

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29983; File No. 812-13795]

### First Trust Exchange-Traded Fund, et al.; Notice of Application

March 15, 2012.

**AGENCY:** Securities and Exchange Commission (“Commission”).

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (“Act”) for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

**APPLICANTS:** First Trust Exchange-Traded Fund (the “Initial Trust”), First Trust Exchange-Traded Fund II (“Trust II”), First Trust Exchange-Traded Fund III (“Trust III”), First Trust Exchange-Traded Fund IV (“Trust IV”), First Trust Exchange-Traded AlphaDEX® Fund (“AlphaDEX Trust”), First Trust Exchange-Traded AlphaDEX® Fund II (“AlphaDEX Trust II” and, together with the Initial Trust, Trust II, Trust III, Trust IV and the AlphaDEX Trust, “Existing Trusts”), First Trust Advisors L.P. (the “Advisor”), and First Trust Portfolios L.P. (the “Distributor”).

**SUMMARY:** *Summary of Application:* Applicants request an order that permits: (a) Series of certain actively managed open-end management investment companies to issue shares (“Shares”) redeemable in large aggregations only (“Creation Units”); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units.

**DATES:** *Filing Dates:* The application was filed on July 15, 2010, and amended on January 7, 2011, September 9, 2011, and March 12, 2012.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 9, 2012, and

should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer’s interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission’s Secretary.

**ADDRESSES:** Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants: 120 East Liberty Drive, Suite 400, Wheaton, IL 60187, Attn: W. Scott Jardine.

**FOR FURTHER INFORMATION CONTACT:** Laura L. Solomon, Senior Counsel, at (202) 551-6915, or Janet M. Grossnickle, Assistant Director, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission’s Web site by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

#### Applicants’ Representations

1. The Existing Trusts are each open-end management investment companies registered under the Act and organized as Massachusetts business trusts. Trust IV will offer one series which will be a Fixed Income Fund as defined below (the “Initial Fund”). Applicants intend to name the Initial Fund the First Trust Senior Loan Fund. The Initial Fund’s investment objective will be to provide high current income. The Initial Fund is expected to invest at least 80% of its net assets (including investment borrowings) in senior loans, which may include loan interests that are not secured by any specific collateral of the borrower, loan interests that have a lower than first lien priority on collateral of the borrower, loans to foreign borrowers, loans in foreign currencies and other loans with characteristics that the Advisor believes qualify as senior loans.

2. The Advisor is registered as an investment adviser under the Investment Advisers Act of 1940 (“Advisers Act”) and it or an entity controlling, controlled by or under common control with the Advisor will serve as the investment adviser to the Funds (as defined below). The Advisor may in the future retain one or more subadvisers (“Fund Subadvisors”) to

manage the Funds’ portfolios. Any Fund Subadvisor will be registered under the Advisers Act. The Distributor is, or another entity (a “Future Distributor”), will be a broker-dealer registered under the Securities Exchange Act of 1934 (“Exchange Act”), and will serve as the principal underwriter and distributor for the Funds.<sup>1</sup>

3. Applicants request that the order apply to the Existing Trusts, the Initial Fund, and to any other open-end management investment company existing or created in the future (together with the Existing Trusts, the “Trusts” and each a “Trust”) and any existing or future series of the Trusts that may utilize active management investment strategies and invest (i) in fixed income securities (including without limitation exchange-traded notes and senior loans) (such securities, “Fixed Income Securities” and each such series, a “Fixed Income Fund”) or (ii) in a combination of equity securities (which may include shares of other exchange-traded funds, money market mutual funds or other investment companies) and Fixed Income Securities (each such series, a “Balanced Fund”) (collectively, “Future Funds”, together with the Initial Fund, the “Funds”).<sup>2</sup> Any Future Fund will be (a) advised by the Advisor or an entity controlling, controlled by, or under common control with the Advisor, and (b) comply with the terms and conditions of the application. Fixed Income Funds that invest all or a portion of their assets in securities not traded in the U.S. markets are each an “International Fixed Income Fund.” International Fixed Income Funds and Balanced Funds that invest all or a portion of their assets in securities not traded in U.S. markets are referred to as “International Funds.” Applicants anticipate that certain International Funds may invest a portion of their assets in depositary receipts representing foreign securities in which they seek to invest

