

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61388; File No. SR-BX-2010-001)

January 20, 2010

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Registered Representative Fee and Options Regulatory 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 January 4, 2010, 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 self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,³ and Rule 19b-4(f)(2) 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 from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ OMX BX, Inc. (the “Exchange”) proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (“BOX”) to institute a new transaction-based “Options Regulatory Fee” and eliminate registered representative fees. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room, on the Exchange’s Internet Web site at

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

<http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/>, and on the Commission's Web site at <http://www.sec.gov>.

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 received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

This proposed rule change is based on a filing previously submitted by the Chicago Board Options Exchange ("CBOE") that was effective upon filing.⁵ The Exchange proposes to amend the BOX Fee Schedule to institute a new transaction-based "Options Regulatory Fee" and eliminate registered representative fees. Each Options Participant that registers an options principal and/or representative who is conducting business on BOX is assessed a registered representative fee ("RR Fee") based on the action associated with the registration. There are annual fees as well as initial, transfer and termination fees. RR Fees as well as other regulatory fees collected by the Exchange were intended to cover only a portion of the cost of the

⁵ See Securities Exchange Act Release No. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008) (SR-CBOE-2008-105) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Registered Representative Fee and an Options Regulatory Fee).

Exchange's regulatory programs.⁶ Prior to recent rule changes by other options exchanges, such as CBOE, NASDAQ OMX PHLX ("PHLX") and the International Securities Exchange ("ISE"), all options exchanges, regardless of size, charged registered representative fees.

The Exchange believes that the current RR Fee is not equitable. The options industry has evolved to a structure with many more Internet-based and discount brokerage firms. These firms have few registered representatives and thus pay very little in RR Fees compared to full service brokerage firms that have many registered representatives. Further, due to the manner in which RR Fees are charged, it is possible for a BOX Options Participant to restructure its business to avoid paying these fees altogether. A firm can avoid RR Fees by terminating its Options Participant status and sending its business to BOX through another separate BOX Options Participant, even an affiliated firm that has many fewer registered representatives. If firms terminated their Options Participant status to avoid RR Fees, the Exchange would suffer the loss of a source of funding for its regulatory programs. More importantly, the regulatory effort the Exchange expends to review the transactions of each type of firm is not commensurate with the number of registered representatives that each firm employs.

In order to address the inequity of the current regulatory fee structure and to offset more fully the cost of the Exchange's regulatory programs pertaining to BOX, the Exchange proposes to eliminate the current RR Fee for BOX Options Participants and adopt an Options Regulatory Fee ("ORF") of \$0.0030 per contract, with a minimum one-cent charge per trade.⁷ This fee

⁶ See Securities Exchange Act Release No. 57152 (January 15, 2008), 73 FR 3767 (January 22, 2008) (SR-BSE-2007-55).

⁷ A fee similar to the RR fee may still apply to those BOX Options Participants that also conduct business on the NASDAQ OMX BX equities trading platform. Any such fees may be found at http://www.nasdaqtrader.com/Trader.aspx?id=bx_pricing. NASDAQ OMX BX will not charge the applicable annual RR renewal fee for the 2010 calendar year. See NASDAQ OMX Equity Regulatory Alert #2009-17. In some instances, the

would be assessed by the Exchange to each BOX Options Participant for all options transactions executed or cleared by the Options Participant that are cleared by The Options Clearing Corporation (“OCC”) in the customer range, i.e., transactions that clear in the customer account of the Options Participant’s clearing firm at OCC, regardless of the marketplace of execution. In other words, the Exchange would impose the ORF on all options transactions executed by a BOX Options Participant, even if the transactions do not take place on BOX.⁸ The ORF would also be charged for transactions that are not executed by a BOX Options Participant but are ultimately cleared by a BOX Options Participant. In the case where a BOX Options Participant executes a transaction and a BOX Options Participant clears the transaction, the ORF would be assessed to the BOX Options Participant who executed the transaction. In the case where a non-BOX Options Participant executes a transaction and a BOX Options Participant clears the transaction, the ORF would be assessed to the BOX Options Participant who clears the transaction.

As noted, the ORF would replace RR Fees, which relate to a BOX Options Participant’s options customer business. Further, RR Fees constituted the single-largest fee assessed that is related to BOX customer trading activity (in that BOX generally does not charge customer

Exchange will refund certain RR fees collected through the CRD system from BOX Options Participants that do not conduct business on NASDAQ OMX BX equities trading platform.

