

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62001; File No. SR-BX-2010-027)

April 29, 2010

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change to Establish New Fee for TotalView Service Available to Non-Professionals and to Establish an Optional Non-Display Usage Cap for Internal Distributors of TotalView

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 April 23, 2010, NASDAQ OMX BX, Inc. (the “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 establish a \$1 per month fee for non-professional use of real-time quotation and order information from the BX Market Center quoting and trading of The NASDAQ Stock Market LLC (“Nasdaq”)-, The New York Stock Exchange LLC (“NYSE”)-, NYSE Amex LLC (“Amex”)- and other regional exchange-listed securities; and (ii) to approve the creation of an optional non-display usage cap of \$16,000 per month for internal distributors of BX TotalView.

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

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

7023. BX TotalView

(a) BX TotalView Entitlement

The BX TotalView entitlement allows a subscriber to see all individual NASDAQ OMX BX Equities System participant orders and quotes displayed in the system, [as well as] the aggregate size of such orders and quotes at each price level, and the trade data for executions that occur within [in the execution functionality of] the NASDAQ OMX BX Equities System.

(1) Except as provided elsewhere in this rule, [in (a)(2)], for the BX TotalView entitlement there shall be a \$20 monthly charge for each Subscriber of BX TotalView for Nasdaq issues and a \$20 monthly charge for each Subscriber of BX TotalView for NYSE and regional issues.

(2) As an alternative to (a)(1), a market participant may purchase an enterprise license at a rate of \$16,000 per month for internal use of non-display data. The enterprise license entitles a distributor to provide BX TotalView to an unlimited number of non-display devices within its firm.

(3) Free-Trial Offers

(A) – (B) No change.

(b) Non-Professional Services

(1) The charge to be paid by non-professional subscribers for access to TotalView Service through an authorized vendor shall be \$1.00 per interrogation device per month.

(2) A “non-professional” is a natural person who is neither:

(A) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association;

(B) engaged as an “investment adviser” as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act);
nor

(C) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

(c) 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, 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 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

The Exchange proposes: (i) to establish a \$1 per month fee for non-professional use of real-time quotation and order information from the BX Market Center quoting and trading of Nasdaq-, NYSE-, Amex- and other regional exchange-listed securities; and (ii) to approve the

creation of an optional non-display usage cap of \$16,000 per month for internal distributors of BX TotalView.

BX TotalView \$1 Fee for Non-Professional Subscribers

The Exchange proposes to establish a new fee for its BX TotalView data product that is similar to that of Nasdaq. Like Nasdaq TotalView, BX TotalView provides 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.

To encourage more competition in the trading and quoting of U.S. exchange-listed stocks, as well as to encourage subscribership to Exchange full-depth products, the Exchange is proposing Rule 7023(b) to establish a \$1 per month fee for non-professional subscribers to BX TotalView.³ BX TotalView consists of real-time market participant quotation information regarding the Exchange's trading of Nasdaq-, NYSE-, Amex- and other exchange-listed stocks.

The Commission has previously only approved a fee of \$20 per month for both BX TotalView for Nasdaq and NYSE and all other regional exchange-listed issues combined. BX intended to establish these as separate fees and charged users beginning in January of 2010 a fee of \$20 per month for BX TotalView and an additional fee of \$20 for NYSE and all other regional exchange-listed issues. Therefore, Rule 7023(a)(1) is being amended to correct this inadvertent error since the existing rule language does not clearly establish a fee of \$20 per month for BX TotalView for Nasdaq issues and a separate fee of \$20 per month for BX TotalView for NYSE and all other regional exchange-listed issues, as intended. All such fees exceeding the \$20

³ Both NYSE Arca, Inc. and the New York Stock Exchange LLC offer full-depth products. See, e.g., Securities Exchange Act Release No. 53469 (March 10, 2006), 71 FR 14045 (March 20, 2006) (SR-PCX-2006-24) and Securities Exchange Act Release No. 44138 (December 7, 2001), 66 FR 64895 (December 14, 2001) (SR-NYSE-2001-42), respectively.

combined fee as currently stated in the rulebook are being refunded and BX will continue to assess a single \$20 fee until this proposed rule change is approved. The Exchange notes that it operates in a highly competitive market in which market participants can readily switch to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees continue to be reasonable and equitably allocated.

The Exchange believes that establishing a \$1 per month fee for non-professional subscribers to BX TotalView will promote wider distribution of data and benefit investors wishing to use that data in making investment decisions. The establishment of non-professional fees is a well-established practice of the network processors that distribute real-time consolidated data for Nasdaq, NYSE, and Amex stocks. As such, non-professional fees have been determined to be consistent with the Act and also to be in the best interests of investors and the public.

