors to innovate with new compelling and varied analytic products for the general investing public that will provide access to market sentiment insights currently available only to sophisticated investors.

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 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.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations). As discussed above, BX Trade Outline is subject to direct competition from other options exchanges that offer similar products. Any of these exchanges can replicate this proposal in full or in part, and nothing in the proposal would interfere with the ability of any exchange to do so.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Outline is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase a license to distribute Derived Data can do so on a non-discriminatory basis.

Indeed, the proposal is designed to foster competition for vendors as well as exchanges by creating an incentive for market data vendors to identify, develop, and sell analytic indicators to help investors inform their investments strategies and analytic models.

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.

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.⁴⁸

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BX-2024-041 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.

⁴⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to file number SR-BX-2024-041. 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-BX-2024-041 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁹

Sherry R. Haywood,

Assistant Secretary.

⁴⁹ 17 CFR 200.30-3(a)(12).