

SECURITIES AND EXCHANGE COMMISSION
(Release No. 63859; File No. SR-BX-2011-007)

February 7, 2011

Self-Regulatory Organizations; NASDAQ OMX BX LLC; Notice of Filing of Proposed Rule Change Relating to Permanent Approval of the BX and NES Inbound Routing Relationship

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4² thereunder, notice is hereby given that on January 28, 2011, NASDAQ OMX BX LLC ("BX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, 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, pursuant to Section 19(b)(1) of the Act³ and Rule 19b-4 thereunder,⁴ proposes request permanent approval of the Exchange's pilot program to permit the Exchange to accept inbound orders that Nasdaq Execution Services, LLC ("NES") routes in its capacity as a facility of NASDAQ, (with the attendant obligations an conditions.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

proposed rule change. 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

The purpose of the proposed rule change is to request permanent approval of the Exchange's pilot program to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of NASDAQ, (with the attendant obligations and conditions). Currently, NES is the approved outbound routing facility of the NASDAQ Stock Market LLC ("NASDAQ") for cash equities, providing outbound routing from NASDAQ to other market centers.⁵ BX also has been previously approved to receive inbound routes of equities orders by

⁵ See Securities Exchange Act Release Nos. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004) (Order Granting Application for a Temporary Conditional Exemption Pursuant To Section 36(a) of the Exchange Act by the National Association of Securities Dealers, Inc. Relating to the Acquisition of an ECN by The Nasdaq Stock Market, Inc.) and 52902 (December 7, 2005), 70 FR 73810 (December 13, 2005) (SR-NASD-2005-128) (Order Approving a Proposed Rule Change To Establish Rules Governing the Operation of the INET System). See also SR-NASDAQ-2011-004 (January 14, 2011); Securities Exchange Act Release Nos. 63083 (October 13, 2010), 75 FR 64370 (October 19, 2010) (SR-NASDAQ-2010-127); 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR-NASDAQ-2010-100); 61682 (March 10, 2010), 75 FR 12592 (March 16, 2010) (SR-NASDAQ-2010-030); 61460 (February 1, 2010), 75 FR 6077 (February 5, 2010) (SR-NASDAQ-2010-018); 60039 (June 3, 2009), 74 FR 27365 (June 9, 2009) (SR-NASDAQ-2009-050); 59875 (May 6, 2009), 74 FR 22794 (May 14, 2009) (SR-NASDAQ-2009-043); 59807 (April 21, 2009), 74 FR 19251 (April 28, 2009) (SR-NASDAQ-2009-036); 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR-NASDAQ-2008-098); 58752 (October 8, 2008), 73 FR 61181 (October 15, 2008) (SR-NASDAQ-2008-079); 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR-NASDAQ-2008-061); 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-NASDAQ-2008-054); 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078); 56867 (November 29, 2007), 72 FR 69263 (December 7, 2007) (SR-NASDAQ-2007-065); 55335 (February 23, 2007), 72 FR 9369 (March 1, 2007) (SR-NASDAQ-2007-005); 54613 (October 17, 2006), 71 FR 62325 (October 24, 2006) (SR-NASDAQ 2006-043); 54271 (August 3, 2006), 71 FR 45876 (August 10, 2006) (SR-

NES in its capacity as an order routing facility of NASDAQ on a pilot basis.⁶ On January 19, 2011, the Exchange filed a proposal to extend the current pilot program until June 15, 2011, with further understanding that the Exchange would file a separate proposal with the Commission seeking permanent approval of the BX and NES routing relationship.⁷ The Exchange hereby seeks permanent approval to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of NASDAQ, (with the attendant obligations and conditions).

In the initial Order, the Commission granted the BX and NES inbound routing relationship on a pilot basis. During this pilot period, BX committed to the following conditions:

1. the Exchange and FINRA will enter into a regulatory services agreement (“Regulatory Contract”), as well as an agreement pursuant to Rule 17d-2 under the Act (“17d-2 Agreement”).⁸ Pursuant to the Regulatory Contract and the 17d-2 Agreement, FINRA will be allocated regulatory responsibilities to review NES’s compliance with certain Exchange rules.⁹ Pursuant to the Regulatory Contract, however, BX retains ultimate responsibility for enforcing its rules with respect to NES;

NASDAQ-2006-027); and 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001).

⁶ See Securities Exchange Act Release Nos. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BX-2008-048); 61271 (December 31, 2009), 75 FR 1102 (January 8, 2010) (SR-BX-2009-085); 61782 (March 25, 2010), 75 FR 16534 (April 1, 2010) (SR-BX-2010-021); 62528 (July 19, 2010), 75 FR 43210 (July 23, 2010) (SR-BX-2010-048). See also Securities Exchange Act Release No. 63769 (January 26, 2011)(SR-BX-2011-003).

⁷ See Securities Exchange Act Release No. 63769 (January 26, 2011)(SR-BX-2011-003).

⁸ 17 CFR 240.17d-2.

⁹ The Exchange also states that NES is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. See Securities Exchange Act Release No. 58927 (November 10, 2008), 73 FR 69685, 69689 (November 19, 2008) (“Notice”),

2. FINRA will monitor NES for compliance with the Exchange’s trading rules, and will collect and maintain certain related information;¹⁰

3. FINRA will provide a report to the Exchange’s chief regulatory officer (“CRO”), on a quarterly basis, that: (i) quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules;¹¹

4. adopt Rule 2140(c), which requires NASDAQ OMX, as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES 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;¹² and

5. that the routing of orders from NES to the Exchange, in NES’s capacity as a facility of Nasdaq, be authorized for a pilot period of twelve months.¹³

¹⁰ Pursuant to the Regulatory Contract, both FINRA and the Exchange will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of Nasdaq 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. Id.

¹¹ Id.

¹² See Equity Rule 2140(c). See also Notice, supra note 7, 73 FR at 69689-69690.

¹³ See Amendment No. 2 to Notice, filed December 23, 2008. In Amendment No. 2, the Exchange clarified that its proposal, as opposed to Nasdaq’s corresponding proposal, be

The Exchange has met all the above-listed conditions. By meeting the above-conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Since the Exchange has met all the above-listed conditions, it now seeks permanent approval of the BX and NES inbound routing relationship. The Exchange will continue to comply with the conditions 1-4 stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁴ in general, and with Section 6(b)(5) of the Act,¹⁵ in particular, in that the proposal 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. Specifically, the proposed rule change will allow the Exchange to continue receiving inbound routes of equities orders from NES, acting in its capacity as a facility of NASDAQ, in a manner consistent with prior approvals and established protections. The Exchange believes that having met the commitments established during the pilot program demonstrates that the Exchange has

approved on a twelve-month pilot basis. See also Notice, supra note 7, n.15 and accompanying text.

See email from Arlinda J. Clark, Assistant General Counsel, NASDQ OMX BX, to Jennifer Dodd, Special Counsel, Office of Market Supervision, Division of Trading and Markets, Commission, dated February 3, 2011 (requesting corrections to this footnote).

¹⁴ 15 U.S.C. 78f.

¹⁵ 15 U.S.C. 78f(b)(5).

mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

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

The Exchange 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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate 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 or disapprove 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 Number SR-BX-2011-007 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-BX-2011-007. 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 Web site viewing and printing 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 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-2011-007 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.¹⁶

Cathy H. Ahn
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).