

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59323; File No. SR-BX-2009-002)

January 30, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a Policy Relating to its Treatment of Trade Reports that it Determines to be Inconsistent with the Prevailing Market

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 January 14, 2009, NASDAQ OMX BX, Inc. (the “Exchange”) 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. The Exchange has designated this proposal as eligible for immediate effectiveness pursuant to Exchange Act Rule 19b-4(f)(6). The Commission is publishing this notice and order 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 adopt a policy relating to its treatment of trade reports that it determines to be inconsistent with the prevailing market and for this policy to be in effect concurrent with the launch of cash equities trading by NASDAQ OMX BX, Inc. The Exchange does not expect that the proposed rule change will have any direct effect, or significant indirect effect, on any other Exchange rule in effect at the time of this filing.

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. The text of these statements may be

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

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

examined at the places specified in Item III below, and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Trades in listed securities occasionally occur at prices that deviate from prevailing market prices and those trades sometimes establish a high, low or last sale price for a security that does not reflect the true market for the security. This filing, which is substantially similar to the New York Stock Exchange's ("NYSE") and The NASDAQ Stock Market LLC's ("Nasdaq") recent filings, seek to address such instances of "aberrant" trades.<sup>3</sup>

The Exchange proposes that its policy in this regard shall be to contact the listing exchange (if the Exchange is not the listing exchange) and other markets (in the case of executions that take place across multiple markets) to determine if any erroneous trade reports were filed. If not, or in the case of non-unlisted trading privilege trades, if the Exchange determines the trade price is inconsistent with the prevailing market for the security after considering the factors outlined herein, the Exchange may make the determination to append an indicator (an "Aberrant Report Indicator") to the trade.

The Exchange will not initially list stocks on its own market, but will trade on an unlisted trading privilege ("UTP") basis securities listed on other markets. Nasdaq operates the securities information processor ("SIP"), which processes trade and quote information for the Nasdaq UTP

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<sup>3</sup> See Securities Exchange Act Release No. 58736 (October 6, 2008), 73 FR 60380 (October 10, 2008) (SR-NYSE-2008-91). See Securities Exchange Act Release No. 59151 (December 23, 2008), 74 FR 158 (January 2, 2009) (SR-NASDAQ-2008-100). The Exchange notes that these proposed policies relating to the Exchange's treatment of trade reports that it determines to be inconsistent with the prevailing market are substantially similar to the NYSE's and Nasdaq's proposed policies.

Plan (“Nasdaq SIP”). The Securities Industry Automation Corporation (“SIAC”) serves as the securities information processor for the CTA Plan and processes trade and quote information. The Nasdaq SIP and the Consolidated Tape Association (“CTA”) offer each participant in the Nasdaq SIP and CTA Plan the discretion to append to the Aberrant Report Indicator to a trade report to indicate that the market believes that the trade price in a trade executed on that market does not accurately reflect the prevailing market for the security.<sup>4</sup>

During the course of surveillance by the Exchange or as a result of notification by another market, listed company or market participant, the Exchange may become aware of trade prices that do not accurately reflect the prevailing market for a security. In such a case, the Exchange proposes to adopt as policies that it:

- i. may determine to append an Aberrant Report Indicator to any trade report with respect to any trade executed on the Exchange that the Exchange determines to be inconsistent with the prevailing market; and
- ii. shall discourage vendors and other data recipients from using prices to which the Exchange has appended the Aberrant Report Indicator in any calculation of the high, low or last sale price of a security.

The Exchange will urge vendors to disclose the exclusion from high, low or last sale price data of any trades with an Aberrant Report Indicator and exclude them from high, low or last sale price information they disseminate and to provide to data users an explanation of the parameters used in the Exchange’s aberrant trade policy.

While SIAC, on behalf of the CTA Plan, and the Nasdaq SIP, on behalf of the Nasdaq

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<sup>4</sup> The CTA recommends that data recipients should exclude the price of any trade to which the Aberrant Report Indicator has been appended from any calculation of the high, low and last sale prices for the security.

UTP Plan, disseminate their own calculations of high, low and last sale prices, vendors and other data recipients--and not the Exchange--frequently determine their own methodology by which they wish to calculate high, low and last sale prices. Therefore, the Exchange shall endeavor to explain to those vendors and other data recipients the deleterious effects that can result from including in the calculations a trade to which the Aberrant Report Indicator has been appended.

