

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

Because the 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 if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸

A proposed rule change filed under Rule 19b-4(f)(6)²⁹ normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),³⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may 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 as it will allow the Exchange to align its initial options listing standards with that of its affiliates, and the Exchange's proposal does not raise new issues. Accordingly, the Commission hereby waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing.³¹

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 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 email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2018-005 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-NASDAQ-2018-005. This file number should be included on the subject line if email 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-NASDAQ-2018-005, and should be submitted on or before February 20, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Eduardo A. Aleman,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82567; File No. SR-BX-2018-005]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fees at Rule 7023

January 23, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 18, 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 amend its fees at Rule 7023 to modify the fee schedule for BX TotalView to reflect substantial enhancements to this product since the current BX TotalView fees were set in 2010.

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.

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

³² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 Exchange has satisfied this requirement.

²⁹ 17 CFR 240.19b-4(f)(6).

³⁰ 17 CFR 240.19b-4(f)(6)(iii).

³¹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 proposes to adjust the fee schedule for BX TotalView to reflect substantial enhancements to this product since the current non-display usage fees and enterprise license fees were set in 2010.³ Specifically, the Exchange proposes to: (i) Introduce a monthly non-display usage⁴ fee of \$55 per Professional Subscriber⁵ for BX TotalView based upon Direct Access; and (ii) increase the monthly enterprise license fee for non-display usage of BX TotalView based upon Direct Access from \$16,000 to \$20,000.

BX TotalView

BX TotalView, like Nasdaq and PSX TotalView, is a real-time market data feed that provides access to every displayed quote and order at every price level in Nasdaq-, NYSE-, NYSE American-, NYSE Arca-, CBOE-, and IEX-listed securities. The product also provides anonymous interest and administrative messages relating to trading halts and symbol directory messages.⁶

BX TotalView is available for a monthly per Subscriber fee of \$20 for either display or non-display usage of Nasdaq issues, and an additional monthly per Subscriber fee of \$20 for NYSE and regional issues. A "Subscriber" is "any access that a distributor of the data entitlement package(s) provides to: (1) Access the

information in the data entitlement package(s); or (2) communicate with the distributor so as to cause the distributor to access the information in the data entitlement package(s)."⁷ The current monthly charges are based on the number of Subscribers, without regard to whether a Subscriber is used for non-display or display usage.

For firms that utilize BX TotalView internally for non-display purposes, the product may also be purchased through an enterprise license fee of \$16,000 per month for unlimited internal use of non-display data. This enterprise license, which provides an alternative to monthly per Subscriber fees, is designed to relieve firms with a large number of internal Subscribers from the administrative burden of identifying, tracking and reporting such Subscribers.

Proposed Changes

BX TotalView is one of a number of market information services offered by the Exchange. Such services are inextricably connected to trade execution: Market information services require trade orders to provide useful information, and investors utilize market information to make trading decisions. Over the seven years that have elapsed since the current fee schedule for non-display usage and enterprise licenses for BX TotalView were introduced,⁸ the Exchange has invested in an array of upgrades to both its trade execution and market information services, which have increased the value of these services overall, and BX TotalView in particular.⁹

The Exchange proposes to adjust its fee schedule for BX TotalView to reflect the value of the many investments improving the product, which include:

- *Glimpse Snapshot Facility*. In 2013, the Exchange substantially updated the Glimpse snapshot facility, which allows firms to obtain a snapshot of the order book at any point during the trading day. The service may be used to validate order book displays or to recover from data gaps during the trading day.¹⁰

- *Enhanced Data Feed*. In 2014, the Exchange enhanced the BX TotalView data feed by: (i) Converting to binary codes to make more efficient use of bandwidth and to provide greater

timestamp granularity; (ii) adding a symbol directory message to identify a security and its key characteristics; and (iii) adding the Market Wide Circuit Breaker ("MWCB") Decline Level message to inform recipients of the setting for MWCB breach points for the trading day, and an MWCB Status Level Message to inform data recipients when an MWCB has breached an established level.¹¹

