

clearing member that maintains CME Group shares are different than those that apply to a CME clearing member that does not. The purpose of the proposed rule change in this filing is to make clarifying revisions to the CME rulebook to more accurately reflect these fee differentials. The rule changes affecting the CME rulebook are included in File No. SR-CME-2011-02.

CME notes that it submitted the rule changes that are the subject of this filing to its primary regulator, the Commodity Futures Trading Commission ("CFTC"), in a separate filing.<sup>5</sup> This filing also included corresponding changes to the rulebook of its affiliated exchanges, The Board of Trade of the City of Chicago, Inc. ("CBOT") and New York Mercantile Exchange, Inc. ("NYMEX").

The text of the CME rule proposed amendments is in Section I of this notice, with additions underlined and deletions in brackets. The proposed effective date for these rule amendments is August 12, 2011 (*i.e.*, ten business days after the date of CME's submission to the CFTC).<sup>6</sup>

The proposed CME rule amendments do not significantly affect the securities clearing operations of CME or any related rights or obligations of CME clearing members. The proposed rule changes are intended to clarify the application of certain proprietary trading exchange fees to a CME clearing member that maintains CME shares and to those that do not. These changes do not affect CME's credit default swap clearing activities in any significant way. As such, the proposed rule change is properly filed under Section 19(b)(3)(A)<sup>7</sup> and Rule 19b-4(f)(4)(ii)<sup>8</sup> thereunder because it effects a change in an existing service of a registered clearing agency that primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does not significantly affect any securities clearing operations of the clearing agency or any related rights or

obligations of the clearing agency or persons using such service.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

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

The foregoing rule change was filed pursuant to Section 19(b)(3)(A)<sup>9</sup> of the Act and paragraph (f)(4)(ii) of Rule 19b-4<sup>10</sup> became effective on August 12, 2011, the same date CME's corresponding filing with the CFTC became effective. At any time within sixty days of the filing of such 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 may be submitted by using the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>), or send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-CME-2011-02 on the subject line.

- Paper comments should be sent 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-CME-2011-02. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of CME. 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-CME-2011-02 and should be submitted on or before September 21, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Elizabeth M. Murphy,**  
Secretary.

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-65199; File No. SR-BX-2011-045]

### **Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change Requesting Permanent Approval of the Pilot Program Permitting BOX To Accept Inbound Routes by NOS**

August 25, 2011.

#### **I. Introduction**

On July 13, 2011, NASDAQ OMX BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change requesting permanent approval of the Exchange's pilot program to permit the Boston Options Exchange ("BOX") to accept certain inbound orders that

<sup>5</sup> CME submitted its filing to the CFTC pursuant to CFTC Regulation 40.6 on July 28, 2011 with a proposed effective date of August 12, 2011 relating to the following CME Group rules: CME and CBOT Rule 106.L (Affiliate Member Firm), CME Rules 900.A. (CME Clearing Members) and 900.B. (Financial Instrument Clearing Member), CBOT Rules 900 (Categories of Clearing Members) and 901 (General Requirements and Obligations), and NYMEX Rule 900.A. (NYMEX Clearing Members).

<sup>6</sup> The Commission notes that the proposed rule change became effective upon filing under Section 19(b)(3)(A) of the Act. CME's statement indicates that the proposed rule change, which became effective on August 12, 2011, became operative that same day.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Supra* note 4.

<sup>11</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.

Nasdaq Options Services, LLC (“NOS”) routes from Nasdaq Options Market (“NOM”). The proposed rule change was published for comment in the **Federal Register** on July 20, 2011.<sup>3</sup> The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

## II. Background

BOX is an options trading facility of the Exchange under Section 3(a)(2) of the Act.<sup>4</sup> Chapter XXXIX, Section 2 of the Grandfathered Rules of the Exchange prohibits the Exchange or any entity with which it is affiliated from acquiring or maintaining an ownership interest in a member in the absence of an effective filing under Section 19(b) of the Act.<sup>5</sup> NOS is a broker-dealer that is a member of the Exchange, and currently provides to members of the Nasdaq Stock Market LLC (“Nasdaq”) that are NOM participants optional routing services to other market centers.<sup>6</sup> NOS is owned by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”), which also owns three registered securities exchanges—Nasdaq, the Exchange, and NASDAQ OMX PHLX LLC.<sup>7</sup> Thus, NOS is an

affiliate of each of these exchanges. Absent an effective filing, Chapter XXXIX, Section 2 of the Grandfathered Rules of the Exchange would prohibit NOS from being a member of the Exchange.

