

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59615; File No. SR-BX-2009-005)

March 20, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving Proposed Rule Change To Establish New Fees for Services Available to Members and Non-Members

I. Introduction

On January 14, 2009, NASDAQ OMX BX, Inc. (“BX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt fees applicable to members and non-members in connection with its cash equities trading business. The proposed rule change was published for comment in the Federal Register on February 4, 2009.³ The Commission did not receive any comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Pursuant to SR-BSE-2008-48, the Exchange adopted a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equities trading.⁴ The new rules, which are designated as the “Equity Rules,” are substantially based on the rules of The NASDAQ Stock Market LLC (the “NASDAQ Exchange”). Through this proposal, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59307 (January 28, 2009), 74 FR 6069 (SR-BX-2009-005).

⁴ Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48).

Exchange seeks to establish non-member and member fees for its cash equities trading business.⁵ The Exchange states that the proposed fee schedule is similar to the NASDAQ Exchange but differs in that it omits several fees that are not pertinent to the Exchange's business and differs in the level of certain fees.

A. Market Data

The Exchange proposes to establish fees for its BX TotalView data product. Like NASDAQ TotalView, BX TotalView will provide all displayed quotes and orders in the market, with attribution to the relevant market participant, at every price level, as well as total displayed anonymous interest at every price level. In recognition of the start-up nature of the new market, the data feed will be provided free of charge to subscribers and distributors for the first year of operation.

After the initial free period, subscribers to BX TotalView will pay a monthly charge of \$20; however, new subscribers receiving BX TotalView for the first time after the expiration of the one-year introductory period will be able to use the product free of charge for an individual 30-day trial period.⁶ Distributors of BX TotalView will pay a \$1,000 monthly fee to receive the data directly from the Exchange, since the Exchange incurs costs to support the connection to each direct distributor; indirect distributors (i.e., those receiving data from a direct distributor) would not pay this charge.⁷ Distributors will also pay a \$500 monthly fee to distribute the data feed internally (i.e., to employees) and a \$1,250 monthly fee to distribute to external customers.⁸

⁵ The Exchange previously adopted fees applicable solely to its members. See Securities Exchange Act Release No. 59337 (February 2, 2009), 74 FR 6441 (February 9, 2009) (SR-BX-2009-004).

⁶ See proposed Equity Rule 7023.

⁷ See proposed Equity Rule 7019.

⁸ Id.

All of the foregoing fees will be waived during the initial free period.

Upon approval of this filing, however, the Exchange will begin to assess a limited number of fees in connection with data provision. Specifically, extranet providers that connect to the Exchange to provide direct access connectivity to market data will be charged a monthly access fee of \$750 for each technical configuration used to provide a connection to a recipient's site.⁹ In addition, data distributors will pay an annual administrative fee of \$500 for delayed distribution of data, and \$1,000 for real-time distribution.¹⁰

The Exchanges establishing the foregoing fee structure to be similar to the structure for NASDAQ TotalView, but at lower overall levels than fees for NASDAQ TotalView. The Exchange states that the lower fee levels reflect the start-up nature of the Exchange's new equities trading platform, and will help to promote competition among exchanges with respect to the quoting and trading services. Specifically, the Exchange believes that the fees it sets for BX TotalView will help to attract order flow to the Exchange. At inception, the Exchange will have zero market share. The Exchange believes that it must set its fees, including data fees, with a view to attracting order flow to increase market share. The Exchange states that due to the existence of alternatives for market participants to determine market depth – such as other depth of book products that may be associated with markets with more liquidity, or order routing strategies designed to ascertain market depth – the Exchange has incentives to ensure that its fees for BX TotalView are set reasonably.

The Exchange believes that proposed fee structure for BX TotalView is not unreasonably discriminatory, since the fees for subscribers are uniform for all subscribers, and the fees for

⁹ See proposed Equity Rule 7025.

