

office of Nasdaq. 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-NASDAQ-2016-002 and should be submitted on or before February 17, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>34</sup>

**Brent J. Fields,**

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76952; File No. SR-BX-2016-003]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding SQF Port Fees

January 21, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 12, 2016, 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 modify BX Options Market (“BX Options”) Chapter XV, Section 3, entitled “BX Options Market—Access Services,” which governs pricing for BX members using BX Options,<sup>3</sup> BX’s facility for executing and routing standardized equity and index options. Specifically, the Exchange proposes to add new streaming quote interface (“SQF”) Port Fees.<sup>4</sup>

The text of the proposed rule change is available on the Exchange’s Web site 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 amend BX Options Chapter XV, Section 3(b) to add new SQF Port Fees.

Currently, BX Options Chapter XV, Section 3 lists port fees as follows:

(b) Port Fees, per port, per month, per mnemonic as follows:

Order Entry Port Fee .....	\$200.00
CTI Port Fee .....	200.00
BX Depth Port Fee <sup>1</sup> .....	200.00
BX TOP Port Fee <sup>1</sup> .....	200.00
Order Entry DROP Port Fee .....	200.00
SQF Port Fee <sup>1</sup> .....	0.00

<sup>1</sup> BX Depth and BX Top Port fees will be assessed to non-BX Participants and BX Participants.

Today, if an option participant transacting business on BX Options (“Participant”)<sup>5</sup> has one mnemonic<sup>6</sup> and 20 SQF Ports, in a month the Participant would not pay anything (20 × \$0.00). The Exchange now proposes to assess an SQF Fee, which is currently set at \$0.00. This change is described below.

The SQF Port is a port that allows a Participant acting as a BX Options Market Maker (“Market Maker”)<sup>7</sup> to

<sup>5</sup> Options Participants may transact options business via the Exchange Trading System. See BX Options Chapter II, Section 1.

<sup>6</sup> A “mnemonic” is a unique identifier consisting of a four character alpha code.

<sup>7</sup> The term “Market Maker” or (“M”) means a Participant that has registered as a Market Maker on BX Options pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive Market

enter his markets into the BX Options markets. The SQF Port also allows a Market Maker to access information such as execution reports and other relevant data through a single feed. Market Makers rely on data available through the SQF Port to provide them the necessary information to perform market making activities in a swift and meaningful way. This proposal establishes that SQF Ports, which are not currently fee liable, will be fee liable. Prospectively, fees for SQF Ports will to be assessed per port, per month.<sup>8</sup>

##### Change 1—SQF Port Fees

SQF Port Fees are currently set at \$0.00 and as such are not fee liable for Participants that are Market Makers. The Exchange is now proposing in BX Options Chapter XV, Section 3(b) a fee of \$500 per port, per month for SQF Ports. The Exchange had not initially made the SQF Ports fee liable in order to incentivize more Market Makers to make markets on the Exchange. The Exchange believes that this strategy has been successful in incentivizing Market Makers and that the Exchange no longer needs to offer SQF Ports without fee liability. Therefore, the Exchange is proposing a \$500 SQF Port Fee that is significantly lower than that of other exchanges.<sup>9</sup> Moreover, the Exchange is proposing that the SQF Port Fee will be per port, per month similarly to how the same fee is offered on other exchanges.<sup>10</sup> The Exchange believes the continued availability of SQF Ports, even where fee liable as discussed, will continue to incentivize Market Makers to make markets on the Exchange. The Exchange believes that it is reasonable to impose an SQF Port Fee so that the Exchange may begin to partially recoup the costs of maintaining and enhancing SQF Ports.<sup>11</sup>

Maker pricing in all securities, the Participant must be registered as a Market Maker in at least one security.

<sup>8</sup> All current port fee assessments (e.g., CTI Port Fee, Order Entry Port Fee, and SQF Port Fee) are assessed per port, per month, per mnemonic. See BX Options Chapter XV, Section 3. For additional information regarding SQF generally, see <http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/sqfnom2.0.pdf>. This document applies to BX Options, NASDAQ Options Market (“NOM”), and NASDAQ OMX Phlx LLC (“Phlx”). NOM, Phlx, and BX Options are options exchanges of Nasdaq, Inc.

