

Finally, NASDAQ notes that the Commission has previously approved the PORTAL Reference Database and that this filing simplifies and modifies fees for the database.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The NASDAQ 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, as amended.

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

Written comments on the proposed rule change were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

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 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*

- 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-NASDAQ-2009-100 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-NASDAQ-2009-100. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the NASDAQ 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-NASDAQ-2009-100 and should be submitted on or before December 28, 2009.

For the Commission, by the Division of Trading & Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-61071; File No. SR-FINRA-2009-067]

#### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt FINRA Rules 2060 (Use of Information Obtained in Fiduciary Capacity) and 5290 (Order Entry and Execution Practices) in the Consolidated FINRA Rulebook**

November 30, 2009.

On October 6, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to adopt NASD Rules 3120 (Use of Information Obtained in Fiduciary Capacity) and 3380 (Order Entry and Execution Practices) as FINRA rules in the consolidated FINRA rulebook without material change. The proposed rule change would renumber NASD Rule 3120 as FINRA Rule 2060 and NASD Rule 3380 as FINRA Rule 5290 in the consolidated FINRA rulebook. The proposed rule change was published for comment in the **Federal Register** on October 28, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

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 association.<sup>4</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>5</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change is appropriate to continue to prohibit members who, in

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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 Commission notes that the Exchange has satisfied the five-day pre-filing notice requirement.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 60850 (October 21, 2009), 74 FR 55598.

<sup>4</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

the capacity of a paying agent, transfer agent, trustee, or in any other similar capacity, have received information as to the ownership of securities, from using such information for the purpose of soliciting purchases, sales or exchanges except at the request and on behalf of the issuer. The Commission also believes that the proposed rule change is appropriate to continue to prohibit conduct that has the intent or effect of splitting orders into multiple smaller orders for execution or any execution into multiple smaller executions for transaction reporting for the primary purpose of maximizing a monetary or in-kind amount to be received by the member or associated person as a result of the execution of such orders or the transaction reporting of such executions. In approving the proposed rule change, the Commission notes that FINRA is adopting NASD Rules 3120 and 3380 as FINRA rules in the consolidated FINRA rulebook without material changes.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>6</sup> that the proposed rule change (SR-FINRA-2009-067) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61073; File No. SR-BX-2009-075]

### Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Clarify the Definition of Material Changes in Business Operations Found in the Membership Rules and To Make a Technical Correction

November 30, 2009.

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 November 23, 2009, NASDAQ OMX BX, Inc. (“BX”) 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 BX. BX has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with 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 the Substance of the Proposed Rule Change

BX proposes to amend Rule 1011(g)(2) to clarify the definition of what BX considers a “material change in business operations,” and to delete a superfluous “and” from the rule text.

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

#### 1011. Definitions

Unless otherwise provided, terms used in the Rule 1000 Series shall have the meaning as defined in Rule 0120.

(a)-(f) No change.

(g) “material change in business operations”

The term “material change in business operations” includes, but is not limited to:

(1) removing or modifying a membership agreement restriction;  
(2)(A) [market making, underwriting, or ] acting as a dealer for the first time; or

*(B) market making for the first time on NASDAQ OMX BX; provided, however, that market making for the first time on NASDAQ OMX BX will not be considered a material change in business operations if the member's market making has previously been approved by FINRA under NASD Rule 1017 or NASDAQ under NASDAQ Rule 1017; [and]*

(3) adding business activities that require a higher minimum net capital under SEC Rule 15c3-1; and

(4) adding business activities that would cause a proprietary trading firm no longer to meet the definition of that term contained in this rule.

(h)-(o) 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, BX 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. BX 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

BX is proposing to amend Rule 1011(g)(2) to clarify its applicability. Rule 1011(g) defines what BX considers a “material change in business operations.” Pursuant to Rule 1017(a)(5), a member must file an application for approval of any material change in its business operations with BX. Rule 1011(g)(2) includes “market making, underwriting, or acting as a dealer for the first time” within the definition of “material change in business operations.” Rule 1011(g)(2) is intended to require BX members to undergo an assessment and obtain approval pursuant to Rule 1017 if they intend to expand their business operations to include market making, underwriting, or acting as a dealer. The definition found in Rule 1011(g)(2) could, however, also be interpreted to include engaging in market making for the first time on a market other than BX, notwithstanding that BX has no regulatory responsibility with respect to that business activity.

BX's Rule 1011(g)(2) is based on NASD Rule 1011(k)(2), and as such, was drafted by NASD<sup>4</sup> (now known as “FINRA”) to be broad in application given its broad, cross-market regulatory responsibilities.<sup>5</sup> In adopting Rule 1011(g)(2), however, BX did not contemplate that the rule would extend to business operations engaged in on other markets. Under such an interpretation of the rule, BX would be required to approve a member's planned change in business operations that would be conducted solely on another market. For example, a BX member that is not a market maker, yet determines to make markets on a market other than BX would, under this interpretation,

<sup>4</sup> In late July 2007, NASD changed its name to the Financial Industry Regulatory Authority (“FINRA”). Accordingly, we use the term NASD in this filing only (i) when referring to period of time before the name change, and (ii) with respect to rules that are still officially designated by FINRA as “NASD rules.”

<sup>5</sup> BX's membership rules mirror, in most respects, those of Nasdaq, which were derived from NASD's rules. BX notes that Nasdaq is seeking to amend its Rule 1011(g)(2) consistent with the changes to the BX rules proposed herein.

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).