

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85131; File No. SR-BX-2019-001)

February 14, 2019

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 2

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 January 31, 2019, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, 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 Options 7, Section 2, which sets forth fees and rebates for the Exchange’s options market (“BX Options”), to adopt language that allows the Exchange to remove a day from its options volume calculations for purposes of determining pricing tiers.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqbx.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

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

Today, the Exchange offers a number of pricing incentives based on volume calculations that are designed to encourage participation in BX Options through rebates or reduced fees for Participants that trade on BX Options in increasingly higher volumes.³ The Exchange now proposes to adopt language in Section 2 that would allow it to exclude certain days from such volume calculations for purposes of determining pricing tiers. The Exchange is standardizing its practice for removing a day from options volume calculations in its Pricing Schedule with its affiliated options market, Nasdaq Phlx (“Phlx”).⁴

Specifically in Options 7, Section 2, the Exchange proposes to adopt new subsection (6) with the title “Removal of Days for Purposes of Pricing Tiers,” which will provide:

- (i)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (iii) below.

³ For instance, the Exchange currently offers BX Options Market Makers and Customers tiered rebates and fees for adding or removing liquidity in Penny Pilot and Non-Penny Pilot Options that are based on average daily volume (“ADV”) calculations. See Options 7, Section 2(1).

⁴ See Phlx Pricing Schedule, Options 7, Section 1(b). The Exchange’s other affiliated options markets, Nasdaq ISE, Nasdaq GEMX, Nasdaq MRX, and The Nasdaq Options Market will also file similar rule change proposals to conform to Phlx’s rule.

(ii) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (iii) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs Participants in writing to route their orders to other markets, (C) the Exchange is inaccessible to Participants during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(iii) If a day is to be excluded as a result of paragraph (i)(B) or (ii) above, the Exchange will exclude the day from any Participant’s monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event; and

(B) the Exchange may exclude from any other applicable options tier calculation provided for in its Pricing Schedule (together with (iii)(A), “Tier Calculations”) any Scheduled Early Close or Unanticipated Event.

provided, in each case, that the Exchange will only remove the day for Participants that would have a lower Tier Calculation with the day included.

The proposed language would: (1) allow the Exchange to remove a day from its volume calculations in Options 7, Section 2⁵ in a number of specified circumstances, which typically result in artificially low volume days, (2) categorize potential excluded days as those that are known in advance (i.e., days in proposed paragraph (i), including Scheduled Early Closes), and those that are not (i.e., Unanticipated Events in proposed paragraph (ii)), and (3) allow the Exchange to remove a day only when doing so would be beneficial for the Participant (i.e., only

⁵ See note 3 above.

if the Participant would have a lower ADV calculation with the day included, hereinafter, the “better of rule”). As it relates to Unanticipated Events, the Exchange will inform all Participants if any such day will be excluded from its Tier Calculations via a system status message disseminated to all Participants. The Exchange notes that it is not proposing to amend the thresholds a Participant must achieve to become eligible for, or the dollar amount associated with, the tiered rebates or fees.

Potential Excluded Days

As noted above, the proposal will allow the Exchange to remove days from Participants’ volume calculations in a number of circumstances that generally result in artificially low volume days. First, the Exchange proposes to adopt language identical to Phlx providing that it will always exclude days where the Exchange announces in advance that it will not be open for trading (e.g., Thanksgiving) from all options tier calculations set forth in its Pricing Schedule.⁶ This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule. Second, the Exchange proposes to adopt language that would permit the Exchange to exclude any Scheduled Early Close from its volume calculations. The Exchange believes that Scheduled Early Closes, which typically are days before or after a holiday, may preclude some Participants from submitting orders to the Exchange at the same level as they might otherwise. This proposal is consistent with the treatment of such days on Phlx.⁷

Third, the Exchange proposes language allowing it to exclude days where the market is not open for the entire trading day, such as days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market, because those days

⁶ See note 4 above at paragraph (1)(A).

⁷ See id. at paragraph (1)(B).

typically have lower trading volume. This is consistent with Phlx's practice for removing such days from its volume calculations.⁸

Fourth, Phlx adopted the language on instructing members to route away to prevent situations where days that have artificially lower volume could not be excluded, for example, because Phlx experienced an issue in the morning that ultimately did not carry over into the trading day.⁹ Like Phlx, the Exchange believes that it should have the flexibility to exclude days if Participants have been instructed to send their orders elsewhere, regardless of whether the issue that resulted in this instruction ultimately impacts the availability of the Exchange for trading.