- *Reg SHO Circuit breaker*. In 2010, the Exchange instituted a Regulation SHO restricted indicator message. This message is disseminated if the price of the security declines by 10 percent or more from the prior closing value during normal market hours.¹²

- *Geographic Diversity*. In 2015, all of the Nasdaq Exchanges moved their Disaster Recovery ("DR") center from Ashburn, Virginia, to Chicago, Illinois. As a result, customers can both receive market data and send orders through the Chicago facility, potentially reducing overall networking costs. Adding such geographic diversity helps protect the market in the event of a catastrophic event impacting the entire East Coast.¹³

- *Chicago "B" Feeds*. In 2017, all of the Nasdaq exchanges added a multicast IP address for proprietary equity and options data feeds in Chicago, allowing firms the choice of having additional redundancy to ensure data continuity.¹⁴

- *Extended Transmission Hours*. In 2014, the Exchange began to transmit data between 3:00 and 4:00 a.m. Eastern, approximately three hours earlier than previously, to provide customers with an opportunity to test connectivity before pre-market sessions open at 7:00 a.m. Eastern.¹⁵

This proposed fee change for BX TotalView differs from the corresponding fee change recently proposed for PSX TotalView¹⁶ in that: (i) The monthly non-display usage fee for Professional Subscribers is proposed to be \$50 for PSX TotalView, and \$55 for BX TotalView, and (ii) the proposed monthly enterprise license fee for non-display usage of PSX TotalView is \$17,000, while the corresponding fee proposal for BX TotalView is \$20,000.

¹¹ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2013-45> and <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2013-33>.

¹² See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2010-023>.

¹³ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2015-17>.

¹⁴ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2017-02>.

¹⁵ The extended schedule for data transmission did not extend pre-market trading hours. See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2014-08>.

¹⁶ See SR-PHLX-2018-10.

³ See Securities Exchange Act Release No. 62001 (April 29, 2010), 75 FR 25014 (May 6, 2010) (SR-BX-2010-027).

⁴ Non-Display usage is any method of accessing Exchange information that does not involve the display of such data on a screen or other mechanism designed for access or use by a natural person or persons. Non-Display usage applies to automated order generation and program trading, algorithmic trading and order routing, and back office processes such as surveillance, order verification, and risk management. See *Id.* (establishing a Non-Display usage cap for internal distributors of BX TotalView).

⁵ A "Subscriber" is any access that a distributor of data entitlement package(s) provides to: (1) Access the information in the data entitlement package(s); or (2) communicate with the distributor so as to cause the distributor to access the information in the data entitlement package(s). See BX Rule 7023(c).

⁶ Symbol directory messages include basic security data such as the market tier and Financial Status Indicator.

⁷ See Note 5.

⁸ See Securities Exchange Act Release No. 62001 (April 29, 2010), 75 FR 25014 (May 6, 2010) (SR-BX-2010-027).

⁹ Many of these upgrades are common to several Nasdaq-affiliated exchanges, as improvements to the products and services of one exchange are reproduced in other exchanges.

¹⁰ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2013-33>.

These differences are justified by differences in the usage of the two exchanges, as well as certain network investments that are unique to BX.

BX has approximately 25 percent more market participants than PSX, as measured by Market Participant Identifier (“MPID”). This greater number of market participants results in more trades: BX processed approximately twice the number of trading messages as PSX in 2017, and, as of February 2017, BX had nearly 5 times more add/remove liquidity than PSX. These differences in usage are reflected in significantly different growth rates: The peak one second transaction rate for BX increased by 78 percent between 2012 and 2017, while the same measure for PSX increased by only 20 percent over the same period.

