



Joan C. Conley
Senior Vice President and Corporate Secretary

March 26, 2010

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Securities Exchange Act Release No. 61592 (Feb. 25, 2010) (SR-BATS-2010-002)

Dear Ms. Murphy:

The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) appreciates the opportunity to submit written comments on SR-BATS-2010-002, a proposal by the BATS Exchange, Inc. (“BATS”) to offer certain data products (the “BATS Data Filing”). The purpose of the BATS Data Filing is to offer and assess fees for market data products reflecting BATS transaction information. NASDAQ OMX supports broad distribution of market data, and also welcomes increased competition for the sale of proprietary data products. NASDAQ OMX is, however, concerned with two procedural issues raised by the BATS Data Filing.

First, the BATS Data Filing implicates a question as to whether the Securities Exchange Act of 1934 (the “Act”) or rules adopted thereunder require self-regulatory organizations (“SROs”) to file a proposed rule change to offer at no charge electronic data feeds of transaction information generated by the SRO. The BATS Data Filing states that BATS offers several such data feeds at no charge:

The Exchange currently offers various data feeds free of charge, including, but not limited to, TCP PITCH, Multicast PITCH, and TCP FAST PITCH, which are depth of book data feeds containing real-time quotation and transaction data from the Exchange; TCP DROP, which contains order execution and other information (e.g., modifications and cancellations) specific to the Exchange activity of one or more Users; and TCP TOP, which contains real-time top of book quotation and transaction information from the Exchange.

NASDAQ OMX has attempted unsuccessfully to locate on BATS’s website any rule language, any proposed rule change filed, or any Securities and Exchange Commission (“Commission”) order approving the offering of such products free of charge. The BATS Data Filing cites no such BATS rule, filing or Commission approval order.

Late last year, NASDAQ OMX was informed by the staff of the Division of Trading & Markets (the "Division") that the Act and Rule 19b-4 thereunder require SROs to file a proposed rule change before offering data feeds of transaction information at no charge. NASDAQ OMX's position in those discussions was that the filing of a proposed rule change prior to offering data free of charge was not clearly required by the Act because in such circumstances the SRO is merely increasing the availability of information without burdening its members or others through the imposition of a fee. Since the Commission has not asserted broad jurisdiction over the content of all information provided by SROs, NASDAQ OMX suggested that it may be difficult to draw a clear line between information requiring a filing and information for which a filing is not required. Further, NASDAQ OMX stated that requiring a proposed rule change prior to offering transaction information at no charge constituted a change in Commission policy and practice that should be announced widely to all SROs. NASDAQ OMX was assured that all other SROs were aware of the Division's stance on the issue.

BATS description of its free data products indicates that the Division's position is not widely understood. Accordingly, NASDAQ OMX respectfully requests that the order ruling on the BATS Data Filing determine either that no proposed rule change is required to offer transaction data free of charge or that BATS must file a proposed rule change regarding the data products described in footnote 4 of the BATS Data Filing.

Second, the BATS Data Filing raises the question whether the Act permits BATS or any exchange to offer the same transaction information via two different delivery mechanisms for two different prices. Specifically, it appears that BATS's clients that receive last sale information via the PITCH data feeds pay nothing while clients receiving the same last sale information via BATS Last Sale, which is a subset of the information offered via PITCH, will pay the fee proposed in the BATS Data Filing.¹

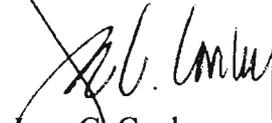
NASDAQ OMX sees valid arguments to permit exchanges to distinguish between data recipients based upon differences in data delivery mechanisms, recipient status, or other factors. Based on our discussions with Division staff, however, we believe that the question of whether such distinctions constitute unfair discrimination within the meaning of Section 6(b)(5) of the Act has recently been the focus of considerable discussion and analysis at the Commission. In fact, The NASDAQ Stock Market LLC has filed a rule proposal that, according to Division staff, may implicate issues of what constitutes fair versus unfair discrimination with respect to fees charged for data. This filing has been

¹ BATS Last Sale may overlap with the TCP TOP or TCP DROP products as well, but NASDAQ OMX is unable to determine this with certainty from the descriptions of TCP DROP and TCP TOP that are contained in footnote 4 of the BATS Data Filing.

pending at the Commission since June of 2009 without being published for comment.² Accordingly, NASDAQ OMX respectfully requests that (1) the Commission publish for notice and comment all pending NASDAQ Stock Market filings, and (2) in the order addressing the BATS Data Filing, the Commission determine whether the Act permits exchanges to offer the same data elements via two different data delivery mechanisms at different prices.

If you have any questions, please do not hesitate to contact me at (301) 978-8735 or Jeffrey Davis at (301) 978-8484.

Sincerely,



Joan C. Conley
Senior Vice President and Corporate Secretary

² SR-NASDAQ-2009-055 (June 22, 2009). Another filing that proposes to differentiate execution fees on the basis of usage of multiple trading platforms has also been pending unpublished since that time. SR-NASDAQ-2009-054 (June 24, 2009).