<sup>1</sup> All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

<sup>2</sup> Pursuant to a prior order, Applicants may operate actively managed exchange-traded funds that invest primarily in equity securities. *First Trust Advisors L.P., et al.*, Investment Co. Act Release Nos. 28421 (Sep. 29, 2008) (notice) and 28468 (Oct. 27, 2008) (order). In addition, applicants have prior orders to operate index based exchange-traded funds that invest primarily in equity securities. *First Trust Exchange-Traded Fund et al.*, Investment Co. Act Release Nos. 27051 (Aug. 26, 2005) (notice) and 27068 (Sep. 20, 2005) (order) as amended by Investment Co. Act Release Nos. 27772 (Mar. 30, 2007) (notice) and 27784 (Apr. 25, 2007) (order).

(“Depository Receipts”).<sup>3</sup> The Funds will not invest in options contracts, futures contracts or swap agreements. Each Fund will operate as an actively-managed exchange-traded fund (“ETF”).

4. Shares of the Initial Fund will be sold at a price of between \$20 and \$200 per Share in Creation Units of at least 25,000 Shares. All orders to purchase Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is either: (a) a broker-dealer or other participant in the National Securities Clearing Corporation (“NSCC Process”), or (b) a participant in the Depository Trust Company (“DTC,” such participant, “DTC Participant”, and facilities of the DTC (the “DTC Process”)), which in either case has executed an agreement with the Distributor and the Transfer Agent, with respect to purchases and redemptions of Creation Units.

5. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (“Deposit Instruments”), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (“Redemption Instruments”).<sup>4</sup> On any given Business Day<sup>5</sup> the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the “Creation Basket.” In addition, the Creation Basket will correspond pro rata to the positions in the Fund’s portfolio

<sup>3</sup> A Fund will not invest in any Depository Receipts that the Advisor or any Fund Subadvisor(s) deems to be illiquid or for which pricing information is not readily available. No affiliated persons of applicants will serve as the depository bank for any Depository Receipts held by a Fund.

<sup>4</sup> The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act. In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of Rule 144A.

<sup>5</sup> A Trust will issue, sell and redeem Creation Units of the applicable Fund on any day that the Trust is open for business, including as required by section 22(e) of the Act (each, a “Business Day”).

(including cash positions) as of the end of the prior Business Day, except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;<sup>6</sup> or (c) TBA Transactions,<sup>7</sup> short positions and other positions that cannot be transferred in kind<sup>8</sup> will be excluded from the Creation Basket.<sup>9</sup> If there is a difference between the net asset value (“NAV”) attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the “Cash Amount”).

6. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount, as described above; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; (d) if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC Process or DTC Process; or (ii) in the case of International Funds, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of

<sup>6</sup> A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

<sup>7</sup> A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree on general trade parameters such as agency, settlement date, par amount and price.

<sup>8</sup> This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

<sup>9</sup> Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Cash Amount (defined below).

some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of an International Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.<sup>10</sup>

7. Each Business Day, before the open of trading on the national securities exchange as defined in section 2(a)(26) of the Act (“Stock Exchange”) upon which its Shares are listed and traded, the Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The Stock Exchange or a major market data vendor will disseminate every 15 seconds throughout the trading day an amount representing, on a per Share basis, the sum of the current value of the Deposit Instruments and the estimated Cash Amount.

8. An investor purchasing a Creation Unit from a Fund will be charged a fee (“Transaction Fee”) to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Units.<sup>11</sup> Orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant and it will be the Distributor’s responsibility to transmit such orders to the Funds. The Distributor also will be responsible for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it.

9. Purchasers of Shares in Creation Units may hold such Shares or may sell such Shares into the secondary market. Shares will be listed and traded on a Stock Exchange. One or more Stock Exchange specialists or market makers (together, “Market Makers”) will be assigned to the Shares. If Shares are

<sup>10</sup> A “custom order” is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

<sup>11</sup> Where a Fund permits an in-kind purchaser to substitute cash in lieu of depositing a portion of the Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing those securities.

listed on the NASDAQ Stock Market LLC (“Nasdaq”) or a similar electronic Stock Exchange (including NYSE Arca, Inc.), one or more member firms of that Stock Exchange will act as a Market Maker and maintain a market for Shares trading on that Stock Exchange.<sup>12</sup> Prices of Shares trading on a Stock Exchange will be based on the current bid/offer market. Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

10. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The Market Maker, in providing a fair and orderly secondary market for the Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Shares will include both institutional investors and retail investors.<sup>13</sup> Applicants expect that the price at which the Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

11. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from a Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor will have to accumulate enough Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. As discussed above, redemptions of Creation Units will generally be made on an in-kind basis, subject to certain specified exceptions under which redemptions may be made in whole or in part on a cash basis. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee

<sup>12</sup> If Shares are listed on Nasdaq, no particular Market Maker would be contractually obligated to make a market in Shares. However, the listing requirements on Nasdaq, stipulate that at least two Market Makers must be registered in Shares to maintain a listing. Registered Market Makers are required to make a continuous two-sided market or subject themselves to regulatory sanctions. No Market Maker will be an affiliated person, or an affiliated person of an affiliated person, of the Funds, except within section 2(a)(3)(A) or (C) of the Act due to ownership of Shares.

<sup>13</sup> Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Shares.

payable in connection with the purchase of a Creation Unit.<sup>14</sup>

12. Neither a Trust nor any individual Fund will be marketed or otherwise held out as an “open-end investment company” or a “mutual fund.” Instead, each Fund will be marketed as an “actively-managed exchange-traded fund.” All marketing materials that describe the method of obtaining, buying or selling Shares, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and that the owners of Shares may purchase or redeem Shares from a Fund in Creation Units only.

13. The Distributor’s Web site, which will be publicly available prior to the public offering of Shares, will include the current Prospectus and Summary Prospectus (if any) for each Fund. The Web site for the Funds which is and will be publicly accessible will contain, on a per Share basis for each Fund, the prior Business Day’s NAV and the market closing price or the mid-point of the bid/ask spread at the time of calculation of such NAV (the “Bid/Ask Price”), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. On each Business Day, before the commencement of trading in Shares on the Stock Exchange, each Fund will disclose on the Web site the identities and quantities of the securities (“Portfolio Securities”) and other assets held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the Business Day.<sup>15</sup>

#### Applicants’ Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act; and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent

<sup>14</sup> All Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities.

<sup>15</sup> Under accounting procedures followed by the Funds, trades made on the prior Business Day (“T”) will be booked and reflected in NAV on the current Business Day (“T + 1”). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act.

#### Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit each Fund, as a series of an open-end management investment company, to issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and that Creation Units always redeemable in accordance with the provisions of the Act. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary substantially from their NAV.

#### Section 22(d) of the Act and Rule 22c-1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not

comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Shares and their NAV remains narrow.

#### Section 22(e) of the Act

7. Section 22(e) generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for the International Funds is contingent not only on the settlement cycle of the United States markets, but also on currently practicable delivery cycles in local markets for underlying foreign securities held by the International Funds. Applicants state that local market delivery cycles for transferring Redemption Instruments to investors redeeming Creation Units, together with

local market holiday schedules, will under certain circumstances require a delivery process in excess of seven calendar days for the International Funds. Applicants request relief under section 6(c) of the Act from section 22(e) to allow International Funds that deliver Redemption Instruments in-kind to pay redemption proceeds up to a maximum of 15 calendar days after the tender of a Creation Unit for redemption.<sup>16</sup> At all other times and except as disclosed in the relevant Statement of Additional Information (“SAI”), applicants expect that each International Fund will be able to deliver redemption proceeds within seven days.<sup>17</sup>

8. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that the SAI for each International Fund will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days, and the maximum number of days, up to a maximum of 15 calendar days, needed to deliver the proceeds for the relevant International Fund. Applicants are seeking relief from section 22(e) only for those International Funds that create and redeem in-kind.

#### Sections 17(a)(1) and (2) of the Act

9. Section 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person (“second tier affiliate”), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines “affiliated person” to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person’s voting securities. The Funds may be deemed to be controlled by the Advisor

<sup>16</sup> In the past, settlement in certain countries, including Russia, has extended to 15 calendar days.

<sup>17</sup> Rule 15c6-1 under the Exchange Act requires that most securities transactions be settled within three business days of the trade. Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may have under rule 15c6-1.

or an entity controlling, controlled by or under common control with the Advisor and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Advisor or an entity controlling, controlled by or under common control with the Advisor (an “Affiliated Fund”).

