

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61073; File No. SR-BX-2009-075)

November 30, 2009

Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Clarify the Definition of Material Changes in Business Operations found in the Membership Rules and to Make a Technical Correction

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 November 23, 2009, NASDAQ OMX BX, Inc. (“BX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by BX. BX has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

BX proposes to amend Rule 1011(g)(2) to clarify the definition of what BX considers a “material change in business operations,” and to delete a superfluous “and” from the rule text.

The text of the proposed rule change is below. Proposed new language is in italics and proposed deletions are in brackets.

**1011. Definitions**

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

Unless otherwise provided, terms used in the Rule 1000 Series shall have the meaning as defined in Rule 0120.

(a) - (f) No change.

**(g) “material change in business operations”**

The term “material change in business operations” includes, but is not limited to:

- (1) removing or modifying a membership agreement restriction;
- (2)(A) [market making, underwriting, or ]acting as a dealer for the first time; or
- ~~(B) market making for the first time on NASDAQ OMX BX; provided, however, that market making for the first time on NASDAQ OMX BX will not be considered a material change in business operations if the member’s market making has previously been approved by FINRA under NASD Rule 1017 or NASDAQ under NASDAQ Rule 1017; [and]~~
- (3) adding business activities that require a higher minimum net capital under SEC Rule 15c3-1; and
- (4) adding business activities that would cause a proprietary trading firm no longer to meet the definition of that term contained in this rule.

(h) - (o) No change.

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**II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, BX 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. BX 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**

BX is proposing to amend Rule 1011(g)(2) to clarify its applicability. Rule 1011(g) defines what BX considers a “material change in business operations.” Pursuant to Rule 1017(a)(5), a member must file an application for approval of any material

change in its business operations with BX. Rule 1011(g)(2) includes “market making, underwriting, or acting as a dealer for the first time” within the definition of “material change in business operations.” Rule 1011(g)(2) is intended to require BX members to undergo an assessment and obtain approval pursuant to Rule 1017 if they intend to expand their business operations to include market making, underwriting, or acting as a dealer. The definition found in Rule 1011(g)(2) could, however, also be interpreted to include engaging in market making for the first time on a market other than BX, notwithstanding that BX has no regulatory responsibility with respect to that business activity.

BX’s Rule 1011(g)(2) is based on NASD Rule 1011(k)(2), and as such, was drafted by NASD<sup>4</sup> (now known as “FINRA”) to be broad in application given its broad, cross-market regulatory responsibilities.<sup>5</sup> In adopting Rule 1011(g)(2), however, BX did not contemplate that the rule would extend to business operations engaged in on other markets. Under such an interpretation of the rule, BX would be required to approve a member’s planned change in business operations that would be conducted solely on another market. For example, a BX member that is not a market maker, yet determines to make markets on a market other than BX would, under this interpretation, technically be required to file an application for approval of the market making pursuant to BX Rule 1017, in addition to satisfying the other market’s market making application and approval

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<sup>4</sup> In late July 2007, NASD changed its name to the Financial Industry Regulatory Authority (“FINRA”). Accordingly, we use the term NASD in this filing only (i) when referring to period of time before the name change, and (ii) with respect to rules that are still officially designated by FINRA as “NASD rules.”

<sup>5</sup> BX’s membership rules mirror, in most respects, those of Nasdaq, which were derived from NASD’s rules. BX notes that Nasdaq is seeking to amend its Rule 1011(g)(2) consistent with the changes to the BX rules proposed herein.

process. Under this scenario, even though the business activity is not associated with BX, and BX has no responsibility to oversee the business activity, BX would be required to duplicate the efforts of another market and make an independent determination whether the member could conduct such business operations on that market. BX believes that this would be an erroneous outcome, and would represent unnecessary duplication of regulatory efforts among self-regulatory organizations.