On August 7, 2008, in connection with the acquisition of the Exchange by NASDAQ OMX, the Commission approved an affiliation between the Exchange and NOS for the limited purpose of permitting NOS to provide routing services for Nasdaq for orders that first attempt to access liquidity on Nasdaq’s system before routing to the Exchange, subject to certain other limitations and conditions.<sup>8</sup> On July 17, 2009, the Exchange filed an immediately effective proposed rule change to modify the conditions for the affiliation between NOS and the Exchange, to permit the Exchange to receive certain orders routed by NOS from NOM without first checking the NOM book for liquidity on a one-year pilot basis.<sup>9</sup> Specifically, the Exchange proposed to permit NOS to route from NOM Exchange Direct Orders and orders in NOM Non-System Securities (including Exchange Direct Orders).<sup>10</sup> The Exchange now seeks permanent approval of this inbound routing pilot.<sup>11</sup>

## III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>13</sup> which requires, among other things, that a national

securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the Exchange. Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>14</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, the Exchange previously proposed, and the Commission approved, limitations and conditions on NOS’s affiliation with the Exchange.<sup>15</sup> Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange previously implemented limitations and conditions to NOS’s affiliation with the Exchange to permit the Exchange to accept orders routed inbound to BOX by NOS from NOM that do not first attempt to access liquidity on the NOM book.<sup>16</sup> The Exchange states it has met these conditions:<sup>17</sup>

- First, the Exchange and FINRA have entered into a Regulatory Contract. Pursuant to the Regulatory Contract, FINRA has been allocated regulatory responsibilities to review NOS’s compliance with BOX’s rules through FINRA’s examination program.<sup>18</sup> Also

<sup>3</sup> See Securities Exchange Act Release No. 64896 (July 15, 2011), 76 FR 43740 (“Notice”).

<sup>4</sup> See Chapter 1, Section 1(a)(6) of the Rules of the Boston Options Exchange Group LLC. See also Securities Exchange Act Release No. 60349 (July 20, 2009), 74 FR 37071 (July 27, 2009) (SR-BX-2009-035) (“BOX Routing Pilot Release”).

<sup>5</sup> 15 U.S.C. 78s(b).

<sup>6</sup> NOS operates as a facility of Nasdaq that provides outbound routing from NOM to other market centers, subject to certain conditions. See NOM Rules Chapter VI, Section 11(e). See also BOX Routing Pilot Release, 74 FR at 37071.

<sup>7</sup> See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01) (“BSE Approval Order”). See also Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (order approving NASDAQ OMX’s acquisition of Phlx.)

NASDAQ OMX acquired the Exchange in August 2008. Prior to the acquisition, the Exchange owned a 21.87% interest in Boston Options Exchange Group, LLC (“BOX LLC”), the operator of BOX. Boston Options Exchange Regulation, LLC (“BOXR”) is a wholly-owned subsidiary of the Exchange, to which the Exchange has delegated, pursuant to a delegation plan, certain self-regulatory responsibilities related to BOX.

At the closing of the acquisition by NASDAQ OMX, the Exchange transferred its interest in BOX LLC to MX US, a wholly-owned subsidiary of the Montreal Exchange Inc. Although the Exchange no longer holds an ownership interest in BOX LLC, it continues to hold self-regulatory obligations with respect to BOX. The Exchange, together with BOXR, retains regulatory control over BOX, and the Exchange, as the SRO, remains responsible for ensuring compliance with the federal securities laws and all applicable rules and regulations.

NASDAQ OMX also currently indirectly owns NOS, a registered broker-dealer and a BOX market participant. Thus, NOS is deemed an affiliate of the

Exchange, BOX and BOXR. See BOX Routing Pilot Release, 76 FR at 37071. See also BSE Approval Order, 76 FR 46936.

<sup>8</sup> See BSE Approval Order, 73 FR at 46944.

<sup>9</sup> See BOX Routing Pilot Release.

<sup>10</sup> NOS provides to NOM participants routing services to other market centers. Pursuant to Nasdaq’s rules, NOS: (1) Routes orders in options currently trading on NOM, referred to as “System Securities;” and (2) routes orders in options that are not currently trading on NOM (“Non-System Securities”). See NOM Rules, Chapter VI, Section 1(b) and 11. When routing Non-System Securities, NOS is not regulated as a facility of Nasdaq, but as a broker-dealer regulated by its designated examining authority. See also BOX Routing Pilot Release, 74 FR at 37071. “Exchange Direct Orders” are orders that are directed to an exchange other than NOM as directed by the entering party without checking the NOM book. See NOM Rules Chapter VI, Section 1(e)(7).

