

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76754; File No. SR-BX-2015-083)

December 23, 2015

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

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 December 17, 2015, 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 amend the Exchange’s transaction fees to adopt a new Participant Fee at Chapter XV, entitled, “Options Pricing,” Section 10 entitled “Participant Fee – Options.”

The Exchange purposes [sic] to adopt a Participant Fee, applicable to BX Options Participants, to recoup costs incurred by the Exchange. The Exchange’s Participant Fee is competitive with those of other options exchanges.³ While the amendment proposed herein is effective upon filing, the Exchange has designated the amendment [sic] become operative on January 4, 2016.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See note 14 below.

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 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 adopt a Participant Fee, applicable to BX Options Participants, so the Exchange can allocate its costs to various options market participants. Today, the Exchange does not assess BX Options Participants a fee to access the options market. The Exchange proposes to assess all BX Options Participants a \$500 per month Participant Fee. The NASDAQ Options Market LLC ("NOM") initially assessed a Participant Fee in 2012 to its Options Participants.⁴ BX is a smaller market, as compared to NOM, and, to date, the Exchange determined not to assess BX members an Options Participant Fee. Now, the Exchange is proposing such a fee, which would be assessed as of January 4, 2016, to all BX Options

⁴ See Securities and Exchange Act Release No. 68502 (December 20, 2012), 77 FR 76572 (December 28, 2012) (SR-NASDAQ-2012-139).

Participants. The proposed Participant Fee is in addition to the trading rights fee of \$1,000 per month to be an Exchange member.⁵

The Exchange believes this Participant Fee is competitive with fees at other options exchanges.⁶

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act⁸ 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 or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹ Likewise, in NetCoalition v. NYSE Arca, Inc.¹⁰ (“NetCoalition”) the D.C. Circuit upheld the Commission’s

⁵ See Exchange Rule 7001.

⁶ See note 14 below.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

⁹ Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (“Regulation NMS Adopting Release”).

¹⁰ NetCoalition v. NYSE Arca, Inc., 615 F.3d 525 (D.C. Cir. 2010).

use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹¹ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹²

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹³ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to adopt a BX Options Participant Fee of \$500 per month is reasonable because the Exchange is seeking to recoup costs related to membership administration. The proposed fee is lower than similar fees at other options exchanges.¹⁴

¹¹ See NetCoalition, at 534.

¹² Id. at 537.

¹³ Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

¹⁴ See The Chicago Board Options Exchange, Incorporated’s Fees Schedule. Per month a Market Maker Trading Permit is \$5,500, an SPX Tier Appointment is \$3,000, a VIX Tier Appointment is \$2,000, and an Electronic Access Permit is \$1,600. See also the International Securities Exchange LLC’s Schedule of Fees. Per month an Electronic Access Member is assessed \$500.00 for membership and a market maker is assessed from \$2,000 to \$4,000 per membership depending on the type of market maker. See also C2 Options Exchange, Incorporated’s Fees Schedule. Per month, a market-maker is assessed a \$5,000 permit fee, an Electronic Access Permit is assessed a \$1,000 permit fee. See also NYSE Arca, Inc.’s Fee Schedule. Per month, a Clearing Firm is assessed a

The Exchange's proposal to adopt a BX Options Participant Fee of \$500 is equitable and not unfairly discriminatory because the Participant Fee will be assessed uniformly to each BX Options Participant.

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.

In terms of intra-market competition, the Exchange's proposal to adopt a BX Options Participant Fee of \$500 per month does not impose an undue burden on competition because the Exchange would uniformly assess the same Participant Fee to each BX Options Participant. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose Participants. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their

\$1,000 per month fee for the first Options Trading Permit ("OTP") and \$250 thereafter, and a market maker is assessed a permit based on the maximum number of OTPs held by an OTP Firm or OTP Holder during a calendar month ranging from \$1,000 to \$6,000 a month.

competitive standing in the financial markets.

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.¹⁵

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. Please include File Number SR-BX-2015-083 on the subject line.

¹⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2015-083. 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 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 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-2015-083, 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.¹⁶

Brent J. Fields
Secretary

¹⁶ 17 CFR 200.30-3(a)(12).