¹⁰ See proposed Equity Rule 7035. These annual administrative fees can be waived for colleges and universities receiving the data for research and educational purposes.

distributors are uniform except with respect to reasonable distinctions between internal and external distribution and direct and indirect receipt of data. The Exchange also believes that the fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

B. Port Fees

In order to receive BX TotalView, subscribers must establish connectivity to the Exchange through extranets, direct connection, and Internet-based virtual private networks. The Exchange proposes to charge fees for the ports required to establish these connections, just as it will charge for access ports used to enter orders into the market.¹¹ A port used for order entry cannot also be used to receive data; thus, a member seeking to enter orders and receive data would require at least two port pairs. Prior to approval of this filing, the Exchange will provide data ports free of charge. Thereafter, the Exchange will generally charge the same fees for data ports that it charges for order entry ports: \$400 per month per port pair, plus an additional \$200 per month for each Internet port that requires additional bandwidth due to the demands of the particular subscriber. In addition, subscribers wishing to obtain data will also have the option of obtaining a Multicast ITCH[®] port pair at a fee of \$1000 per month.¹² The differences between these two options relate to speed and processes for verifying completeness of the data. The standard port pair option provides one copy of the data and uses procedures under which the system receiving the data communicates back to the Exchange to verify completeness of the information. Under the Multicast ITCH option, two copies of the data are provided without these verification processes, and consequently at a higher rate of speed. Because the recipient of

¹¹ See Securities Exchange Act Release No. 59337 (February 2, 2009), 74 FR 6441 (February 9, 2009) (SR-BX-2009-004) (establishing Equity Rule 7015 to charge fees for ports used by members to enter orders).

the data receives two copies, it can, if it wishes, undertake its own verification by programming its systems to compare the two copies. The fees for data ports are identical to the comparable fees charged by the NASDAQ Exchange.

C. Testing

The Exchange proposes to establish fees for its testing facility, to be set at levels identical to the fees for the NASDAQ Exchange's testing facility.¹³ In general, the Exchange will charge \$285 per hour for an active connection during the facility's normal operating hours and \$333 per hour for an active connection at other times. Because the fees are waived for testing of new, enhanced, or modified services and/or software offered by the Exchange, as well as for modifications initiated by the Exchange and for a 30-day period for new subscribers to existing services, the testing fees will not be charged until the later of (i) approval of this filing, or (ii) 30 days after the launch of the NASDAQ OMX BX Equities System. Thereafter, as provided in the rule, the fees will be waived for a 30-day period for each new market participant.

D. Other Fees

Other fee rules relate to special data requests¹⁴ and partial month charges¹⁵ and are comparable to corresponding NASDAQ Exchange rules.

¹² Equity Rule 7015.

¹³ See proposed Equity Rule 7030(d).

¹⁴ See proposed Equity Rule 7030(b). This provision allows the Exchange to recoup costs associated with responding to ad hoc requests for market data, such as requests that may be made by news reporters or academic researchers.

¹⁵ See proposed Equity Rule 7031. This provision provides that market data distributors may elect to be billed on a prorated basis during the month of initiation or termination of service.

III. Discussion

The Commission has reviewed carefully the proposed rule change and 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.¹⁶ In particular, it is consistent with Section 6(b)(4) of the Act,¹⁷ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,¹⁸ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,¹⁹ which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,²⁰ adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in

¹⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78f(b)(8).

²⁰ 17 CFR 242.603(a).

an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.²¹

A. BX Market Data & Port Fees

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.²² In the NYSE Arca Order, the Commission stated that “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”²³ It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”²⁴ If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”²⁵

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange

²¹ BX is an exclusive processor of BX depth-of-book data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

²² Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (“NYSE Arca Order”). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

²³ Id. at 74771.

²⁴ Id. at 74782.

²⁵ Id. at 74781.

proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.²⁶ In contrast, individual exchanges and other market participants distribute non-core data voluntarily.²⁷ The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.²⁸ Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.²⁹ Because BX's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The proposal before the Commission, in part, relates to fees for BX TotalView which are non-core, depth of book market data products, and as in the Commission's NYSE Arca Order analysis at least two broad types of significant competitive forces applied to BX in setting the terms of this proposal: (i) BX's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing BX's depth-of-book order data.

²⁶ See 17 CFR 242.603(b). (“Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.”).

²⁷ See NYSE Arca Order at 74779.

²⁸ Id.

²⁹ Id.

Attracting order flow is the core competitive concern of any equity exchange, including BX. Attracting order flow is an essential part of a national securities exchange's competitive success. If a national securities exchange cannot attract order flow to its market, it will not be able to execute transactions. If a national securities exchange cannot execute transactions on its market, it will not generate transaction revenue. If a national securities exchange cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of January 2009.³⁰

³⁰ Source: ArcaVision (available at www.arcavision.com).

