

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59307; File No. SR-BX-2009-005)

January 28, 2009

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 14, 2009, NASDAQ OMX BX, Inc. (“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 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 Exchange proposes to adopt fees applicable to members and non-members in connection with the resumption of its cash equities trading business. The text of the proposed rule change is available from the principal office of the Exchange and from the Commission, and is also available at www.nasdaqtrader.com/Trader.aspx?id=BSEPendingRules. The Exchange proposes to implement the proposed rule change as soon as practicable following Commission approval.

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 Exchange 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

¹ 15 U.S.C. 78s(b)(1).

in Item IV below. The Exchange 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

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). At the time of this acquisition, the Exchange was not operating a venue for trading cash equities. Pursuant to SR-BSE-2008-48, the Exchange has adopted a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equities trading.³ The new rules, which are designated as the “Equity Rules,” are based to a substantial extent on the rules of The NASDAQ Stock Market LLC (the “NASDAQ Exchange”). The Equity Rules leave in effect the Exchange’s pre-existing rules (the “Options Rules”) for the purpose of governing trading on the Exchange’s Boston Options Exchange facility (“BOX”). In addition, in SR-BX-2009-004, which was immediately effective pursuant to Section 19(b)(3)(A) of the Act,⁴ the Exchange adopted new fees applicable solely to its members.

In this filing, the Exchange is proposing new fees to be charged to members and non-members in connection with the resumption of its cash equities trading business. The fee schedules are structurally similar to those of the NASDAQ Exchange, but with the omission of many fees that are not pertinent to the Exchange’s planned business and with several differences in the level of certain fees.

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (SR-BSE-2008-48).

⁴ 15 U.S.C. 78s(b)(3)(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.⁵ 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.⁶ 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.⁷

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

⁵ See proposed Equity Rule 7023.

⁶ See proposed Equity Rule 7019.

⁷ Id.

site.⁸ In addition, data distributors will pay an annual administrative fee of \$500 for delayed distribution of data, and \$1,000 for real-time distribution.⁹

The foregoing fee structure is similar to the structure for NASDAQ TotalView, but the overall level of fees will be lower than for NASDAQ TotalView. These 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 and therefore must set its fees, including data fees, with a view to attracting order flow. Moreover, the alternatives that exist 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 – provide incentives for the Exchange to ensure that its fees for BX TotalView are set reasonably.

The fees are not unreasonably discriminatory, since the fees for subscribers are uniform for all subscribers, and the fees for distributors are uniform except with respect to reasonable distinctions between internal and external distribution and direct and indirect receipt of data. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

⁸ See proposed Equity Rule 7025.

⁹ See proposed Equity Rule 7035. These annual administrative fees can be waived for colleges and universities receiving the data for research and educational purposes.

Port Fees

In order to receive BX Total View, 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.¹⁰ 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.¹¹ 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 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.

¹⁰ See SR-BX-2009-004 (establishing Equity Rule 7015 to charge fees for ports used by members to enter orders).

¹¹ Equity Rule 7015.

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.¹² 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.

Other Fees

Other fee rules relate to special data requests¹³ and partial month charges¹⁴ and are comparable to corresponding NASDAQ Exchange rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁵ in general and with Section 6(b)(4) of the Act,¹⁶ as stated above, in that it provides an equitable allocation of reasonable dues, fees, and other charges among its members

¹² See proposed Equity Rule 7030(d).

¹³ 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.

¹⁴ 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.

¹⁵ 15 U.S.C. 78f.

¹⁶ 15 U.S.C. 78f(b)(4).

and other persons using the its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. All fees are structured in manner comparable to corresponding fees of the NASDAQ Exchange already in effect, and are set at levels equal to or lower than the levels of the comparable NASDAQ Exchange fees. The proposed fees for BX TotalView are equitably allocated since the fees for subscribers are uniform for all subscribers, and the fees for distributors are uniform except with respect to reasonable distinctions between internal and external distribution and direct and indirect receipt of data. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products. The proposed testing fees are uniformly applied to all testing facility users, except with respect to reasonable distinctions based on time of use and with respect to testing for new services.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Despite its long history, the Exchange will effectively be entering the competitive markets for equities trading as a start-up venture. Accordingly, its fees must be set at a level that will promote competition in these markets, or potential users of its services will simply continue to obtain services from the Exchange's multiple competitors. Notably, with regard to market data, 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 Exchange' market data will have little value to market participants. In light of the start-up nature of the Exchange's operations, the products and services introduced by the Exchange will promote competition if they succeed in providing

market participants with viable and cost-effective alternatives to existing competitors.

Conversely, they will have no effect on competition if they fail to provide such alternatives.

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

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- (A) by order approve the 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 e-mail to rule-comments@sec.gov. Please include File No. SR-BX-2009-005 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-2009-005. 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 the Exchange. 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-2009-005 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).