<sup>9</sup> The proposed \$500 SQF Port Fee is, for example, significantly lower than the current \$750 NOM SQF Port Fee. See NOM Chapter XV, Section 3(b).

<sup>10</sup> For example, the NOM SQF Port Fee is similarly offered per port, per month. See NOM Chapter XV, Section 3(b).

<sup>11</sup> The Exchange is proposing to delete the “1” indicating applicability of note 1 to the SQF Port Fee, as note 1 is clearly applicable only to BX Depth and BX Top Port Fees.

<sup>34</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> References in this proposal to Chapter and Series refer to BX Options rules, unless otherwise indicated.

<sup>4</sup> SQF Ports are described in detail below.

As proposed, BX Options Chapter XV, Section 3 will read as follows:

Sec. 3 BX Options Market—Access Services

The following charges are assessed by BX for connectivity to the BX Options Market:

- (a) TradeInfo BX
  - BX Options Participants using TradeInfo BX will be charged a fee of \$95 per user per month.
- (b) Port Fees, per port, per month, per mnemonic as follows:

Order Entry Port Fee .....	\$200.00
CTI Port Fee .....	200.00
BX Depth Port Fee <sup>1</sup> .....	200.00
BX TOP Port Fee <sup>1</sup> .....	200.00
Order Entry DROP Port Fee .....	200.00
Port Fees, per port, per month as follows:	
SQF Port Fee .....	500.00

<sup>1</sup> BX Depth and BX Top Port fees will be assessed to non-BX Participants and BX Participants.

With the proposed SQF Fee, if a Participant has 20 SQF Ports, the Participant would pay \$10,000 (20 × \$500).<sup>12</sup>

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>13</sup> in general, and with Section 6(b)(4) and 6(b)(5) of the Act,<sup>14</sup> 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 its facilities which the Exchange operates or controls [sic], 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 pricing 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.”<sup>15</sup> Likewise, in *NetCoalition v. Securities and Exchange Commission*<sup>16</sup> (“NetCoalition”) the D.C.

<sup>12</sup> The number of mnemonics is not relevant for the proposed SQF Port Fees.

<sup>13</sup> 15 U.S.C. 78f.

<sup>14</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>15</sup> Securities Exchange Act Release No. 51808 [sic] at 37499 (June 9, 2005) (“Regulation NMS Adopting Release”).

<sup>16</sup> *NetCoalition v. Securities and Exchange Commission*, No. 09–1042 (D.C. Cir. 2010).

Circuit upheld the Commission’s 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.<sup>17</sup> 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.”<sup>18</sup>

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’ . . .”<sup>19</sup> 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 believes that its proposal should continue to provide opportunities for more efficient participation in orders and executions on the Exchange, and at the same time facilitate the ability of the Exchange to recoup some costs, maintain, and improve SQF Ports.

Change 1—SQF Port Fees

SQF Ports are not currently fee liable for Participants that are Market Makers. The Exchange is now proposing in BX Options Chapter XV, Section 3(b) a fee of \$500 per port, per month for SQF Ports.<sup>20</sup> The Exchange had not initially made the SQF Ports fee liable in order to incentivize more BX Market Makers to make markets on the Exchange. The Exchange believes that this strategy has been successful in incentivizing Market Makers and that the Exchange no longer needs to offer SQF Ports without fee liability.

The Exchange believes that its proposal to make the SQF Port Fee \$500 per port, per month is reasonable because it would allow the Exchange to keep pace with increasing technology

<sup>17</sup> See *id.* at 534–535.

<sup>18</sup> See *id.* at 537.

<sup>19</sup> *Id.* at 539 (quoting Securities Exchange Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) at 73 FR at 74782–74783).