⁸ The ORF would apply to all customer orders executed by a BOX Options Participant on BOX. Exchange rules require each BOX Options Participant to submit trade information in order to allow the Exchange to properly prioritize and match orders and quotations and report resulting transactions to the OCC. See BOX Rules Chapter V, Section 15. The Exchange represents that it has surveillances in place to verify that BOX Options Participants comply with the rule.

transaction fees),⁹ and the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to BOX Options Participants' activities supports applying the ORF to transactions cleared but not executed by a BOX Options Participant. The Exchange's regulatory responsibilities are the same regardless of whether a BOX Options Participant executes a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, frontrunning, contrary exercise advice violations and insider trading.¹⁰ These activities span across multiple exchanges.

The Exchange believes the initial level of the fee is reasonable because it relates to the recovery of the costs of supervising and regulating BOX Options Participants. The Exchange believes the amount of the ORF is fair and reasonably allocated because it is a closer approximation to the Exchange's actual costs in administering its regulatory program.

The ORF would be collected indirectly from BOX Options Participants through their clearing firms by OCC on behalf of the Exchange. The Exchange expects that BOX Options

⁹ Under BOX's Take or Make fee structure, customer trading may generate Make fees, but these fees are not specifically related to customer activity and are offset by equal Take credits. Therefore, Make fees are not intended to directly raise funds for Exchange programs, including regulatory.

¹⁰ The Exchange also participates in The Options Regulatory Surveillance Authority ("ORSA") national market system plan and in doing so shares information and coordinates with other exchanges designed to detect the unlawful use of undisclosed material information in the trading of securities options. ORSA is a national market system comprised of several self-regulatory organizations whose functions and objectives include the joint development, administration, operation and maintenance of systems and facilities utilized in the regulation, surveillance, investigation and detection of the unlawful use of undisclosed material information in the trading of securities options. The Exchange compensates ORSA for the Exchange's portion of the cost to perform insider trading surveillance on behalf of the Exchange. The ORF will cover the costs associated with the Exchange's arrangement with ORSA.

Participants will pass-through the ORF to their customers in the same manner that firms pass-through to their customers the fees charged by Self Regulatory Organizations (“SROs”) to help the SROs meet their obligations under Section 31 of the Exchange Act.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of BOX Options Participants, including performing routine surveillances, investigations, as well as policy, rulemaking, interpretive and enforcement activities.¹¹ The Exchange believes that revenue generated from the ORF will cover the substantial majority of the Exchange’s regulatory costs related to the BOX market. At present, RR Fees make up the largest part of the Exchange’s total options regulatory fee revenue, however, the total amount of BOX specific regulatory fees collected by the Exchange is significantly less than the regulatory costs incurred by BOX on an annual basis. The Exchange notes that its regulatory responsibilities with respect to BOX Options Participant compliance with options sales practice rules have been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of options sales practice regulation.

The Exchange would monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other BOX regulatory fees and fines, does not exceed the Exchange’s total regulatory costs. The Exchange expects to monitor BOX regulatory costs and revenues at a minimum on an annual basis. If the Exchange determines BOX regulatory revenues exceed regulatory costs, the Exchange would adjust the ORF by submitting a fee change filing to the Commission. The Exchange would notify BOX Options Participants of adjustments to the ORF via a Regulatory Information Circular.

¹¹ As stated above, the RR Fees collected by the Exchange were originally intended to cover only a portion of the cost of the Exchange’s regulatory programs.

The Exchange believes the proposed ORF is equitably allocated because it would be charged to all BOX Options Participants on all their customer options business. The Exchange believes the proposed ORF is reasonable because it will raise revenue related to the amount of customer options business conducted by BOX Options Participants, and thus the amount of Exchange regulatory services those BOX Options Participants will require, instead of how many registered representative a particular BOX Options Participant employs.¹²

As a fully-electronic exchange without a trading floor, the amount of resources required by the Exchange to surveil non-customer trading activity is significantly less than the amount of resources the Exchange must dedicate to surveil customer trading activity. This is because surveilling customer trading activity is much more labor-intensive and requires greater expenditure of human and technical resources than surveilling non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., market maker) of its regulatory program.

