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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67046; File No. SR-BX-2012-031)

May 23, 2012

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Eliminate the Fees Under Rule 7003(b) and Adopt a New Equities Regulatory Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 16, 2012 NASDAQ OMX BX, Inc. (“BX” or “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 the Substance of the Proposed Rule Change

The Exchange proposes to eliminate the fees under Rule 7003(b) and replace them with a new Equities Regulatory Fee. The Exchange will implement the fee effective June 1, 2012.

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

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7003. Regulatory, Registration and Processing Fees

(a) No change.

(b) [The following fees will be collected via the Web CRD registration system for the registration of associated persons of Exchange members:

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

(1) \$60 for each initial Form U4 filed for the registration of a representative or principal. This fee shall be waived for initial registrations occurring between January 1, 2009 and October 1, 2009.

(2) \$40 for each registration U4 transfer or re-licensing of a representative or principal. This fee shall be waived for transfers or re-licensings occurring between January 1, 2009 and October 1, 2009.

(3) \$50 annually for each of the member's registered representatives and principals for system processing. This fee shall be waived for the period from January 1, 2009 until such time as the Exchange submits a proposed rule change to reinstate it.]

The Equities Regulatory Fee is a fee assessed to member firms to offset the cost of regulating member firms' activity on the Exchange. The fee is assessed on a member firm annually based on historical daily average orders entered on the Exchange in the prior calendar year by a member firm, according to the following table:

<u>Daily Order Tiers</u>	<u>Annual Equities Regulatory Fee</u>	<u>Pro-Rated Equities Regulatory Fee (7 months)</u>
>= 50,000 orders	\$4,000	\$2,333
>= 1,000 orders, but < 50,000 orders	\$2,500	\$1,458
< 1,000 orders	\$0	\$0

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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 is proposing to eliminate the fees found under Rule 7003(b) (“Registration Fees”) and adopt a new Equities Regulatory Fee. Currently, the Exchange assesses a member firm the following Registration Fees: \$60 fee for each initial Form U4 filed for the registration of a representative or principal; \$40 fee for each registration U4 transfer or re-licensing of a representative or principal; and \$50 for each of the member firm’s registered representatives and principals for system processing (this fee is currently waived). The Exchange is proposing to eliminate these fees and introduce a new Equities Regulatory Fee (“ERF”), which is a tier-based fee assessed annually at the beginning of the calendar year that covers, in part, the regulatory costs of the Exchange. The ERF uses a member firm’s historical average daily orders entered on the Exchange over the prior calendar year as a measure of the member’s expected current year’s Exchange activity.

Registration Fees, as well as other membership fees collected by the Exchange, are intended to cover a portion of the cost of the Exchange’s regulatory program. The Exchange’s regulatory program consists of, among other things, surveillance, analysis and investigation of trading occurring on the Exchange conducted by the NASDAQ OMX Group’s Market Watch group. The Exchange also has certain fixed costs associated with running its regulatory program. In addition to the costs incurred by the regulatory program effectuated by the Exchange, it also incurs regulatory costs associated with a regulatory services agreement with the Financial Industry Regulatory Authority, Inc. (“FINRA”), whereby FINRA performs certain regulatory functions on behalf of the Exchange for a fee.<sup>3</sup>

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<sup>3</sup> Rule 1001.

Exchange rules require that every qualified registered representative and principal of a member firm be registered with, and approved by, the Exchange.<sup>4</sup> The Exchange believes that Registration Fees are no longer the best means to assess regulatory fees because they are based on the number of registered associated persons of Exchange members. The Exchange has found that the number of registered associated persons employed by a member firm is not the most accurate measure of regulatory cost incurred by the Exchange. Specifically, the regulatory effort expended by the Exchange is largely related to the number of orders entered into the Exchange, and is not necessarily commensurate with the total number of registered associated persons employed by a member firm. In this regard, the Exchange notes that member firms must comply with, among other things, the order protection requirements of Regulation NMS,<sup>5</sup> which effectively means that an order of a registered representative's customer will not necessarily be executed on BX, but rather on a venue at which it will receive the best price for its customer. As a consequence of the current Registration Fee structure, a majority of these fees are paid by member firms with comparatively large groups of registered representatives that do not necessarily trade on the Exchange, and therefore are not a significant part of the regulatory expense incurred by the Exchange. Notwithstanding, under the current Registration Fee structure, such member firms are assessed greater regulatory fees as compared to a member firm with few registered representatives, but a large number of orders (and therefore greater regulatory cost) entered into the Exchange.

