

waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it makes only technical changes to FINRA's rules which should help to avoid confusion among FINRA members and other market participants.

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-FINRA-2009-003 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-FINRA-2009-003. 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. Copies of such filing also will be

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

available for inspection and copying at the principal office of FINRA.

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 the File Number SR-FINRA-2009-003 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59261; File No. SR-BX-2009-001]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Deferring Operation of Its Listing Standards for Primary Listings and Consolidating Requirements for Products Traded on the Exchange Pursuant to Unlisted Trading Privileges

January 15, 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 January 8, 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 the proposed rule change as constituting a non-controversial rule change under Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</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.

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

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

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes (i) to suspend the operation of the Exchange's newly adopted listing standards with respect to primary listings on the Exchange until such time as the Exchange adopts listing fees, and (ii) to adopt rules reflecting the requirements for trading products on the Exchange pursuant to unlisted trading privileges ("UTP") that have been established in various new product proposals previously approved by the Commission. The Exchange proposes to make the change operative on January 12, 2009.

The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Web site at [http://nasdaqtrader.com/Trader.aspx?id=Boston\\_Stock\\_Exchange](http://nasdaqtrader.com/Trader.aspx?id=Boston_Stock_Exchange).

### 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

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. At the time of this acquisition, the Exchange was not operating a venue for listing or trading cash equities. Pursuant to SR-BSE-2008-48, the Exchange has adopted a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equity trading.<sup>5</sup> The new rules, which are designated as the "Equity Rules," include rules that permit issuers of various types of securities to establish primary listings on the Exchange. However, the Exchange has determined that market conditions do not currently warrant offering the Exchange as a listing venue.

<sup>5</sup> Securities Exchange Act Release No. 59154 (December 23, 2008) (SR-BSE-2008-48).

Accordingly, although the listing standards will remain in the Exchange's rulebook, the Exchange is proposing new Equity Rule 4401, which provides that the provisions of the Equity Rule 4000 Series that permit the listing of securities will not be operative until the Exchange files a proposed rule change under Section 19(b)(2) under the Act to adopt listing fees for the Exchange and such proposed rule change is approved by the Commission. The rule is similar in effect to Rule 14.1(a) of the BATS Exchange.

In addition, the Exchange also proposes to amend its rules to reflect certain requirements for trading products on the Exchange pursuant to UTP that have been established in various new product proposals previously approved by the Commission. The Exchange is amending Equity Rule 4420 to provide that it may extend UTP to any security that is an NMS Stock (as defined in Rule 600 of Regulation NMS) that is listed on another national securities exchange. Any such security will be subject to all of the Exchange's trading rules applicable to NMS Stocks, unless otherwise noted, including the provisions of Equity Rules 4120, 4420, 4630, and new Rule 4421 described below. The Exchange will file with the Commission a Form 19b-4(e) with respect to any such security that is a "new derivative securities product" as defined in Rule 19b-4(e) under the Act<sup>6</sup> (defined as a "UTP Derivative Security"). In addition, any new derivative securities product traded on the Exchange will be subject to the criteria described below.

Proposed Equity Rule 4421(a)(2) provides that the Exchange will distribute an information circular prior to the commencement of trading in a UTP Derivative Security, which generally will include the same information as the information circular provided by the listing exchange, including: (1) The special risks of trading the UTP Derivative Security; (2) the Rules of the Exchange that will apply to the UTP Derivative Security, including Equity Rule 2310, the Exchange's suitability rule; (3) information about the dissemination of the value of the underlying assets or indexes; and (4) the applicable trading hours for the UTP Derivative Security and risks of trading during the Exchange's pre-market session (8 a.m. to 9:30 a.m.) and post-market session (4 p.m. to 7 p.m.) due to the lack of calculation or dissemination of the

underlying index value, the intraday indicative value, or a similar value.

Proposed Equity Rule 4421(a)(3)(A) reminds Members<sup>7</sup> that they are subject to the prospectus delivery requirements under the Securities Act of 1933, as amended (the "Securities Act"), unless a UTP Derivative Security is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 (the "1940 Act") and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. The Exchange will inform its Members of the application of these provisions to a particular UTP Derivative Security governed by the 1940 Act by means of an information circular.