The fees are not unreasonably discriminatory, since the fees for non-professionals are uniform for all non-professionals. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

Rule 7023(a) is also being amended to clarify the data that is included in the BX TotalView Entitlement specifically includes trade data for executions that occur within the NASDAQ OMX Equities System. The data included remains consistent with what has always been included in the BX TotalView Entitlement, as well as the data included in the Nasdaq TotalView Entitlement. This revision is intended for clarification purposes only.

BX TotalView Enterprise License

The Exchange is proposing to amend Exchange Rule 7023 and establish an optional \$16,000 per month non-display BX TotalView fee cap for internal distributors, which would encompass both BX TotalView for Nasdaq issues and BX TotalView for NYSE and regional

issues. The BX TotalView fee cap would not include distributor fees. By providing this non-display usage cap, firms will have more administrative flexibility in their consumption of BX TotalView information.

Currently, the Exchange requires that internal distributors count and report each server and display device that processes BX TotalView-ITCH data as a professional BX TotalView user. Some firms report upwards of 500 devices, while other firms report as few as one non-display device using BX TotalView-ITCH data.

The Exchange proposes to permit a market participant to purchase an enterprise license at a rate of \$16,000 per month for non-display usage in a firm. As the number of devices increase, so does the administrative burden on the end customer of counting these devices. For firms that feel they are near the capped amount, this new enterprise license helps relieve this administrative burden. Additionally, firms would purchase this optional enterprise license to reduce fees so no firms would experience a fee increase as a result of this filing. The Exchange's filing is substantially similar to a recent Nasdaq filing.⁴

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,⁶ 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 the Exchange operates

⁴ See Securities Exchange Act Release No. 61700 (March 12, 2010), 75 FR 13172 (March 18, 2010) (SR-NASDAQ-2010-034).

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4), (5).

or controls and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the BX TotalView fee for non-professional subscribers, 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 Nasdaq already in effect. The proposed fees for BX TotalView are equitably allocated since the fees for non-professionals are uniform for all non-professionals. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

The Exchange proposes to increase the existing \$20 combined fee for both BX TotalView for Nasdaq and NYSE and all other regional exchange-listed issues by charging two separate \$20 fees per month. One \$20 fee would be charged for BX TotalView for Nasdaq and the other \$20 fee would be charged for NYSE and all other regional exchange-listed issues. The \$20 increase per month for subscribers is modest. Additionally, the Exchange notes that it operates in a highly competitive market in which market participants can readily switch to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees continue to be reasonable and equitably allocated.

The Exchange's competitive response to pricing pressures in a competitive marketplace is consistent with what the Commission has described as "the clear intent of Congress in adopting Section 11A of the Exchange Act that, whenever possible, competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities."⁷ Specifically with respect to pricing of non-core data products, the Commission has stated that "[t]he Exchange Act and its legislative history strongly support the

⁷ Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities."⁸ A price reduction in response to competitive forces, such as the proposal here, is the essence of competition.

The Exchange believes that it is neither inequitable nor unfairly discriminatory to provide volume-based discounts to members that contribute to the success of both the transaction execution and data businesses, in light of the link between these businesses that the Commission has recognized. In doing so, the Exchange not only acknowledges the multiple contributions of such customers to its profitability and the value it provides to other customers, but also provides incentives for other firms to increase their use of the Exchange's services across these business lines.

Discounts based on a member's aggregate volumes of usage have routinely been adopted by exchanges (and by participants in many other industries), even though a member that reduces its volumes by trading in other markets may no longer qualify for the discount. For example, Nasdaq has volume pricing discounts for transaction executions and data currently in effect under Rules 7018 and 7023. A member that opts to provide high volumes of liquidity and distribute TotalView to large numbers of subscribers under an enterprise license currently receives favorable pricing for both executions and data, based on the aggregate volume of business that it brings to the exchange. If the member opts to direct order flow to another exchange or distribute other data products in lieu of TotalView, the discount will no longer be available – not because the member is being penalized, but simply because its consumption of products has dropped to a level that no longer justifies discounted pricing.

⁸ Id.

As the Commission has found, market data and execution services are effectively a joint product – one in which market data is both an input to, and a byproduct of, trade execution.⁹ Accordingly, the Exchange believes that it is entirely appropriate that the benefits to the Exchange when a member provides liquidity and consumes and distributes data should be shared with the customers that provide those benefits. Notably, the Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. And, as the Commission has recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”¹⁰ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”¹¹ The proposal here was made not only in the presence of competition, but it is a direct product of competitive forces.

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. To the contrary, the Exchange’s proposed price reduction in response to competitive pricing offers is the essence of competition. As the Supreme Court has recognized, “cutting prices in order to increase business often is the very essence of competition.”

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

If competitors lose business to the Exchange because the Exchange offers more attractive pricing, that is not a reduction of competition. Rather, it is a *result* of competition. As the Supreme Court has recognized:

⁹ Id.

