

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61124; File No. SR-BX-2009-074)

December 7, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Chapter XI (Communications with Public Customers)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 19, 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 substantially prepared by the Exchange. The Exchange has designated the proposed rule change as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ 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 proposes to remove or otherwise amend elements of Chapter XI, Section 24⁵ (“Communications with Public Customers”) of the Boston Options Exchange Group, LLC (“BOX”)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ For ease of reference, Chapter XI, Section 24 will simply be referred to as “Section 24.”

Trading Rules that incorporate provisions of the Securities Act of 1933 (the “Securities Act”)⁶ because options traded on BOX consist solely of standardized options issued by the Options Clearing Corporation (“OCC”), a registered clearing agency, and are exempt under Securities Act Rule 238 from all provisions of the Securities Act except the antifraud provisions of Section 17. In addition, the proposed amendments expand the types of communications governed by Section 24 to include independently prepared reprints and other communications between a participant or participant organization and a customer. The proposed amendments also exempt certain options communications from the pre-approval requirement by a Registered Options Principal (“ROP”). Additionally, the Exchange proposes to correct certain internal citation and typographical errors associated with earlier rule filings.⁷ The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room and also on the Exchange’s Internet Web site at

<http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/>.

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.

⁶ 15 U.S.C. 77a et seq.

⁷ See Securities Exchange Act Release No. 58221 (July 24, 2008), 73 FR 44296 (July 30, 2008) (SR-BSE-2008-29) and Securities Exchange Act Release No. 59434 (February 23, 2009), 74 FR 9012 (February 27, 2009) (SR-BSE-2008-56).

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

1. Purpose

On December 23, 2002, the Commission published final rules that exempt standardized options, as defined in Rule 9b-1⁸ of the Exchange Act⁹, that are issued by a registered clearing agency and traded on a national securities exchange or on a registered national securities association, from all provisions of the Securities Act (other than the anti-fraud provisions) and from the registration requirements of the Exchange Act.¹⁰ Because the Securities Act and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, the Exchange proposes to remove elements of the Securities Act that are embedded in Section 24 of the BOX Rules. In particular, the Exchange proposes to remove all references to a “prospectus” from Section 24. Prospectuses are no longer required for such standardized options, and the OCC has, in fact, ceased publication of a prospectus.¹¹ In addition, the proposed amendments will update and reorganize Section 24 of the BOX Rules. The proposed amendments are similar to amendments filed by the International Securities Exchange (“ISE”) and Chicago Board Options Exchange (“CBOE”) and approved by the Commission and

⁸ 17 CFR 240.9b-1.

⁹ 15 U.S.C. 78a et seq.

¹⁰ See “Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule,” Securities Act Release No. 8171 (December 23, 2002), 68 FR 188 (January 2, 2003).

¹¹ The options disclosure document (“ODD”) prepared in accordance with Rule 9b-1 under the Exchange Act is not deemed to be a prospectus. 17 CFR 230.135b. See, e.g., Securities Act Release No. 8049 (December 21, 2001).

would provide a more uniform approach to communications to customers regarding standardized options.¹²

Deletion of Certain Provisions

As noted above, Section 24 of the BOX Rules contains a number of references to the delivery of a prospectus and other Securities Act requirements. The Exchange proposes to delete the following from Chapter XI: Section 24(a)(iv), which references the Securities Act definition of prospectus; Section 24(e), which incorporates Securities Act principles in that it prohibits written material concerning options from being furnished to any person who has not previously or contemporaneously received the ODD; Section 24(b)(ii), which defines the term “Educational Material;”¹³ Section 24(g), which outlines what is permitted in an “Advertisement;” and Section 24(h), which concerns the use of educational material.

Redesignation of Section 24(a) to Proposed Section 24(d) and Related Amendments

Section 24(a) currently contains an outline of the “General Rule” for options communications. The Exchange proposes to redesignate paragraph (a) as paragraph (d), and to incorporate limitations on the use of options communications contained in Section 24(f) into proposed Section 24(d). In addition, proposed Section 24(d)(iii) would amend Section 24(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. Also, as previously noted, BOX proposes to delete Section 24(a)(iv). Further, current Section 24(i) sets

¹² See Securities Exchange Act Release No. 58823 (October 21, 2008), 73 FR 63747 (October 27, 2008) (SR-CBOE-2007-30); and Securities Exchange Act Release No. 59600 (March 19, 2009), 74 FR 13286 (March 26, 2009) (SR-ISE-2009-09).

¹³ This paragraph essentially incorporates language of Securities Act Rule 134a. While this amendment would eliminate the separate educational material category, as discussed below the Exchange also proposes to revise the definition of Sales Literature to include educational material.

forth the standards applicable to Sales Literature and Section 24(i)(i) sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposes to redesignate Section 24(i)(i) as Section 24(d)(vii).

Redesignation of Section 24(c) to Proposed Section 24(b) and Related Amendments

The Exchange proposes to redesignate paragraph (c) as paragraph (b). The Exchange also proposes to amend this paragraph to include the types of communications proposed to be added to the definition of “Options Communications” in proposed Section 24(a). Proposed Sections 24(b)(ii) and (b)(iii) would also amend the current requirements to obtain advance approval from a ROP for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material.” Specifically, proposed Section 24(b)(ii) would exempt correspondence from the pre-approval requirement unless the correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence would be subject to general supervision and review requirements. Proposed Section 24(b)(iii) would exempt institutional sales material from the pre-approval requirement if the material is distributed to “qualified investors” (as defined in Section 3(a)(54) of the Exchange Act).¹⁴ Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, Proposed Section 24(b)(iv) would require that firms retain options communications in accordance with the record-keeping requirements of Rule 17a-

¹⁴ 15 U.S.C. 78c(a)(54).