The Exchange is amending Equity Rule 4120(b) to more fully address trading halts in UTP Derivative Securities traded on the Exchange pursuant to UTP. As currently in effect, Rule 4120(b) provides for trading halts of "Derivative Securities Products," which are defined as a series of Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, Trust Issued Receipts, Commodity-Related Securities, or securities representing interests in unit investment trusts or investment companies. Although this definition covers a wide range of products that would be considered UTP Derivative Securities, for the avoidance of doubt, the Exchange is explicitly amending the definition to include all UTP Derivative Securities. The current rule also contains a definition of "Required Value" and provides for trading halts in certain circumstances where a Required Value is not being disseminated. Currently, "Required Value" is defined to mean "(i) the value of any index or any commodity-related value underlying a Derivative Security Product and (ii) the indicative optimized portfolio value, intraday indicative value, or other comparable estimate of the value of a share of a Derivative Securities Product updated regularly during the trading day." The Exchange proposes to amend the definition to also include "(iii) a net asset value in the case of a Derivative Securities Product for which a net asset value is disseminated, and (iv) a 'disclosed portfolio' in the case of a Derivative Securities Product that is a series of managed fund shares or actively managed exchange-traded funds for which a disclosed portfolio is disseminated."

Thus, as amended, the rule provides that the Exchange, upon notification by the listing market of a halt due to a temporary interruption in the calculation or wide dissemination of a Required Value for a Derivative Securities Product, will immediately halt trading in that product on the Exchange. If the Required Value continues not to be calculated or widely disseminated at the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product on that day. If an interruption in the calculation or wide dissemination of the Required Value continues, the Exchange may resume trading in the Derivative Securities Product only if calculation and wide dissemination of the Required Value resumes or trading in such product resumes on the listing market.

The Exchange is also amending Equity Rule 4630, which governs the activities of registered market makers in Commodity-Related Securities. A "Commodity-Related Security" is defined to mean a security that is issued by a trust, partnership, commodity pool or similar entity that invests, directly or through another entity, in any combination of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, or the value of which is determined by the value of commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives. A "commodity" is defined in Section 1(a)(4) of the Commodity Exchange Act, a definition that includes currencies. As amended, the rule provides that a registered market maker in a Commodity-Related Security is prohibited from acting or registering as a market maker in any commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security. The rule further provides that a member acting as a registered market maker in a Commodity-Related Security must file with the Exchange's Regulation Department in a manner prescribed by such Department and keep current a list identifying all accounts for trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security, in which the market maker holds an interest, over which it may exercise investment discretion, or in which it shares in the profits and losses. No market maker shall trade in, or

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

<sup>7</sup> A Member is any registered broker-dealer that has been admitted to membership in the Exchange.

exercise investment discretion with respect to, such underlying commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives, in an account in which a market maker, directly or indirectly, controls trading activities, or has an interest in the profits or losses thereof, that has not been reported as required by the Rule.

In addition, a member acting as a registered market maker in a Commodity-Related Security is obligated to establish adequate information barriers when such market maker engages in communications to other departments within the same firm or the firm's affiliates that involve trading in commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security. The member acting as a registered market maker in a Commodity-Related Security shall make available to the Exchange's Regulation Department such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security, as may be requested by the Regulation Department. Finally, in connection with trading a Commodity-Related Security or commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying a Commodity-Related Security, the member acting as a market maker in a Commodity-Related Security shall not use any material nonpublic information received from any person associated with the member or employee of such person regarding trading by such person or employee in the commodities, futures contracts, options on futures contracts, forward contracts, commodity swaps, or other related derivatives underlying such Commodity-Related Security.

The Exchange represents that its surveillance procedures for UTP Derivative Securities traded on the Exchange will be similar to the procedures used for equity securities traded on the Exchange and will incorporate and rely upon existing Exchange surveillance procedures. The Exchange will closely monitor activity in UTP Derivative Securities traded on the Exchange pursuant to UTP to deter any potential improper trading activity.

The proposed rule change also provides that the Exchange will enter into a comprehensive surveillance sharing agreement ("CSSA") with a market trading components of the index or portfolio on which the UTP Derivative Security is based to the same extent as the listing exchange's rules require the listing market to enter into a CSSA with such market.

Finally, the Exchange is amending provisions of Equity Rule 4120 and 4630 that stipulate that the Exchange will file separate proposals under Section 19(b)(2) of the Act for each issue of Managed Fund Shares or Commodity-Based Securities that it trades on a UTP basis. Because the new rules being adopted by the Exchange consolidate the requirements for trading such securities that have been established in new product proposals previously approved by the Commission, separate proposals under Section 19(b)(2) of the Act are no longer required for trading these securities.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general and with Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by providing for the trading of securities, including UTP Derivative Securities, on the Exchange pursuant to UTP, subject to consistent and reasonable standards.