<sup>20</sup> In establishing that the SQF Fee is per port, per month the Exchange is proposing that the Exchange SQF Port Fee will be similar to that of NOM. See NOM Chapter XV, Section 3(b).

costs. The proposed SQF Port Fee reflects the desire of the Exchange to recoup costs that the Exchange bears with respect to maintaining ports. The proposed SQF Port Fee is reasonable because it enables the Exchange to offset, in part, its costs associated with making such ports available, including costs based on software and hardware enhancements and resources dedicated to development, quality assurance, and support. This will continue to incentivize Market Makers while allowing the Exchange to recoup its costs. The proposed SQF Port Fee is reasonable because it is lower than, and therefore competitive with, fees for similar ports on other exchanges.<sup>21</sup> In addition, the proposed SQF Port Fee is in line with costs for other ports at other options exchanges.<sup>22</sup> SQF Ports allow a Market Maker to access information and rely on data available through such ports to provide necessary information to perform market making activities in a swift and meaningful way. Market Makers are valuable market participants that provide liquidity in the marketplace and incur costs unlike other market participants because Market Makers add value through continuous quoting<sup>23</sup> and the commitment of capital. Exchange Market Makers provide a critical liquidity function across thousands of individual option puts and option calls, a function no other market participants are obligated to perform.

The Exchange believes that establishing the proposed SQF Port Fee is equitable and not unfairly discriminatory. This is because the SQF Port Fee is applicable to all Participants that are Market Makers on the Exchange and will apply uniformly to all similarly

<sup>21</sup> The proposed \$500 SQF Port Fee is, for example, significantly lower than the current \$750 NOM SQF Port Fee. See NOM Chapter XV, Section 3(b).

<sup>22</sup> See NOM Pricing Schedule (port fees \$650 or \$750 per port); and Phlx Pricing Schedule, (port fees \$650 or \$1250 capped per port). See also ISE Gemini, LLC (“ISE Gemini”) Fee Schedule (port fees \$750 to \$15,000 depending on connectivity levels); and C2 Options Exchange, Incorporated (“C2”) (generally assesses port fees \$500 to \$1,000 depending on connectivity levels).

<sup>23</sup> Pursuant to BX Options Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a Market Maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. The Exchange recognizes that BX Option Market Makers that utilize SQF Ports require more technology infrastructure and more ports than BX Option Participants that are not engaged in market making, and has built this in to the fee structure.

situated Participants. All Market Makers that use a SQF Port(s) will be assessed the SQF Port Fee in the same way.

#### *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. Specifically, the Exchange does not believe that its proposal to make changes to BX Options Chapter XV, Section 3(b) to add new SQF Port Fees will impose any undue burden on competition, as discussed below.

The Exchange operates in a highly competitive market in which many sophisticated and knowledgeable market participants can readily and do send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive. Additionally, new competitors have entered the market and still others are reportedly entering the market shortly. These market forces ensure that the Exchange's fees remain competitive with the fee structures at other trading platforms. In that sense, the Exchange's proposal is actually pro-competitive because it enables the Exchange to continue offering SQF Ports to the benefit of market participants.

The Exchange does not believe that the proposed rule change will impose any undue 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. Moreover, in terms of intra-market competition, the Exchange notes that the proposed assessment of an SQF Port Fee will be applied uniformly to all Participants that are Market Makers that use such ports but should have no undue burden on any particular group

of users. The proposal is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup for certain of its connectivity costs, while continuing to offer competitive rates to Participants.

Furthermore, in this instance the proposed SQF Port Fee does not impose a burden on competition because the Exchange's execution and routing services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets. Additionally, the changes proposed herein are pro-competitive to the extent that they continue to allow the Exchange to promote and maintain order executions.

#### *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**

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>24</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2016-003 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-2016-003*. This file number should be included on the subject line if email 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 Web site 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; 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-2016-003 and should be submitted on or before February 17, 2016.

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

**Brent J. Fields,**

*Secretary.*

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>25</sup> 17 CFR 200.30-3(a)(12).