

to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2013-05 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-MSRB-2013-05. 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 MSRB. 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-MSRB-2013-05 and should be submitted on or before July 19, 2013.

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

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69837; File No. SR-BX-2013-036]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change for Permanent Approval of a Pilot To Permit BX Options To Accept Inbound Options Orders From NASDAQ OMX PHLX LLC and NASDAQ Options Market

June 24, 2013.

#### I. Introduction

On May 7, 2013, NASDAQ OMX BX, Inc. ("Exchange" or "BX") 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 that permits the BX Options System to accept inbound orders routed by Nasdaq Options Services LLC ("NOS") from the NASDAQ OMX PHLX LLC ("PHLX") and The NASDAQ Stock Market LLC's NASDAQ Options Market ("NOM"). The proposed rule change was published for comment in the **Federal Register** on May 21, 2013.<sup>3</sup> The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

#### II. Background

BX Rule 2140(a) prohibits the Exchange or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, an Exchange member or an affiliate of an Exchange member in the absence of an effective filing under

Section 19(b) of the Act.<sup>4</sup> NOS is a registered broker-dealer that is a member of the Exchange, and currently provides to members of NASDAQ Stock Market LLC ("NASDAQ") and PHLX optional routing services to other markets.<sup>5</sup> NOS is owned by NASDAQ OMX Group, Inc. ("NASDAQ OMX"), which also owns three registered securities exchanges—the Exchange, the NASDAQ and PHLX.<sup>6</sup> Thus, NOS is an affiliate of these exchanges.<sup>7</sup> Absent an effective filing, BX Rule 2140(a) would prohibit NOS from being a member of the Exchange. The Commission initially approved NOS's affiliation with BX in connection with NASDAQ OMX's acquisition of BX,<sup>8</sup> and NOS currently performs certain limited activities for the Exchange.<sup>9</sup>

On May 1, 2012, BX filed a proposed rule change to permit the Exchange to accept inbound orders that NOS routes in its capacity as a facility of NASDAQ and PHLX on a pilot basis subject to certain limitations and conditions.<sup>10</sup> On May 7, 2013, the Exchange filed the instant proposal to allow the Exchange to accept such orders routed inbound by NOS from NASDAQ and PHLX on a permanent basis subject to certain limitations and conditions.<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

<sup>4</sup> 15 U.S.C. 78s(b). BX Rule 2140(a) also prohibits a BX member from being or becoming an affiliate of BX, or an affiliate of an entity affiliated with BX, in the absence of an effective filing under Section 19(b). See BX Rule 2140(a)(2).

<sup>5</sup> NOS operates as a facility of both Phlx and NASDAQ that provides outbound routing from Phlx and NOM to other market centers, subject to certain conditions. See Phlx Rule 1080(m) and NASDAQ Options Rules, Chapter VI, Sec. 11 (Order Routing).

<sup>6</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) (order approving NASDAQ OMX's acquisition of BX) ("BX Acquisition Order"). See also Securities Exchange Act Release 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31) (order approving NASDAQ OMX's acquisition of PHLX).

<sup>7</sup> See *id.* See also Notice, 78 FR 29795.

<sup>8</sup> See BX Acquisition Order, 73 FR 46944.

<sup>9</sup> See, e.g., BX Options Rules, Chapter VI, Sec. 11 (Order Routing). See also Securities Exchange Act Release No. 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (SR-BX-2012-030) ("BX Options Order").

<sup>10</sup> See Securities Exchange Act Release No. 66983 (May 14, 2012), 77 FR 29730 (May 18, 2012) (notice of proposed rule change to establish BX Options market and allow, among other things, BX to accept inbound orders from NASDAQ and PHLX on a one-year pilot basis).

<sup>11</sup> See Notice, 78 FR 29795-29796.

<sup>25</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> See Securities Exchange Act Release No. 69576 (May 15, 2013), 78 FR 29795 ("Notice").

