

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59919; File No. SR-BX-2009-025)

May 14, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change to Retroactively Amend the Fee Schedule to Clarify and Correct References to the Volume Discount Given to Market Makers

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 May 8, 2009, NASDAQ OMX BX, Inc. (the “Exchange”) filed with the Securities and Exchange Commission (“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 purpose of the proposed rule change is to amend the Fee Schedule of the Boston Options Exchange Group, LLC (“BOX”) on a retroactive basis to clarify and correct references relating to the volume discount (“Volume Discount”) given to Market Makers. 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 website 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

received on the proposed rule change. The text of those 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 parts 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 amend on a retroactive basis Section 3 (Market Maker Trading Fees) of the BOX Fee Schedule.³ BOX applies a Volume Discount to the fees charged to BOX Market Makers who engage in particularly active trading volume on BOX. The proposed changes will clarify and correct the Fee Schedule to reflect that trading volume in options classes included within the Liquidity Make or Take Pricing Structure ("Make or Take"), as set forth in Section 7 of the BOX Fee Schedule, is excluded when determining a Market Maker's Volume Discount.⁴ The text explicitly stating this was inadvertently removed from the BOX Fee Schedule in a prior filing, SR-BSE-2007-52.⁵

The Exchange requests that the current proposed changes be made effective retroactive to November 30, 2007, which is the date of filing and effectiveness of SR-BSE-2007-52. The Exchange believes that the proposed changes will eliminate any gap in the treatment of Make or Take volume when calculating the Volume Discount and is consistent with previous Commission

³ The BOX Fee Schedule can be found on the BOX Website at www.bostonoptions.com.

⁴ Make or Take volume is excluded when determining a Market Maker's monthly trading volume for purposes of the Volume Discount and is not eligible to have a Volume Discount applied to it.

⁵ See Securities Exchange Act Release No. 56948 (December 12, 2007), 72 FR 72426 (December 20, 2007)(SR-BSE-2007-52).

action on similar matters pertaining to the allocation of exchange member fees and dues.⁶

Additionally, the Exchange believes that the inadvertent elimination of the language in question from the BOX Fee Schedule did not alter BOX Market Makers' understanding that Make or Take volume was excluded from the calculation of the Volume Discount.⁷

⁶ See Securities Exchange Act Release No. 55549 (March 28, 2007), 72 FR 16837 (April 5, 2007)(SR-CHX-2007-02)(Order Granting Accelerated Approval of a Proposed Rule Change To Amend the CHX Fee Schedule on a Retroactive Basis To Clarify the Application of a Credit Against Specialist Fixed Fees). The approval order stated that the rule change clarified the application of a specialist fixed fee credit that the exchange was offering as an incentive for specialists and would reconcile the discrepancy between the manner in which the exchange intended to apply the credit and the description of the credit in a prior proposal. The order also stated that approval would clarify ambiguity about the application of the specialist fixed fee credit. The Commission believed that accelerated approval would provide clarity without delay. See also Securities Exchange Act Release No. 57347 (February 19, 2008), 73 FR 10080 (February 25, 2008)(SR-NASDAQ-2007-100)(Order Approving Proposed Rule Change to Nasdaq Rule 7033 To Modify the Fees Charged for the Mutual Fund Quotation Service and To Correct Certain Errors in the Rule Manual). The Commission approved a Nasdaq proposal seeking retroactive approval for the implementation of previously approved Mutual Fund Quotation Service ("MFQS") fees which Nasdaq failed to transfer from the NASD rule to the corresponding Nasdaq rule when Nasdaq commenced operations as a national securities exchange, more than one and one half year earlier, on August 1, 2006. The Commission stated that such approval was appropriate as it corrected an omission in Nasdaq's rules. See also Securities Exchange Act Release No. 56240 (August 13, 2007), 72 FR 46527 (August 20, 2007)(SR-ISE-2007-49)(Order Approving Proposed Rule Change Relating to Fee Changes on a Retroactive Basis). The Commission stated that application of the amendments to ISE's Schedule of Fees on a retroactive basis, to a point in time approximately six months prior, were appropriate and aligned revenue collected from members with license costs charged to ISE.

⁷ See BOX Information Circular entitled "Amended BOX Fee Schedule – Expansion of 'Make or Take' and Elimination of Minimum Activity Charger (MAC)" that was distributed to Participants on November 28, 2007 which stated that the establishment of the Make or Take Credit set forth in the then proposed rule filing SR-BSE-2007-52 would not impact Volume Discounts. Specifically, the BOX Information Circular stated: "Current discounts based upon average daily volumes (ADV) of over 25,000 and 50,000 contracts will be maintained."

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,⁸ in general, and Section 6(b)(4) of the Act,⁹ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The proposed changes will result in clarification of the fees charged for trading activity on BOX. The Exchange believes that retroactive approval of the proposed rule change will clarify the BOX Fee Schedule and eliminate any concern of inequitable allocation of fees as between the Market Makers and other Options Participants during the retroactive period.

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.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4).

- B. institute proceedings to determine whether the proposed rule change should be 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-2009-025 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-2009-025. 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 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 inspection and copying in the Commission's Public Reference Room, 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; 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-2009-025 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.¹⁰

Florence E. Harmon
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).