In making the determination to append the Aberrant Report Indicator, the Exchange shall consider all factors related to a trade, including, but not limited to, the following:

- Material news released for the security;
- Suspicious trading activity;
- System malfunctions or disruptions;
- Locked or crossed markets;
- A recent trading halt or resumption of trading in the security;
- Whether the security is in its initial public offering;
- Volume and volatility for the security;
- Whether the trade price represents a 52-week high or low for the security;
- Whether the trade price deviates significantly from recent trading patterns in the security;
- Whether the trade price reflects a stock-split, reorganization or other corporate action;
- The validity of consolidated tape trades and quotes in comparison to national best bids and offers; and
- The general volatility of market conditions.

In determining whether trade prices are inconsistent with the prevailing market, the

Exchange proposes that its policy shall be to follow the following general guidelines: The Exchange will review whether a trade price does not reflect the prevailing market for a security if the trade occurs during regular trading hours (i.e., 9:30 a.m. to 4 p.m.) and occurs at a price that deviates from the “Reference Price” by an amount that meets or exceeds the following thresholds:

<u>Trade Price</u>	<u>Numerical Threshold (percent)</u>
Between \$0 and \$15.00	7 Percent
Between \$15.01 and \$50.00	5 Percent
In excess of \$50.00	3 Percent

The “Reference Price” refers to (a) if the primary market for the security is open at the time of the trade, the national best bid or offer for the security, or (b) if the primary market for the security is not open at the time of the trade, the first executable quote or print for the security on the primary market after execution of the trade in question. However, if the circumstances suggest that a different Reference Price would be more appropriate, the Exchange will use the different Reference Price. For instance, if the national best bid and offer for the security are so wide apart as to fail to reflect the market for the security, the Exchange might use as the Reference Price a trade price or best bid or offer that was available prior to the trade in question.

If the Exchange determines that a trade price does not reflect the prevailing market for a security and the trade represented the last sale of the security on the Exchange during a trading session, the Exchange may also determine to remove that trade’s designation as the last sale and the preceding last sale eligible trade would become the new last sale. The Exchange may do so either on the day of the trade or at a later date, so as to provide reasonable time for the Exchange to conduct due diligence regarding the trade, including the consideration of input from markets and other market participants.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and Section 6(b)(5) of the Act,<sup>6</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

In particular, the Aberrant Report Indicator is consistent with the protection of investors and the public interest in that the Exchange will seek to ensure a proper understanding of the Aberrant Report Indicator among securities market participants by: (i) urging vendors to disclose the exclusion from high, low or last sale price data of any aberrant trades excluded from high, low or last sale price information they disseminate and to provide to data users an explanation of the parameters used in the Exchange's aberrant trade policy; (ii) if the Exchange determines to list securities in the future, informing the affected listed company each time the Exchange or another market appends the Aberrant Report Indicator to a trade in an Exchange-listed stock; and (iii) reminding the users of the information that these are still valid trades in that they were executed and not unwound as in the case of a clearly erroneous trade.

### 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 that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

Written comments were neither solicited nor received.

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

Pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(6) thereunder,<sup>8</sup> the Exchange has designated this proposal as one that effects a change that: (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

A proposed rule change filed under 19b-4(f)(6) normally may not become operative for 30 days after the date of filing.<sup>9</sup> However, Rule 19b-4(f)(6)(iii)<sup>10</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to a proposal previously approved by the Commission.<sup>11</sup> The Commission believes that the

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<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>10</sup> Id.

<sup>11</sup> See Securities Exchange Act Release No. 58736 (October 6, 2008), 73 FR 60380 (October 10, 2008) (SR-NYSE-2008-91). See also Securities Exchange Act Release No. 59151 (December 23, 2008), 74 FR 158 (January 2, 2009) (SR-NASDAQ-2008-100).

Exchange's proposal to append an Aberrant Report Indicator to certain trade reports is a reasonable means to alert investors and others that the Exchange believes that the trade price for a trade executed in its market does not accurately reflect the prevailing market for the security. In addition, the Commission notes that the Exchange will use objective numerical thresholds in determining whether a trade report is eligible to have an Aberrant Trade Indicator appended to it. The Commission further notes that the Exchange's appending the Aberrant Trade Indicator to a trade report has no effect on the validity of the underlying trade. Finally, waiving the 30-day operative delay will allow the Exchange to apply the proposed change to aberrant trades immediately.<sup>12</sup> Based on the above, the Commission designates the proposal to become operative upon filing.

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 the 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:

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<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the impact of the proposed rule on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).



- 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-2009-002 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-2009-002. 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 inspection and copying 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 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

available publicly. All submissions should refer to File Number SR-BX-2009-002 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>

Florence E. Harmon  
Deputy Secretary

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