The proposed ERF is designed to more closely allocate the regulatory expenses incurred by the Exchange to the member firms responsible for those expenses. In lieu of assessing fees

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<sup>4</sup> Rule 1030 series.

<sup>5</sup> 17 CFR 242.600, et seq.

based on the number of Exchange-registered associated persons, the Exchange is proposing to assess a fee on the number of orders entered into the Exchange by a member firm. The Exchange will assess the ERF annually at the beginning of the calendar year based on a member firm's historical average daily orders entered into the Exchange over the prior calendar year.<sup>6</sup> The Exchange is using a member firm's average daily orders entered into the Exchange in the prior calendar year as a measure of such firm's anticipated order activity in the current year. The Exchange believes that using such a measure will more closely tie the member firm's Exchange order activity in the current year to the projected regulatory costs incurred by the Exchange for such member's Exchange activity in that same year. The ERF is tiered so that member firms that enter what is essentially an immaterial number of orders into the Exchange will not be assessed an ERF. Member firms that qualify under the mid-level tier of the ERF will be assessed a fee of \$2,500 annually, and member firms that qualify for the top tier of the ERF will be assessed \$4,000 annually. The Exchange selected the tiers so that an approximately equal number of member firms would fall under each tier. Member firms that fall under the first tier represent a relatively small regulatory cost to the Exchange, the sum of which is covered by other regulatory fees paid by these members. The Exchange allocated the total of fees assessed annually under the current Registration Fees among the remaining two tiers so that the fees collected would closely approximate the Registration Fees assessed annually, with the member firms that fall under the top tier paying a larger fee than those under the mid-level tier. As such, the Exchange believes that the order-based tier structure of the ERF is a more fair allocation of fees assessed

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<sup>6</sup> The calculation of a member firm's average daily orders in any given calendar year is based only on the trading days during the year that it was a member of the Exchange. For example, if a member firm was approved by the Exchange on October 10, 2013, only the trading days from that date through the end of the year would be used for purposes of calculating the firm's average daily orders, which would be done in early 2014.

for regulatory expenses. Because the Exchange is implementing the ERF mid-calendar year, it will prorate the annual fee for each member firm from June 1, 2012 through December 31, 2012 and use the average daily order for calendar year 2011 for purposes of calculating its ERF obligation for calendar year 2012.

As noted above, the Exchange believes that the ERF is a better means of allocating the regulatory costs incurred by the Exchange than the current Registration Fees, and it does not anticipate the ERF will result in an increase or decrease in total fees assessed to cover regulatory costs. Rather, the Exchange believes that the ERF will result in a more equitable allocation of the fees assessed for this purpose. In this regard, the Exchange will evaluate annually, at the close of the calendar year, the amount of revenue collected from the ERF to ensure that the fees collected are commensurate with the projected needs of the Exchange's regulatory program as represented by the regulatory costs incurred during that year. If the Exchange determines regulatory revenues would exceed regulatory costs, it would adjust the ERF to bring the fees in line with such costs and use the adjusted ERF in the calculation of member firm fees due in the next annual ERF assessment.<sup>7</sup> If the Exchange determines that the fees collected under the ERF are commensurate with regulatory costs, the Exchange would not adjust the ERF.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act<sup>8</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges

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<sup>7</sup> The Exchange will conduct and complete this assessment in January of each year. If an adjustment to the ERF is warranted, the Exchange would submit a proposed rule change to the Commission to amend the ERF fee schedule. Shortly thereafter, the Exchange would assess the ERF on its member firms based on the new fee and members' average daily orders in the prior year. If no change in the ERF is warranted, the Exchange would use the existing ERF fee schedule as a basis for assessing the fee.