Fifth, the Exchange proposes to adopt identical language as Phlx to exclude days where the Exchange is inaccessible to Participants during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption.¹⁰ While the language proposed above on instructing Participants to route away may also cover Exchange system disruptions that occur before the market opens, the Exchange notes that it may not always instruct Participants to route away in such instances. For example, the Exchange may be inaccessible to Participants in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct Participants to route away. In this instance, the Exchange would not be permitted to exclude the day from its volume calculations. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from Participants who submit eligible interest to be included in the Exchange's opening process. As a

⁸ See id. at paragraph (2)(A).

⁹ See id. at paragraph (2)(B).

¹⁰ See id. at paragraph (2)(C).

result, days where Participants are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and Participants therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV will therefore make it more difficult for Participants to achieve particular pricing tiers for that month. Accordingly, excluding such days from the monthly tier calculations will diminish the likelihood of a cost increase occurring because a Participant is not able to reach a pricing tier on that date that it would reach on other trading days during the month.

Sixth, the Exchange proposes to adopt language identical to Phlx to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system.¹¹ Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead Participants who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some Participants from submitting orders to the Exchange. The Exchange also notes that this proposal is consistent with the rules of other options exchanges.¹²

¹¹ See id. at paragraph 2(D).

¹² See BATS BZX Options Exchange Fee Schedule (defining an "Exchange System Disruption" as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee

Because the potential excluded days proposed above generally have artificially lower trading volume, the Exchange believes it is reasonable and equitable to exclude such days in determining its fee and rebate tiers. The Exchange desires to avoid penalizing Participants that might otherwise qualify for certain tiered pricing but that, because of special circumstances on a particular day, did not participate on the Exchange to the extent that they might have otherwise participated. Absent the authority to exclude such days, Participants may experience an effective increase in the cost of trading on BX Options, a result that is both unintended and undesirable to the Exchange and to its Participants.

Categories of Excluded Days

In light of the foregoing proposal, the Exchange seeks to categorize the potential excluded days proposed above between days that are known in paragraph (i) and days that are not in paragraph (ii), and define the latter as Unanticipated Events. Specifically, paragraph (i) would set forth days that the Exchange announces in advance that it will not be open for trading in paragraph (i)(A), and Scheduled Early Closes in paragraph (ii)(B), as further described above. The Unanticipated Events in paragraph (ii) would cover the days where the Exchange is not open for the entire trading day (e.g., the Exchange declares a trading halt in all securities), days that the Exchange instructs Participants in writing to route away, and the two Exchange systems-related disruptions, each as described above. The foregoing proposal is consistent with how Phlx categorizes potential excluded days today.¹³

Better of Rule

Schedule (defining an “Exchange System Disruption” as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

¹³ See note 4 above at paragraphs (1) and (2).

Similar to Phlx, the proposed language also specifies how the potential excluded days will be removed from the Exchange's volume calculations. In particular, the language will allow the Exchange to exclude any Scheduled Early Close or Unanticipated Event from its calculations of ADV or any other applicable options volume tiers provided for in its Pricing Schedule, provided that the Exchange will only remove such days for Participants that would have a lower volume calculation with the day included (i.e., the better of rule).¹⁴

Phlx adopted the better of rule to avoid penalizing members that step up and trade on days with artificially low volume so that it only excludes such days for members that would have a lower volume calculation with the day included. This language would also be helpful on the Exchange as it would ensure that Participants that continue to execute a large volume of contracts are not inadvertently disadvantaged when the Exchange removes a day from its volume calculations. Furthermore, Phlx adopted the catch-all provision applying to other options tier calculations set forth in its pricing schedule, but not specified within paragraph (3) of its rule, so that it would have flexibility to apply the better of rule going forward to all options pricing programs administered by the Exchange that are based on volume calculations.¹⁵ The Exchange believes that adopting a similar principle-based approach for its options volume calculations would ensure that days are removed from such calculations only if doing so would be beneficial for the Participant. As such, the proposed language will not apply to straight volume accumulations as Participants do not benefit when a day is removed for such accumulations. Again, the Exchange believes that the approach of Phlx would be beneficial as it counts volume executed during an excluded day toward its members' straight volume accumulations.

¹⁴ Phlx similarly excludes Scheduled Early Closes and Unanticipated Events from its ADV calculations and other applicable volume calculations in its pricing schedule, subject in each case to the better of rule. See note 4 above at paragraph (3).

¹⁵ See id. at paragraph (3)(C).