BX is proposing to separate market making from the other business activities currently found under Rule 1011(g)(2) by creating two new subparts to the rule. Proposed new Rule 1011(g)(2)(B) will address market making and adds new language to make clear that the rule applies only to engaging in market making for the first time on BX, and as a consequence, a BX member seeking to be designated as a market maker for the first time on another market would not be required to follow the Rule 1017 process. BX believes that the proposed rule change would not lessen the regulatory oversight of members, since market making on another market would fall within the jurisdiction and oversight of that market together with the member's designated examining authority.<sup>6</sup>

In making it clear that market making under Rule 1011(g)(2)(B) applies only to such activity "on BX," BX is concerned that common members of BX and FINRA, or of BX and The NASDAQ Stock Market LLC ("Nasdaq"), may misinterpret Rule 1011(g)(2)(B) to require approval pursuant to BX Rule 1017 of market making on BX for the first time when the same business operation had been previously approved by FINRA or Nasdaq pursuant to their respective Rules 1017. BX based much of its membership

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<sup>6</sup> 17 CFR 240.17d-1. Rule 17d-1 authorizes the Commission to name a single SRO as the designated examining authority to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission and SRO rules.

rules on those of Nasdaq, which had based much of its membership rules on those of NASD, with minor modifications in some instances resulting from Nasdaq's exchange status. As noted above, BX Rule 1011(g) is virtually identical to NASD Rule 1011(k), except for the addition of a fourth material change to business operations to reflect a change that results in a loss of proprietary trading firm status. BX Rule 1017 is also substantially similar to NASD Rule 1017. In a similar regard, the membership rules of BX mirror those of Nasdaq in most respects. BX notes that the underlying review pursuant to either BX Rule 1017 or Nasdaq Rule 1017, upon which BX or Nasdaq would reference in making a determination, is conducted by FINRA.<sup>7</sup> As such, the process leading to a prior approval of market making by either FINRA or Nasdaq pursuant to their Rules 1017 would follow the same process as if the BX Rule 1017 review were conducted.

BX is proposing to add language to Rule 1011(g)(2)(B) that will make it clear that BX does not consider market making under the rule for the first time on BX to be a material change, if the market making has already been approved by either FINRA pursuant to NASD Rule 1017, or alternatively by Nasdaq pursuant to Nasdaq Rule 1017. BX believes that the proposed clarifying language under BX Rule 1011(g)(2)(B) recognizing prior approvals of market making under the rules of FINRA and Nasdaq will serve to avoid confusion over the application of the rule in regards to common members. BX believes the proposed changes are consistent BX's current practice and will avoid unnecessary regulatory duplication.

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<sup>7</sup> When conducting a review on behalf of BX or Nasdaq pursuant to their respective Rules 1017, FINRA provides a recommendation on whether to approve the change in business operations or not.

BX is also proposing to delete references to underwriting from Rule 1011(g)(2).

Underwriting is not conducted on BX and there is no circumstance in which a BX member could act as an underwriter unless that member was also a member of FINRA, and hence subject to FINRA's rules and oversight. BX believes that the keeping the term in Rule 1011(g)(2) serves no purpose and could be misleading. Accordingly, BX is proposing to delete the term from the rule.

BX is also proposing to make a minor technical correction to the rule by deleting a superfluous "and" from the rule text.

## 2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Section 6(b)(5) of the Act,<sup>9</sup> in particular in that it is 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, 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. The proposed rule change is designed to clarify the application of BX Rule 1011(g)(2) to ensure its consistent interpretation, and to avoid extending the Rule 1017 approval process to non-BX business operations conducted on other exchanges of which the BX member is also a member. Further, the proposed rule change makes clear that BX recognizes FINRA and Nasdaq approvals of material changes in business operations, which is based upon the similarity of their rules and

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

processes to those of BX. Such recognition will serve to avoid unnecessary regulatory duplication among self-regulatory organizations. The proposed rule change also makes a minor technical correction to the rule.

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

Nasdaq [sic] does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)<sup>10</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>11</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

BX believes that the proposed rule change does not significantly affect the protection of investors or the public interest because it merely clarifies the application of an existing rule to avoid erroneous interpretation of its applicability, prevents unnecessary regulatory duplication among self-regulatory organizations, and makes a minor technical correction to the rule.

BX has asked that the Commission waive the 30-day pre-operative waiting period contained in Rule 19b-4(f)(6)(iii).<sup>12</sup> BX requests this waiver so that these corrections can be immediately operative, eliminating any potential confusion caused by the currently unclear rule.

The Commission notes the proposal presents no novel issues and is designed to provide clarity regarding the application of an existing rule. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.<sup>13</sup>

#### **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

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<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>13</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BX-2009-075 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2009-075. 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 inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of BX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you

wish to make available publicly. All submissions should refer to File Number SR-BX-2009-075 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).