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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83224; File No. SR-BX-2018-018)

May 14, 2018

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7018(a) to Establish a New Fee for Orders with Midpoint Pegging that Execute at a Price Better than the Midpoint of the NBBO

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 April 30, 2018, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 new fee for orders with Midpoint pegging that receive an execution price that is better than the midpoint of the National Best Bid and Offer (“NBBO”), as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on May 1, 2018.

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaqbx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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 purpose of the proposed rule change is to amend the Exchange's transaction fees at Rule 7018 to establish a new fee of \$0.0017 per share executed for a buy (sell) order with Midpoint pegging that receives an execution price that is lower (higher) than the midpoint of the NBBO.

The Exchange operates on the “taker-maker” model, whereby it pays credits to members that take liquidity and charges fees to members that provide liquidity. Among the fees that the Exchange charges to members that submit liquidity-providing orders to the Exchange, the Exchange charges a baseline fee of \$0.0030 per share executed for each non-displayed order that adds liquidity. However, for certain types of non-displayed orders that add liquidity, the Exchange charges lower fees relative to the baseline fee as a means of incentivizing additional liquidity. For example, the Exchange charges \$0.0015 per share executed for orders with

Midpoint pegging<sup>3</sup> or \$0.0005 if the order with Midpoint pegging is entered by a member that adds 0.02% of total Consolidated Volume of non-displayed liquidity.

The new fee that the Exchange proposes to charge for a Midpoint pegging order that executes at a price which is less aggressive than the midpoint of the NBBO will be higher than the \$0.0005 or \$0.0015 fees that the Exchange charges for Midpoint pegging orders, generally. This is reasonable because Midpoint pegging orders that execute at prices less aggressive than the Midpoint of the NBBO provide less price improvement to other participants and execute at better prices (from the perspective of the firm having entered the order with Midpoint pegging) than Midpoint pegging orders that execute at the midpoint. However, the Exchange notes that the proposed fee will still be lower than the baseline \$0.0030 fee that the Exchange charges for non-display orders as a means of incenting orders that provide price improvement relative to the Midpoint.

The Exchange also proposes to add language to existing provisions of the fee schedule that also apply to orders with Midpoint pegging to clarify that these other provisions and their associated fees do not apply to orders with Midpoint pegging that receive price improvement relative to the midpoint of the NBBO.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>5</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

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<sup>3</sup> Pursuant to Rule 4703(d), an order with a “Midpoint pegging” attribute is a non-displayed order whose price is determined with reference to midpoint between the Inside Bid and Inside Offer (the “Midpoint”).

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

<sup>5</sup> 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>6</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>7</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>8</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>9</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution

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<sup>6</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>7</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>8</sup> See NetCoalition, at 534 - 535.

<sup>9</sup> Id. at 537.

of order flow from broker dealers' ...."<sup>10</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposed fee is reasonable because it benefits participants by providing a new way in which members may qualify for a reduced transaction fee, while also incentivizing members to add liquidity to the Exchange. It is also reasonable for the Exchange to charge a higher fee for a Midpoint pegging order that receives price improvement relative to the midpoint of the NBBO than it does for a Midpoint pegging order that executes at the Midpoint because the former order receives a better price than the latter one relative to the midpoint of the NBBO.

The Exchange believes that the proposed fee is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members.

**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. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust

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<sup>10</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed fee does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The proposed fee will apply to all similarly situated members.

Moreover, the proposal promotes competition because the Exchange intends for it to incentivize members to add liquidity to the Exchange, potentially attracting additional participants to the Exchange.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action,

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

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-2018-018 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2018-018. 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 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2018-018 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>12</sup>

Eduardo A. Aleman,  
Assistant Secretary.

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

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