Table 1 Reported Share Volume in U.S-Listed Equities during January 2009 (%)			
Trading Venue	All Stocks	NYSE-Listed	NASDAQ- Listed
NASDAQ	27.1	20.5	39.9
All Non-Exchange	26.7	26.2	31.0
NYSE Arca	17.9	15.7	15.8
NYSE	14.8	26.2	0.0
BATS	10.7	9.0	10.8
International Stock Exchange	1.3	1.4	1.4
National Stock Exchange	0.6	0.7	0.7
Chicago Stock Exchange	0.4	0.4	0.3
CBOE Stock Exchange	0.2	0.0	0.1
NYSE Alternext	0.1	0.0	0.0
NASDAQ OMX BX	0.0	0.0	0.0

The market share percentages in Table 1 strongly indicate that BX must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on BX to act reasonably in setting its fees for BX market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom BX must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue

to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.³¹

In addition to the need to attract order flow, the availability of alternatives to BX's TotalView data significantly affect the terms on which BX can distribute this market data.³² In setting the fees for its BX TotalView data, BX must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.³³ Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.³⁴ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.³⁵

For more specific information concerning depth, market participants can choose among products offered by the various exchanges and ECNs.³⁶ The various self-regulatory

³¹ See NYSE Arca Order at 74783.

³² See Richard Posner, Economic Analysis of Law § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705 (2007); Atlanta Richfield Co. v. United States Petroleum Co., 495 U.S. 328 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); State Oil Co. v. Khan, 522 U.S. 3 (1997); Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

³³ See NYSE Arca Order at 74783.

³⁴ Id.

³⁵ Id.

³⁶ See NYSE Arca Order at 74784.

organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. In addition, market participants can assess depth with tools other than market data, such as “pinging” orders that search out both displayed and nondisplayed size at all price points within an order’s limit price.³⁷

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on the BX in setting the terms for distributing its depth-of-book order data. The Commission believes that the availability of those alternatives, as well as the BX’s compelling need to attract order flow, imposed significant competitive pressure on the BX to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the BX was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. Further, the Commission did not receive any comment letters raising concerns of a substantial countervailing basis that the terms of the proposal failed to meet the requirements of the Act or the rules thereunder.

The Commission notes that BX is effectively entering the competitive markets for equities trading as a start-up venture. If its fees are not set at a level that will promote competition in these markets, potential users will simply continue to obtain services from the Exchange’s multiple competitors. Accordingly, the Exchange must set fees for market data and transaction executions that promote the Exchange as a trading venue. If its fees are set at inappropriately high levels, market participants will seek to avoid using the Exchange, and the

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Id.

Exchange' market data will have little value to market participants. Thus, consistent with the analysis set forth in the NYSE Arca Order, the Exchange's operations, products and services must be designed to promote competition in order to succeed and provide market participants with viable and cost-effective alternatives to existing competitors.

B. Testing and Other Fees

The Exchange proposes to establish new fees for its testing facility at the rates of \$285 per hour for an active connection during the facility's normal operating hours and \$333 per hour for an active connection at other times. Under the proposal, the Exchange will waive fees for testing of new, enhanced, or modified services and/or software offered by the Exchange, as well as for modifications initiated by the Exchange and for a 30-day period for new subscribers to existing services, the testing fees will not be charged until the later of (i) approval of this filing, or (ii) 30 days after the launch of the NASDAQ OMX BX Equities System. Thereafter, fees will be waived for a 30-day period for each new market participant. The Commission notes that the Exchanges's new fees for its testing facility are at levels identical to the fees for the NASDAQ Exchange's testing facility.³⁸

In addition, the Exchange proposes new fee rules related to special data requests to allow the Exchange to recoup costs associated with responding to ad hoc requests for market data, such as requests that may be made by news reporters or academic researchers.³⁹ The Exchange also proposes fees for partial month charges to enable market data distributors to elect to be billed on a prorated basis during the month of initiation or termination of service.⁴⁰ The Commission

³⁸ See proposed Equity Rule 7030(d).

³⁹ See proposed Equity Rule 7030(b).

⁴⁰ See proposed Equity Rule 7031.

notes that these new fees for special data requests and partial month charges are similar to corresponding NASDAQ Exchange rules.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴¹ that the proposed rule change (SR-BX-2009-005) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

Florence E. Harmon
Deputy Secretary

⁴¹ 15 U.S.C. 78s(b)(2).

⁴² 17 CFR 200.30-3(a)(12).