¹⁰ Id.

¹¹ Id.

When a firm . . . lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an “anticompetitive” consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition “is really claiming that it [is] unable to raise prices.” This is not antitrust injury; indeed, “cutting prices in order to increase business often is the very essence of competition.” The antitrust laws were enacted for “the protection of competition, not competitors.”

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (emphasis in original; citations omitted).

Likewise with respect to the Exchange Act, Congress has “expressed its preference for the Commission to rely on competition” with respect to market information.¹² Accordingly, in circumstances analogous to those here, the Commission has stated that “reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”¹³

As the Commission recently recognized,¹⁴ the market for transaction execution and routing services is highly competitive, and the market for proprietary data products is complementary to it, since the ultimate goal of such products is to attract further order flow to an exchange. Thus, exchanges lack the ability to set fees for executions or data at inappropriately

¹² Id.

¹³ Id.

¹⁴ Id.

high levels. Order flow is immediately transportable to other venues in response to differences in cost or value. Similarly, if data fees are set at inappropriate levels, customers that control order flow will not make use of the data and will be more inclined to send order flow to exchanges providing data at fees they consider more reasonable.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

With regard to the market for executions, broker-dealers currently have numerous alternative venues for their order flow, including multiple competing self-regulatory organization (“SRO”) markets, as well as broker-dealers (“BDs”) and aggregators such as the Direct Edge and LavaFlow electronic communications networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions, and FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ECN and BD is

currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSEArca, BATS, and Direct Edge.

Any ECN or BD can combine with any other ECN, broker-dealer, or multiple ECNs or BDs to produce jointly proprietary data products. Additionally, non-BDs such as order routers like LAVA, as well as market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ECNs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and distribution of proprietary data products, as Archipelago and BATS Trading did prior to registering as SROs. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace writ large.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Although their business models may differ, vendors exercise pricing discipline because they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to successfully market proprietary data products.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly

grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading, and Direct Edge. Today, BATS publishes its data at no charge on its website in order to attract order flow, and it uses market data revenue rebates from the resulting executions to maintain low execution charges for its users.¹⁵ Several ECNs have existed profitably for many years with a minimal share of trading, including Bloomberg Tradebook and LavaFlow.

The proposed rule change is a direct response to this competition. It recognizes the concern that the order flow and data product use that such firms currently bring to the Exchange may migrate elsewhere if their contributions are not appropriately recognized. At the same time, if other customers determine that their fees are too high in comparison to those paid by firms qualifying for the discount, they will take their business to other venues. Thus, the proposal must strike a balance between growing and retaining the business of actual and potential firms and the business of firms that lack the volume of business to become eligible. In light of the highly competitive nature of these markets, the Exchange's revenues and market share are likely to be diminished by the proposal if it strikes this balance in the wrong way.¹⁶

¹⁵ However, on April 9, 2010 the Commission approved BATS proposed rule change to begin offering and charging for three new data products, which include BATS Last Sale Feed, BATS Historical Data Products, and a data product called BATS Market Insight. See Securities Exchange Act Release No.61885 (April 9, 2010), 75 FR 20018 (April 16, 2010).

¹⁶ The Commission has recognized that an exchange's failure to strike this balance correctly will only harm the exchange. "[M]any market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory.... For example, an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able to respond by using alternatives to the exchanges data." *Id.*

Finally, the concern identified by the Commission with respect to “an exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange” is inapplicable here.¹⁷ It is important that the Commission avoid stifling competition on the merits – including competition on price – out of a concern for protecting competitors from pricing pressure. Indeed, the Supreme Court has cautioned that “mistaken inferences in cases” involving alleged harm to competitors from low prices “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” Matsushita, 475 U.S. at 594.

A concern that access to market data could be used to “penalize” market participants for trading in other markets may be plausible only if (a) the market data of the exchange in question is so essential to customers that the exchange has market power by virtue of the data, (b) the exchange requires customers to trade on its platform in exchange for access to the market data, and (c) competition on the merits is thwarted by the conditioning. None of those conditions is met here. As noted above, there is robust competition for market data, and customers can and do switch among various providers of market data. It would thus be implausible to suggest that the Exchange has any market power by virtue of its market data. Second, the Exchange has not attempted to condition access to market data on a customer’s refusal to use a competitor’s platform. Nor has the Exchange attempted to impose a “penalty” on anyone – to the contrary, it is proposing a price reduction to respond to competitive offers. And, as noted above, the price reduction proposed here is the essence of competition, rather than an effort to thwart competition on the merits.

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.

¹⁷ Id.

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 self-regulatory organization consents, the Commission will:

- A. by order approve such 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-2010-027 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-2010-027. 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 of the 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-2010-027 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.¹⁸

Florence E. Harmon
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).