

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60257; File No. SR-BX-2009-036)

July 7, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Further Extend the Temporary Cap on Certain Fees for 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 June 30, 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 the Exchange. BX filed the proposal pursuant to Section 19(b)(3)(A)³ of the Act and Rule 19b-4(f)(2)⁴ thereunder. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

BX proposes to extend the temporary cap on fees charged for OUCH ports to the Equities Market due to unanticipated delays in developing and implementing an anti-internalization function. The text of the proposed rule change is below. Proposed new language is italicized; deleted language is in brackets.⁵

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7015. Access Services.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomxbx.cchwallstreet.com>.

The following charges are assessed by the Exchange for ports to establish connectivity to the NASDAQ OMX BX Equities Market, as well as ports to receive data from the NASDAQ OMX BX Equities Market:

- \$400 per month for each port pair, other than Multicast ITCH® data feed pairs, for which the fee is \$1000 per month. Additional OUCH port pairs beyond 15 are at no cost for the months of May[and], June and July 2009.
- Internet Ports: An additional \$200 per month for each Internet port that requires additional bandwidth.

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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 extend the temporary modification to its pricing for OUCH ports, which provide connectivity to the NASDAQ OMX BX Equities Market. On May 1, 2009, BX filed an immediately effective rule change to eliminate fees for a member firm's OUCH ports in

excess of 15 for the months of May and June 2009.⁶ In that filing, BX noted member firms had complained that, because BX does not have an anti-internalization capability, they must purchase additional OUCH ports that they would otherwise not need to purchase solely to avoid unwanted execution against their customer orders. Internalization occurs when a member firm's customer order is posted on the market and executed all or in part by the same member firm. Member firms must avoid internalization of certain customer orders to avoid violating rules and regulations of the Employee Retirement Income Security Act that preclude and/or limit managing broker-dealers of such customer accounts from trading as principal with orders generated for those accounts. Currently, some member firms are only able to avoid internalization by purchasing additional OUCH ports through which they place all order flow that must not be internalized. Such additional ports have a [sic] discrete MPID numbers, which allow these member firms to identify the orders and avoid internalization.

BX determined to limit the number of OUCH port pairs that a member is charged monthly to 15 for the months of May and June 2009, so that those firms affected by BX's lack of an anti-internalization function were provided relief until BX could implement such a function. BX noted in its rule change that it would either seek to remove the cap language from the rule upon its expiration or alternatively would seek to extend the cap until such time the anti-internalization function could be implemented. BX had originally anticipated developing and implementing the anti-internalization function by the end of June; however, BX has encountered unanticipated delays that will prevent the function from being implemented on schedule. As such, BX is proposing to further extend the temporary modification of its OUCH port pair pricing through July 2009, at which time BX anticipates the implementation of the anti-

⁶ See Securities Exchange Act Release No. 59894 (May 8, 2009), 74 FR 23000 (May 15, 2009).

internalization function will be complete and affected member firms can reduce the number of ports currently subscribed to solely due to the lack of such a function. BX will seek to remove the cap language from the rule upon its expiration or alternatively will seek to extend the cap until such time the anti-internalization function can be implemented.

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general, and with Section 6(b)(4) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which BX operates or controls. The proposed fee change applies uniformly to all BX members. BX has determined that temporarily instituting a cap on fees for OUCH ports in excess of 15 will provide relief to member firms required to purchase additional ports solely due to BX's lack of an anti-internalization function.

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.

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.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(4).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and subparagraph (f)(2) of Rule 19b-4 thereunder.¹⁰ 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.

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-2009-036 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-2009-036. 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

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

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, 100 F Street, NE, Washington, DC 20549, 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 publicly available. All submissions should refer to File Number SR-BX-2009-036 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.¹¹

Elizabeth M. Murphy
Secretary

¹¹ 17 CFR 200.30-3(a)(12).