10. Applicants request an exemption from section 17(a), under sections 6(c) and 17(b), to permit in-kind purchases and redemptions by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (1) Holding 5% or more, or more than 25%, of the outstanding Shares of the respective Trust or one or more Funds; (2) an affiliation with a person with an ownership interest described in (1); or (3) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds.

11. Applicants contend that no useful purpose would be served by prohibiting these affiliated persons or second tier affiliates of a Fund from purchasing or redeeming Creation Units through “in-kind” transactions. The deposit procedure for in-kind purchases and the redemption procedure for in-kind redemptions will be the same for all purchases and redemptions. The composition of a Creation Basket will be the same and will be valued under the same objective standards applied to valuing the Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons and second tier affiliates described above to effect a transaction detrimental to the other holders of Shares. Applicants also believe that in-kind purchases and redemptions will not result in abusive self-dealing or overreaching by these persons of the Fund.

#### Applicants’ Conditions

The applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. As long as the Funds operate in reliance on the requested order, the Shares of the Funds will be listed on a Stock Exchange.

2. Neither the Trusts nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may

acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

4. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Securities and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

5. The Advisor or Fund Subadvisor (if any), directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund could not engage directly.

6. The requested order will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed exchange-traded funds.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**  
*Deputy Secretary.*

[FR Doc. 2012-6865 Filed 3-21-12; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66615; File No. SR-BX-2012-019]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the BOX Fee Schedule

March 16, 2012.

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 March 12, 2012, 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 Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> 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

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC ("BOX"). The changes to the BOX Fee Schedule pursuant to this proposal will be effective upon filing for March 2012; Participants will only be assessed any applicable routing fee for orders on the effective date and thereafter. 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 Web site 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 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

The Exchange proposes to implement a change to the BOX routing fees. BOX believes the proposed structure will provide an incentive to BOX Options Participants ("Participants") to submit their customer orders for execution on BOX and will discourage potentially abusive and predatory order routing practices to evade fees on other exchanges.<sup>5</sup> BOX proposes to continue

to provide routing to away exchanges at no charge to Participants that execute more than 40% of their non-Professional, Public Customer transactions<sup>6</sup> on BOX, rather than those orders being executed at other exchanges after BOX routes them to an away exchange.

If BOX does not have sufficient liquidity at the NBBO to execute Public Customer Orders on BOX, such orders are routed to an away exchange for execution. Currently, BOX does not assess any fee to Participants for doing so. BOX, however, believes that exempting all outbound Public Customer Orders from routing fees is resulting in some Participants sending an increasing amount of orders to BOX when BOX is not at the NBBO, so that the orders will be routed to an away exchange; and BOX believes this activity pattern is designed to evade transaction fees on other exchanges. In order to curtail this activity that BOX believes is designed to take advantage of BOX routing Public Customer order at no charge, BOX proposes a routing fee structure that provides an incentive to Participants whom execute their Public Customer transactions on BOX. The proposed change will have no effect on the billing of orders of non-Participants, including any orders routed to BOX from away exchanges.

The Exchange proposes that BOX will continue to route Public Customer Orders to an away exchange without imposing any fee, to the extent that more than 40% of the Participants' Public Customer Orders sent to BOX each month execute on BOX. Executions on BOX would include orders executing on the BOX Book, or through any other BOX mechanism that may be available to execute Public Customer Orders (e.g., Price Improvement Period, Solicitation or Facilitation Auction Mechanisms). If 60% or more of a Participants' Public Customer Orders executed through BOX each month are routed to and executed at an away exchange, BOX will assess a \$0.50 per contract routing fee to all of a Participants' Public Customer orders routed to an away exchange for execution for the month. BOX will calculate the percentage of contracts executed on BOX compared to the

submitting orders to BOX when limited liquidity is on BOX at the national best bid or offer ("NBBO"). This limited liquidity is not enough to fill the orders submitted, and thus, BOX is required, in accordance with its obligations to customer orders under the national market system plan for Options Order Protection, to route such orders to a market that is displaying liquidity at the NBBO.

<sup>6</sup> For the purposes of the discussion in this proposed rule change, these non-Professional, Public Customer Orders will be referred to as Public Customer Orders.

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

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

<sup>5</sup> Note that BOX does not route broker-dealer proprietary orders and thus does not assess them any routing fees. Based on BOX market data, BOX believes certain Participants are intentionally

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

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