<sup>8</sup> 15 U.S.C. 78f(b)(4).

among members and issuers and other persons using any facility or system which the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange believes that the new ERF is a more equitable allocation of fees as compared to the current Registration Fees, in that the ERF is tied to the use of, and hence regulatory cost incurred by, the Exchange. The Exchange determined to have three tiers under the ERF, with each tier representing a near equal number of Exchange member firms. In selecting the proposed fees under each of the tiers of the ERF, the Exchange first analyzed the distribution of Registration Fees among member firms in comparison to the distribution among member firms under various potential fees under the tiers of the ERF. The Exchange elected to assess the ERF based on the proposed tiers because the Exchange found these tiers to correlate the closest to the regulatory costs incurred by the Exchange, as offset by the other regulatory fees collected. In this regard, the Exchange notes that certain member firms that have historical average daily orders of less than 1,000 are not assessed a fee under proposed Rule 7003(b) because such members [sic] firms represent a much smaller regulatory cost to the Exchange relative to member firms that enter a greater number of orders and the sum of such costs is generally met by other regulatory fees assessed these member firms.<sup>9</sup> As the goal of the ERF is to more equitably assess regulatory fees, the Exchange believes that it is not unfairly discriminatory to member firms that fall under the mid-level and top tiers to assess no ERF on certain low-order volume member firms that already pay other regulatory fees adequate to cover the regulatory costs incurred by the Exchange associated with such member firms' activities in a given year. The Exchange divided the total fees assessed under the Registration Fees among the mid-level and top tiers, with 50,000 average daily orders representing the mid-point between

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<sup>9</sup> For example, BX assesses each member firm an annual membership fee of \$3,000 and a monthly trading rights fee of \$500. See Rule 7001(a).

remaining two thirds of member firms falling under these tiers and the top tier paying a greater amount than the mid-level tier based on the relative regulatory cost such member firms represent to the Exchange.

The Exchange also believes that the ERF is a reasonable fee as it is assessed on member firms based on their usage of the Exchange, and the Exchange does not believe that the new fee will result in a net increase in fees received compared to the fees currently received through assessment of the Registration Fees. Because the Exchange is more closely tying regulatory fees with regulatory costs and because the Exchange has taken great care in determining the tiers under which member firms will fall under the fee, as described above, the Exchange does not believe that the proposed fee unfairly discriminates between member firms assessed the fee. In addition, because the Exchange is implementing the ERF in the middle of a calendar year, it is pro-rating the fees assessed to reflect the partial calendar year of the ERF's effectiveness and that member firms may have paid Registration Fees through the first five months of 2012. The ERF will be applied to all member firms equally, based upon the tier under which they fall.

The Exchange also believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act<sup>10</sup> because it 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. As a self-regulatory organization, the Exchange has an obligation to regulate its member firms and their associated persons. The regulatory fees assessed by the Exchange are designed to cover the expenses associated with running an effective regulatory program.

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<sup>10</sup> 15 U.S.C. 78f(b)(5).

Eliminating the Registration Fees and implementing the ERF will not negatively impact the total fees assessed to help cover the regulatory program costs. As discussed, the total fees assessed under Rule 7003(b) will be compared annually to the regulatory costs expected to be incurred during the same calendar year, and the Exchange will make any adjustments to the fee needed to keep it in line with such costs.

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. To the contrary, the Exchange believes that the new fee is pro-competitive as it will more closely align the fee assessed for the Exchange's regulatory program with the use of the Exchange, thus allowing member firms to compete for order flow on a level playing field in terms of regulatory fees assessed as a precondition for participation on the Exchange. The Exchange notes a member firm that believes the ERF to be an excessive burden may reduce its order flow to the Exchange, thus reducing the impact of the ERF, or may withdraw as a member of the Exchange altogether.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>11</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>12</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2012-031 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-2012-031. 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 website (<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 website viewing and printing 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-2012-031, 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.<sup>13</sup>

Elizabeth M. Murphy  
Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).