### 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.

### 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>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

The Exchange has asked the Commission to waive the 30-day operative delay. The Commission believes that such waiver is consistent with the protection of investors and the public interest because such waiver should benefit investors by creating, without undue delay, additional competition in the trading of UTP Derivative Securities, subject to consistent and reasonable standards. Waiver of the waiting period will also allow prompt clarification of the status of the Exchange as a listing venue by specifying that the Exchange's listing standards shall not be operative for primary listings until the Exchange adopts listing fees. The proposed rule change is modeled closely after similar rules of other national securities exchanges<sup>12</sup> and does not raise any novel or significant regulatory issues. Therefore, the Commission designates the proposed rule change as operative upon filing.<sup>13</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:

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, as required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with 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 days prior to the filing of the proposed rule change.

<sup>12</sup> See, e.g., NSX Rule 15.9 and Securities Exchange Act Release No. 57448 (March 6, 2008), 73 FR 13597 (March 13, 2008) (SR-NSX-2008-05); ISE Rule 2101 and Securities Exchange Act Release No. 57387 (February 27, 2008), 73 FR 11965 (March 5, 2008) (SR-ISE-2007-99); BATS Rule 14.1 and Securities Exchange Act Release No. 58623 (September 23, 2008), 73 FR 57169 (October 1, 2008) (SR-BATS-2008-004).

<sup>13</sup> For purposes only of waiving the operative date of this proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

*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-2009-001 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-2009-001. 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 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-2009-001 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59266; File No. SR-NASDAQ-2008-016]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change To Create the Nasdaq Market Pathfinders Service and Establish Fees for the Service**

January 16, 2009.

**I. Introduction and Description of the Proposal**

On June 27, 2008, The NASDAQ Stock Market LLC ("Nasdaq") 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 that would establish the Nasdaq Market Pathfinders Service ("Service") and establish fees for the Service. The Service will allow subscribers to view a real time data product that tracks the aggregated market activity of certain market participants who are aggressively buying and/or selling. Nasdaq proposes to offer new subscribers a 30-day waiver of the user fees for the Service. After the conclusion of the waiver period, subscribers may avail themselves of three different subscription options at varying prices.

The proposed rule change was published in the **Federal Register** on July 17, 2008.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> Nasdaq responded to the comment letter on September 18, 2008.<sup>5</sup> The Commission is approving the proposed rule change.

**II. Summary of Comment Letter**

The commenter suggests that the Commission cannot approve the proposed rule change for the following reasons:

- Nasdaq is proposing to make commercial use of data supplied to it in Nasdaq's capacity as a regulatory body, despite the Commission's previous statement that, with regard

<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. 58145 (July 11, 2008), 73 FR 41143.

<sup>4</sup> See August 7, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), to Florence Harmon, Acting Secretary, Commission ("SIFMA Letter").

<sup>5</sup> See September 18, 2008 letter from Jeffrey S. Davis, Deputy General Counsel and Vice President, Nasdaq, to Florence Harmon, Acting Secretary, Commission ("Nasdaq Letter").

to OATS information, it does not believe such data should be used for non-regulatory purposes unless the data is made available to other market participants on the same terms under which it is provided to Nasdaq.<sup>6</sup>

- Nasdaq has failed to provide a detailed discussion of the data or analytics to be included in the Service. SIFMA stated that several firms have expressed concern with the proposal's potential to compromise the confidentiality of the transacting party's trading strategies or provide misinformation as to a transacting party.
- SIFMA questions whether the Service will provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, or whether the impact on such algorithms and strategies will be such as to render them useless.
- SIFMA also raised a procedural concern, stating that Nasdaq is proposing to create a proprietary product that uses data its members are required to submit without compensation; no other exchange or market data vendor can replicate this product because necessary elements are not available to anyone but Nasdaq; and no cost data is provided to allow an opportunity to determine if the fees are fair and reasonable.

**III. Nasdaq's Response to the Comment Letter**

In response to the SIFMA Letter, Nasdaq made the following points:

- SIFMA inaccurately claims that Nasdaq is collecting data in its capacity as a regulatory body and using it for commercial purposes, stating that the Service does not use OATS information, but instead relies on trade information sent directly and only from the Nasdaq Matching Engine.
- The Service will not operate in a manner that permits users to distinguish between short and long sales; the Service will not compromise the confidentiality of the transacting party's trading strategies, nor provide misinformation as to a transacting party because there are filters in place to prevent this from occurring.
- The Service will not provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, nor will it affect those

<sup>6</sup> SIFMA Letter at 2, quoting the Commission's order approving Nasdaq's exchange application. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131), in text following footnote 136.

<sup>14</sup> 17 CFR 200.30-3(a)(12).