<sup>11</sup> See Notice.

<sup>12</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(1).

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

<sup>15</sup> See BSE Approval Order, 73 FR at 46944.

<sup>16</sup> See BOX Routing Pilot Release, 74 FR at 37072.

<sup>17</sup> See Notice, 76 FR at 43741.

<sup>18</sup> The Exchange also states that NOS is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. See Notice, 76 FR at 43740, n.8.

pursuant to the Regulatory Contract, however, BX retains ultimate responsibility for enforcing its rules with respect to NOS, except to the extent they are covered by an agreement with FINRA pursuant to Rule 17d-2 under the Act ("17d-2 Agreement"),<sup>19</sup> in which case FINRA is allocated regulatory responsibility.

- Second, FINRA and BX will monitor NOS for compliance with the Exchange's trading rules, and will collect and maintain certain related information.<sup>20</sup>

- Third, FINRA will provide a report to the BOXR's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) Quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.<sup>21</sup>

- Fourth, the Exchange has adopted Chapter XXXIX, Section 2(c) of the Grandfathered Rules of the Exchange, which requires NASDAQ OMX, as the holding company owning NOS and affiliated with BOX through the ownership of the Exchange, to establish and maintain procedures and internal controls reasonably designed to ensure that NOS does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.<sup>22</sup>

- Fifth, NOS was authorized to route NOM Exchange Direct Orders without checking the NOM book, and orders in NOM non-system securities, inbound to the Exchange from NOM for a pilot period of twelve months, which was

subsequently extended to September 15, 2011.<sup>23</sup>

The Exchange believes that by meeting the above-listed conditions it has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NOS, and has demonstrated that NOS cannot use any information advantage it may have because of its affiliation with the Exchange.<sup>24</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>25</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NOS to provide inbound routing to the Exchange on a permanent basis instead of a pilot basis, subject to the other conditions described above.

The Exchange has proposed four ongoing conditions applicable to NOS's routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's oversight of NOS,<sup>26</sup> combined with FINRA's monitoring of NOS's compliance with BOX's rules and quarterly reporting to the BOXR's CRO,

<sup>23</sup> See Notice, 76 FR at 43741. See also Securities Exchange Act Release No. 65177 (August 19, 2011) (SR-BX-2011-058). The Commission notes that the original pilot period of twelve months began on August 16, 2009, but was extended several times. See Notice, 76 FR at 43740, n.5.; and SR-BX-2011-058, *supra*.

<sup>24</sup> See BOX Routing Pilot Release, 76 FR at 43741.

<sup>25</sup> See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 8, 2008) (SR-Amex-2008-62) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2009-85) (order approving the purchase by ISE Holdings of an ownership interest in DirectEdge Holdings LLC); and 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.).

<sup>26</sup> This oversight will be accomplished through the Regulatory Contract between the Exchange and FINRA, and, as applicable, a 17d-2 Agreement.

will help to protect the independence of the Exchange's regulatory responsibilities with respect to NOS. The Commission also believes that Chapter XXXIX, Section 2(c) of the Exchange's Grandfathered Rules is designed to ensure that NOS cannot use any information advantage it may have because of its affiliation with the Exchange.

#### IV. Conclusion

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change (SR-BX-2011-045) be, and hereby is, approved.

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

Elizabeth M. Murphy,

Secretary.

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65195; File No. SR-Phlx-2011-117]

#### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Active SQF Port Fee and the Order Entry Port Fee

August 25, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that, on August 12, 2011, NASDAQ OMX PHLX LLC ("Phlx" 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 Fee Schedule to reflect that the Exchange will not assess a charge for the use of additional Active Specialized Quote Feed ("SQF") Ports and Order Entry Ports in limited circumstances.

The text of the proposed rule change is available on the Exchange's Web site

<sup>27</sup> 15 U.S.C. 78s(b)(2).

<sup>28</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>19</sup> 17 CFR 240.17d-2.

<sup>20</sup> Pursuant to the Regulatory Contract, both FINRA and the Exchange will collect and maintain all alerts, complaints, investigations and enforcement actions in which NOS (in its capacity as a facility of Nasdaq routing orders to BOX) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. See Notice, 76 FR at 43741, n.10.

<sup>21</sup> See *id.*

<sup>22</sup> See chapter XXXIX, Section 2(c) of the Grandfathered Rules of the Exchange. See also Notice, 76 FR at 43741.