4 under the Exchange Act.¹⁵ Proposed Section 24(b)(iv) would also require that firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

Redesignation of Section 24(d) to Proposed Section 24(c) and Related Amendments

The Exchange proposes to redesignate paragraph (d) as paragraph (c). Section 24(d) currently requires members to obtain approval for every advertisement and all educational material from the Exchange. This requirement applies regardless of whether the options communications are used before or after the delivery of a current ODD. The Exchange proposes to amend this provision to require approval by the Exchange only with respect to options communications used prior to the delivery of a current ODD. The Exchange is proposing to eliminate the pre-approval requirement for options communications used subsequent to the delivery of the ODD because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Section 24(b) requires the ROP of a member organization to pre-approve options communications (with certain exceptions for “Correspondence” and “Institutional Sales Material”). This provision would also be amended to include the types of communications added to the definition of “Options Communications” in proposed Section 24(a).

Redesignation of Section 24(b) to Proposed Section 24(a) and Related Amendments

Section 24(b) currently defines terms used in Section 24. BOX proposes to redesignate paragraph (b) as paragraph (a). BOX also proposes to amend the definition of “Options

¹⁵ 17 CFR 240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain “originals of all communications received and copies of all communications sent...including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public.”

Communications” in proposed Section 24(a) to expand the types of communications governed by Section 24 to include independently prepared reprints and other communications between a member or member organization and a customer. The Exchange proposes to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances,” and “Independently Prepared Reprints” to make the rule more clear. In addition, as previously noted, BOX proposes to delete the definition of “Educational Material.”

Proposed Section 24(e)

Proposed Section 24(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally would clarify and restate the requirements contained in current Section 24(i). Proposed Section 24(e)(i)(2) would require options communications to contain contact information for obtaining a copy of the ODD. As previously noted, the provisions of Section 24(g) that outline what is permitted in an advertisement are proposed to be deleted and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Section 24(e)(ii).

Redesignation of Portions of Section 24(i) to Proposed Section 24(g), Proposed Section 24(h), Proposed Section 24(i), and Related Amendments

As stated above, the Exchange proposes to redesignate Section 24(i)(i) as proposed Section 24(d)(vii). Current Section 24(i)(ii) pertains to standards for Sales Literature that contains projected performance figures and current Section 24(i)(iii) pertains to standards for Sales Literature that contains historical performance figures. The Exchange proposes to redesignate Section 24(i)(ii) as proposed Section 24(g)(i) and current Section 24(i)(iii) as

proposed Section 24(h). Section 24(i) currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange is proposing to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or accompany any communication that conveys past or projected performance figures involving options or constitutes a recommendation pertaining to options. A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation or past or projected performance figures. Because BOX is proposing to merge educational material into the sales literature category,¹⁶ this amendment would continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

The Exchange proposes to redesignate current Section 24(i)(iv) as proposed Section 24(i). The Exchange proposes to delete Sections 24(i)(v), (i)(vi), and (i)(vii). The Exchange believes that subparagraphs (i)(v) and (i)(vi) are unnecessary because worksheets are included in the definition of “Sales Literature.” The Exchange believes that subparagraphs (i)(vii) is no longer necessary because the Exchange is proposing to clarify the record-keeping requirements applicable to options communications in proposed Section 24(b)(iv).

Additionally, the Exchange proposes to amend Sections 2, 10 and 24 to clarify certain potentially confusing or inaccurate citations from previous filings.¹⁷ References to “Registered Options and Security Futures Principal” will be amended to refer to “Registered Options Principal.” Similarly, a reference to the “supervision of options and security futures sales practices” will be amended to remove the words “and security futures.” Unnecessary brackets in

¹⁶ See Proposed Section 24 (a)(ii).

¹⁷ See supra note 7.

Section 10(a)(4) will be removed. In addition, references to “Rule 10” will be amended to refer to “Section 10” and the proper reference for the definition of “control” will be added in Section 10(h). Finally, references to Compliance Options Principal will be amended to refer to Registered Options Principal.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,¹⁸ in general, and Section 6(b)(5) of the Act,¹⁹ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to prevent fraudulent and manipulative acts, 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. In particular, the proposed rule change will provide the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between the Exchange’s and other SROs’ options communications rules. In addition, the corrections made will serve to minimize potential confusion by Exchange Participants.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

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

This proposed rule change was filed pursuant to paragraph (A) of section 19(b)(3) of the Exchange Act²⁰ and Rule 19b-4(f)(6) thereunder.²¹ This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Because the rule change is based upon rules in place at ISE and CBOE, and does not present any novel issues, and is intended to maintain consistency among the exchanges, the Exchange requests that the Commission waive the 30-day operative delay²² period for “non-controversial” proposals and make the proposed rule change effective and operative upon filing. The Commission notes that the proposed rule change is substantially identical to proposed rule changes approved by the Commission after an opportunity for public comment,²³ and does not raise any new substantive issues. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposal operative upon filing

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

²² For 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).

²³ The Exchange’s proposed rule change is substantially identical to proposed rule changes by the CBOE and ISE that were recently approved by the Commission. See supra note 12.

for “non-controversial” proposals and make the proposed rule change effective and operative upon filing.²⁴

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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. Please include File Number SR–BX–2009-074 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-2009-074. 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

²⁴ For 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 copying and inspection in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE, Washington, DC 20549. Copies of such 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-2009-074 and should be submitted on or before [date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Florence E. Harmon
Deputy Secretary

²⁵ 17 CFR 200.30-3(a)(12).