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for options transactions regardless of the exchange on which the transactions occur. The Exchange has a statutory obligation to enforce compliance by BOX Options Participants and their associated persons with the Exchange Act and the rules of the Exchange and to surveil for other manipulative conduct by market participants (including non-BOX Options Participants) trading on the Exchange. The Exchange cannot effectively surveil for such conduct without

¹² The Exchange expects that implementation of the proposed ORF will result generally in many traditional brokerage firms paying less regulatory fees while Internet and discount brokerage firms will pay more.

looking at and evaluating activity across all options markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, frontrunning and contrary exercise advice violations/expiring exercise declarations.¹³ Also, the Exchange and the other options exchanges are required to populate a consolidated options audit trail ("COATS") system in order to surveil BOX Options Participant activities across markets.¹⁴

In addition to its own surveillance programs, the Exchange works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG"),¹⁵ the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. The Exchange's participation in ISG helps it to satisfy the Exchange Act requirement that it have coordinated surveillance with markets on which security futures are traded and markets on which any security underlying security futures are traded to detect manipulation and insider trading.¹⁶

The Exchange believes that charging the ORF across markets will avoid having BOX Options Participants direct their trades to other markets in order to avoid the fee and to thereby

¹³ The Exchange and other options SROs are parties to a 17d-2 agreement allocating among the SROs regulatory responsibilities relating to compliance by the common members with rules for expiring exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See Securities Exchange Act Release No. 56941 (December 11, 2007).

¹⁴ COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct the market promptly to effectively surveil certain rules.

¹⁵ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

¹⁶ See Exchange Act Section 6(h)(3)(I).

avoid paying for their fair share of regulation. If the ORF did not apply to activity across markets then BOX Options Participants would send their orders to the least cost, least regulated exchange. Other exchanges could impose a similar fee on their member's activity, including the activity of those members on BOX.¹⁷

The Exchange notes that there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee¹⁸ and the CBOE's ORF.¹⁹ While the Exchange does not have all the same regulatory responsibilities as FINRA, the Exchange believes that, like the CBOE, its broad regulatory responsibilities with respect to BOX Options Participants' activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike FINRA's Trading Activity Fee, the ORF would apply only to a BOX Options Participant's customer options transactions.

The Exchange has designated this proposal to be operative on January 1, 2010.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,²⁰ in general, and Section 6(b)(4) of the Act,²¹ in particular, in that it provides for

¹⁷ The Exchange notes that CBOE currently assesses an options regulatory fee similar to the one proposed herein, which fee is also assessed on the trading activity of a CBOE member on BOX. Similar regulatory fees have also recently been assessed by PHLX (See Securities Exchange Act Release No. 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100)); and ISE (See Securities Exchange Act Release No. 61154 (December 11, 2009), 74 FR 67278 (December 18, 2009) (SR-ISE-2009-105)).

¹⁸ See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 3402 (June 6, 2003).

¹⁹ See supra note 5.

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(4).

the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. In particular, the Exchange believes the ORF is objectively allocated to BOX Options Participants because it would be charged to all BOX Options Participants on all their transactions that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those BOX Options Participants that require more Exchange regulatory services based on the amount of customer options business they conduct.

The Commission has addressed the funding of an SRO's regulatory operations in the Concept Release Concerning Self-Regulation²² and the release on the Fair Administration and Governance of Self-Regulatory Organizations.²³ In the Concept Release, the Commission states that: "Given the inherent tension between an SRO's role as a business and a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation."²⁴ In order to address this potential conflict, the Commission proposed in the Governance Release rules that would require an SRO to direct monies collected from regulatory fees, fines, or penalties exclusively to fund the regulatory operations and other programs of the SRO related to its regulatory responsibilities.²⁵ The Exchange has designed the ORF to generate revenues that will approximately be equal to BOX's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

²² See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) ("Concept Release").

²³ See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) ("Governance Release").

²⁴ Concept Release at 71268.

²⁵ Governance Release at 71142.

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 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act²⁶ and Rule 19b-4(f)(2)²⁷ thereunder, because it establishes or changes a due, fee, or other charge applicable only to a member.

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

²⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁷ 17 CFR 240.19b-4(f)(2).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BX-2010-001 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-2010-001. 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 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. 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 No. SR-BX-2010-001 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Florence E. Harmon
Deputy Secretary

²⁸ 17 CFR 200.30-3(a)(12).