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 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 inbound orders that NOS routes in its capacity as a facility of NASDAQ and PHLX on a pilot basis.<sup>15</sup> The Exchange has now proposed to permit BX to accept inbound orders that NOS routes in its capacity as a facility of NASDAQ and PHLX on a permanent basis, subject to the same limitations and conditions of this pilot:<sup>16</sup>

- First, the Exchange and the Financial Industry Regulatory Authority ("FINRA") maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d-2 under the Act

("17d-2 Agreement").<sup>17</sup> Pursuant to the Regulatory Contract and the 17d-2 Agreement, FINRA is allocated regulatory responsibilities to review NOS's compliance with certain Exchange rules.<sup>18</sup> Pursuant to the Regulatory Contract, however, the Exchange retains ultimate responsibility for enforcing its rules with respect to NOS.

- Second, FINRA monitors NOS for compliance with the Exchange's trading rules, and collects and maintains certain related information.<sup>19</sup>

- Third, FINRA provides a report to the Exchange's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) quantifies all alerts (of which the Exchange or FINRA is aware) that identify NOS as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NOS as a participant that has potentially violated Commission or Exchange rules.

- Fourth, the Exchange has in place BX Rule 2140(c), which requires NASDAQ OMX, as the holding company owning both the Exchange and NOS, 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.

The Exchange stated that it has met all the above-listed conditions. By meeting such conditions, the Exchange believes that 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

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

<sup>18</sup> NOS is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements. See Notice, 78 FR 29796 n.11.

<sup>19</sup> Pursuant to the Regulatory Contract, both FINRA and the Exchange collect and maintain all alerts, complaints, investigations and enforcement actions in which NOS (in its capacity as a facility of NASDAQ and PHLX routing orders to the Exchange) 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, 78 FR 29796 n.12.

because of its affiliation with the Exchange.<sup>20</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>21</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, in its capacity as a facility of NASDAQ and PHLX, to route orders inbound to the Exchange on a permanent basis instead of a pilot basis, subject to the limitations and conditions described above.<sup>22</sup>

The Exchange has proposed four ongoing conditions applicable to NOS's routing activities, which are enumerated above. The Commission believes that these conditions will mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's

<sup>20</sup> See Notice, 78 FR 29796.

<sup>21</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 3, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60) (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 Direct Edge Holdings LLC); 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.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGX Exchange, Inc. and EDGA Exchange, Inc.); and 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order granting the exchange registration of BATS-Y Exchange, Inc.).

<sup>22</sup> The Commission notes that these limitations and conditions are consistent with those previously approved by the Commission for the Exchange. See, e.g., Securities Exchange Act Release Nos. 69233 (March 25, 2013), 78 FR 19352 (March 29, 2013) (SR-NASDAQ-2013-028); 69232 (March 25, 2013), 78 FR 19342 (March 29, 2013) (SR-BX-2013-013); 69229 (March 25, 2013), 78 FR 19337 (March 29, 2013) (SR-Phlx-2013-15); 67256 (June 26, 2012) 77 FR 39277 (July 2, 2012) (SR-BX-2012-030); and 64090 (March 17, 2011), 76 FR 16462 (March 23, 2011) (SR-BX-2011-007).

<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 BX Options Order, 77 FR 39280-39281 (order approving, among other things, BX's proposal to accept inbound orders from NASDAQ and PHLX on a one-year pilot basis).

<sup>16</sup> See Notice, 78 FR 29796.

oversight of NOS,<sup>23</sup> combined with FINRA's monitoring of NOS's compliance with the Exchange's rules and quarterly reporting to the Exchange, will help to protect the independence of the Exchange's regulatory responsibilities with respect to NOS. The Commission also believes that the Exchange's Rule 2140(c) 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>24</sup> that the proposed rule change (SR-BX-2013-036) be, and hereby is, approved.

