SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62258; File No. SR–BX–2010–027]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving 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

June 10, 2010.

I. Introduction

On April 23, 2010, NASDAQ OMX BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to (i) 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) approve the creation of an optional non-display usage cap of $16,000 per month for internal distributors of BX TotalView. The proposed rule change was published for comment in the **Federal Register** on May 6, 2010.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange is proposing to establish a $1 per month fee for non-professional subscribers to BX TotalView.[4] 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 new fee for the BX TotalView data product is similar to the fees charged by 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.

The Commission has previously only approved a fee of $20 per month for both BX TotalView for Nasdaq and BX TotalView for NYSE and all other regional exchange-listed issues combined.[5] BX intended to establish these as separate fees, and charged users beginning in January 2010, a fee of $20 per month for BX TotalView for Nasdaq and an additional fee of $20 for BX TotalView for NYSE and all other regional exchange-listed issues. Therefore, BX is proposing to amend Rule 7023(a)(1) to 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 BX originally intended. The Exchange has represented that all such fees charged exceeding the $20 combined fee as currently stated in the rulebook are being refunded.

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 BX Equities System. BX notes that 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.

In addition, the Exchange is proposing to amend Rule 7023 to 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. The Exchange notes that this fee cap is substantially similar to a recent Nasdaq filing.[6]

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, it is consistent with Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[10] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[11] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[12]

On December 2, 2008, the Commission issued an approval order ("Order") that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for "non-core" market data products, such as the BX TotalView data feeds.[13] The Commission believes that that the proposed rule change is consistent with the Act for the reasons noted in the NYSE Arca Order and the 2009 Order approving fees for the BX TotalView data feeds.[14]

The proposal before the Commission relates to fees for BX TotalView, which are non-core, depth of book market data

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62001 (April 29, 2010), 75 FR 25014 (May 6, 2010) ("Notice").

[4] 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.

[5] *See* Securities Exchange Act Release No. 59615 (March 20, 2009), 74 FR 14604 (March 31, 2009) (SR–BX–2009–005).

[6] *See* Securities Exchange Act Release No. 61700 (March 12, 2010), 75 FR 13172 (March 18, 2010) (SR–NASDAQ–2010–034).

[7] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(8).

[11] 17 CFR 242.603(a).

[12] BX is an exclusive processor of BX depth-of-book data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes data on an exclusive basis on its own behalf.

[13] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data) (the "NYSE Arca Order").

[14] *See supra* notes 5 and 13.

products. As in the Commission's NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to BX in setting the terms of this proposal: (i) BX's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing BX's depth-of-book order data. Attracting order flow is the core competitive concern of any national securities exchange, including BX. Attracting order flow is an essential part of a national securities exchange's competitive success. If a national securities exchange cannot attract order flow to its market, it will not be able to execute transactions. If a national securities exchange cannot execute transactions on its market, it will not generate transaction revenue. If a national securities exchange cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability.

BX must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on BX to act reasonably in setting its fees for BX market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom BX must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[15]

In addition to the need to attract order flow, the availability of alternatives to BX's TotalView data significantly affects the terms on which BX can distribute this market data.[16] In setting the fees for its BX TotalView data, BX must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data.[17] Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[18] In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.[19] For more specific information concerning depth, market participants can choose among products offered by the various exchanges and ECNs.[20] The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. In addition, market participants can assess depth with tools other than market data, such as "pinging" orders that search out both displayed and nondisplayed size at all price points within an order's limit price.[21]

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on BX in setting the terms for distributing its depth-of-book order data. The Commission believes that the availability of those alternatives, as well as BX's compelling need to attract order flow, imposed significant competitive pressure on BX to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because BX was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. Further, the Commission did not receive any comment letters raising concerns of a substantial countervailing basis that the terms of the proposal failed to meet the requirements of the Act or the rules thereunder.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–BX–2010–027) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Deputy Secretary.

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[15] *See* NYSE Arca Order, *supra* note 13, at 74783.

[16] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[17] *See* NYSE Arca Order, *supra* note 13, at 74783.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 74784.

[21] *Id.*

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62269; File No. SR–Phlx–2010–82]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Trading Halts in Options During a Trading Pause in the Underlying Security

June 10, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on June 10, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" 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 Exchange has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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 amend Exchange Rule 1047, Trading Rotations, Halts and Suspensions, to state that Trading on the Exchange in any option contract shall be halted whenever trading in the underlying security has been paused by the primary listing market. Trading in such options contracts may be resumed upon a determination by the Exchange that the conditions that led to the pause are no

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).