In addition, the Exchange proposes to harmonize its language with Phlx’s language by adding further detail throughout the proposed rule text to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its tier calculations. Specifically, the Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (i)(B) and (ii) that such days may be excluded from the tier calculations only pursuant to paragraph (iii).¹⁶ Paragraph (iii) will then provide that if a day is to be excluded as a result of paragraph (i)(B) or (ii), the Exchange will be required to exclude the day from any Participant’s monthly options tier calculations as detailed within paragraph (iii).¹⁷ With the proposed changes, the Exchange seeks to clarify that it will exclude days from any Participant’s Tier Calculations in a uniform manner to ensure that days are removed only in situations where the Participant benefits. The Exchange will look at each potential excluded day in a month and determine for every Participant their ADV or other applicable volume calculation based on their trading volume on that day. If any Participant would have a lower volume calculation with the particular day included, the Exchange will exclude that day for that Participant. As such, the proposed changes specify that the Exchange will apply the better of rule in a uniform manner for all Participants, and that there is no arbitrary selection of “winners” or “losers” when the Exchange excludes days.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁹ in particular, in

¹⁶ See id. at paragraphs (1)(B) and (2) for similar language on Phlx.

¹⁷ See id. at paragraph (3) for similar language on Phlx.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(4) and (5).

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.

The Exchange believes that the proposed rule change is reasonable and equitable as it provides a new framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to Participants and consistent with similar provisions already in place on Phlx. The proposed rule change would permit the Exchange to remove a day from its volume calculations in numerous circumstances as described above, and ensures that the Exchange will only do so when beneficial for the Participant. The Exchange believes that it is reasonable and equitable to exclude Scheduled Early Closes from its volume calculations because this preserves the Exchange's intent behind adopting volume-based pricing. Absent the authority to exclude Scheduled Early Closes, Participants may experience an effective increase in fees or decrease in rebates. The artificially low volumes of trading on such days typically reduce the trading activity of Participants. Accordingly, allowing the Exchange to exclude such days from its volume calculations will diminish the likelihood of an effective increase in the cost of trading on BX Options, a result that is unintended and undesirable to the Exchange and to its Participants.

The Exchange equally believes that it is reasonable and equitable to exclude a day when Participants are instructed to route their orders to other markets as this also preserves the Exchange's intent behind adopting volume-based pricing, and avoids penalizing Participants that follow this instruction. The Exchange likewise believes it is reasonable and equitable to exclude a day from its volume calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade which renders the Exchange inaccessible to

Participants. Without this change, Participants that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct Participants to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a Participant is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing Participants that might otherwise qualify for certain tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some Participants from submitting orders to the Exchange even if such issue is not actually a complete systems outage.

In addition, the Exchange believes that it is reasonable and equitable to only exclude a day from its volume calculations for Participants that would otherwise have a lower volume calculation with the day included. Without these changes, Participants that route away in accordance with the Exchange's instructions, or that step up and trade significant volume on excluded trading days, may be negatively impacted, resulting in an effective cost increase for those Participants. In addition, having a catch-all in paragraph (iii)(B) so that the better of rule applies to other options volume calculations than ADV to allow the Exchange to apply the rule going forward to all pricing programs based on volume calculations will further protect Participants. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume calculations, and allowing the Exchange to exclude

such days from any volume tier calculation if the Participant would have a lower tier calculation with the day included will further protect Participants from being inadvertently penalized.

Furthermore, the Exchange believes that categorizing the potential excluded days is reasonable and equitable because it will bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (i) and (ii), defining the latter as Unanticipated Events, and stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to adopt numerous days that may be excluded from its volume calculations. Providing in paragraph (i)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Furthermore, the Exchange believes that the proposed changes to specify how days in paragraphs (i)(B) and (ii) may be excluded from its volume calculations will bring greater transparency by delineating the various circumstances in which the better of rule will apply. Providing in paragraph (iii) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the Tier Calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. Furthermore, the proposed changes specifying that the days in paragraphs (i)(B) and (ii) may be excluded only pursuant to paragraph (iii), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (iii) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its Tier Calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all Participants, and that there is no arbitrary selection of "winners" or "losers."

Finally, the Exchange believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all Participants.

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. The proposed rule change is designed to protect Participants from the possibility of a cost increase by excluding days when overall participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. Furthermore, other options exchanges have adopted rules that are substantially similar to the Exchange's proposal.²⁰

The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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 Act²¹ and paragraph (f) of Rule 19b-4 thereunder.²² At any time within 60 days of the filing of

²⁰ See notes 4 and 12 above.

²¹ 15 U.S.C. 78s(b)(3)(A)(ii).

the proposed rule change, the Commission summarily may temporarily suspend 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. Please include File Number SR-BX-2019-001 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.

All submissions should refer to File Number SR-BX-2019-001. 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

²² 17 CFR 240.19b-4(f).

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 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2019-001, 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.²³

Eduardo A. Aleman
Deputy Secretary

²³ 17 CFR 200.30-3(a)(12).