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

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69835; File No. SR-MSRB-2013-04]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information on Municipal Fund Securities

June 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on June 10, 2013, the Municipal Securities Rulemaking Board ("MSRB") 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 MSRB. 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 MSRB is filing with the Commission a proposed rule change

<sup>23</sup> This oversight will be accomplished through the 17d-2 Agreement between FINRA and the Exchange and the Regulatory Contract. See Notice, 78 FR 29796 n.10 and accompanying text.

<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</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.

consisting of new Rule G-45, on reporting of information on municipal fund securities, and Form G-45, and amendments to Rules G-8, on books and records, and G-9, on preservation of records (the "proposed rule change"). The MSRB will designate an implementation date for the proposed rule change that is not earlier than one year from the date of SEC approval.

The text of the proposed rule change is available on the MSRB's Web site at [www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx](http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-Filings.aspx), at the MSRB's principal office, 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 MSRB 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 MSRB 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

*Summary of Proposed Rule Change.* The proposed rule change will, for the first time, provide the MSRB with more comprehensive information regarding 529 College Savings Plans ("529 plans" or "plans") underwritten by brokers, dealers or municipal securities dealers ("dealers") by gathering data directly from such dealers. The MSRB regulates dealers that act in the capacity of underwriters of 529 plans, as well as dealers that sell interests in 529 plans and municipal advisors to such plans. Interests in 529 plans have been deemed to be municipal securities by the Commission,<sup>3</sup> and the MSRB has categorized such interests as municipal fund securities.<sup>4</sup> MSRB rules govern the

<sup>3</sup> See letter dated February 26, 1999 from Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, to Diane G. Klinke, General Counsel of the Board, in response to letter dated June 2, 1998 from Diane G. Klinke to Catherine McGuire, published as Municipal Securities Rulemaking Board, SEC No-Action Letter, Wash. Serv. Bur. (CCH) File No. 032299033 (Feb. 26, 1999).

<sup>4</sup> The term municipal fund security is defined in MSRB Rule D-12 to mean a municipal security issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act of

activities of dealers who transact business in municipal fund securities, and it is important that the MSRB have accurate, reliable and complete information about 529 plans underwritten by dealers in order to carry out its rulemaking responsibilities.

#### Current MSRB Requirements

Today, the MSRB collects certain information regarding 529 plans from underwriters and issuers. Just as it does for municipal securities that are not municipal fund securities, the MSRB's Electronic Municipal Market Access ("EMMA"<sup>5</sup>) system serves as a centralized venue for the submission by underwriters of 529 plan primary offering disclosure documents ("plan disclosure documents") and continuing disclosures, such as annual financial reports submitted to EMMA by issuers or their agents. However, the MSRB does not currently receive detailed underwriting or transaction information, as it does for other types of municipal securities.

The proposed rule change will require dealers acting in the capacity of underwriters to submit to the MSRB, for the 529 plans they underwrite, on a semi-annual or, in the case of performance data, annual basis, certain information. The information includes plan descriptive information, assets, asset allocation information (at the investment option level), contributions, withdrawals, fee and cost structure, performance data, and other information. While some of the information, such as fees and costs, may be contained in plan disclosure documents submitted to EMMA, the information is not submitted in a manner that allows for analysis or comparison, since it is imbedded in static documents submitted in portable document format. The proposed rule change requires the information to be submitted electronically through new Form G-45, which is discussed in more detail below. The MSRB, and other regulatory authorities that are charged by statute with examining dealers for compliance with, and enforcing, MSRB rules, including the SEC and the Financial Industry Regulatory Authority ("FINRA"), will be able to utilize this information to analyze 529 plans, monitor their growth rate, size and investment options, and compare plans based on fees and costs and performance. By collecting this information, the MSRB will enhance its

1940, would constitute an investment company within the meaning of Section 3 of the Investment Company Act of 1940.

<sup>5</sup> EMMA is a registered trademark of the MSRB.