BX also has invested in two network enhancements that are unique to that Exchange:

- *Price Improvement Indicator.* In 2014, the Exchange introduced a Price Improvement Indicator (“PII”) ¹⁷ message. The purpose of this indicator is to denote when a Retail Price Improvement order better than the best displayed bid and/or offer price for a given security is available.¹⁸
- *Additional Data Feed at Carteret.* In 2017, the Exchange added a new source IP address for the BX data feeds at its Carteret facility, providing additional redundancy to ensure data continuity.¹⁹

The proposed price increases are also justified by the fact that, while usage of the BX exchange increased and the Exchange invested in a number of enhancements to its data feed, fees for BX fell in real terms as a result of price inflation.²⁰ The proposed increase to the monthly non-display usage fee amounts to an annual increase of approximately 4.65 percent over the relevant period, and the proposed enterprise license fee increase translates to an annual increase of approximately 3.24 percent over the relevant period, both of which are partially offset by inflation.

As a result of these substantial upgrades, the Exchange proposes two substantive changes to the BX TotalView fee schedule: (i) Introduce a monthly non-display usage fee of \$55 per Subscriber based upon Direct

Access; and (ii) increase the monthly enterprise license fee for non-display usage based upon Direct Access from \$16,000 to \$20,000.²¹

The current fee structure allows firms to purchase BX TotalView for all issues for display or non-display usage by professionals for a per Subscriber monthly charge of \$40 (\$20 for Nasdaq issues and \$20 for NYSE and regional issues). The Exchange proposes to remove non-display usage based upon Direct Access from those fees, and institute a separate fee for non-display usage based upon Direct Access for all Nasdaq, NYSE and regional issues.²² Fees for non-professionals will not change. The effect of this proposal would be to leave the total fees for display usage and non-display usage not based upon Direct Access by professionals for all issues unchanged at \$40, but to increase the monthly fee to \$55 per month for non-display usage by professionals based upon Direct Access.²³ With this change, the pricing structure for BX TotalView will conform to the pricing structure for Nasdaq TotalView (which has differential fees for display and non-display usage),²⁴ the proposed pricing structure for PSX TotalView (proposed in a separate filing for the PSX Exchange),²⁵ as well as the non-display fee structure for NYSE and other exchanges.²⁶ As noted elsewhere, differential pricing for display and non-

²¹ In addition to these two substantive changes, the Exchange proposes four technical changes. First, the Exchange proposes to add the phrase “for display usage” to Rule 7023(a)(1) to distinguish between display usage fees, which shall remain unchanged, and non-display usage fees, which will increase. Second, the Exchange proposes to change the reference to per Subscriber fees in new Rule 7023(a)(3) from (a)(1) to (a)(2) because non-display fees have been moved from section (a)(1) to (a)(2) for Professionals that take the feed through Direct Access. Third, the Exchange proposes to renumber former Rules 7023(a)(2) and (a)(3) to Rules 7023(a)(3) and (a)(4), respectively, to reflect the introduction of new Rule 7023(a)(2). Fourth, the Exchange proposes to revise proposed Rule 7023(a)(4) (“Free-Trial Offers”) to reflect the new fee set forth in proposed Rule 7023(a)(2).

²² Any Subscriber within a firm that obtains Exchange data through a Subscriber from that same firm with Direct Access has obtained such data “based upon Direct Access.”

²³ “Direct Access” means a telecommunications interface with the Exchange for receiving Exchange data, or receiving an Exchange data feed within the Exchange co-location facility, or receiving Exchange data via an Extranet access provider or other such provider that is fee-liable under Rule 7025. See BX Rule 7019(c).

²⁴ See Nasdaq Rule 7023(b)(2).

²⁵ See SR–PHLX–2018–10. BX fees are higher than PSX fees because of differences in usage between the two exchanges, as well as differences in infrastructure investments, as described above.

²⁶ See, e.g., NYSE PDP Market Data Pricing (November 3, 2017), found at https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Pricing.pdf.

display usage has become the industry norm.

The second proposal will increase the monthly enterprise license fee for internal non-display usage based upon Direct Access from \$16,000 to \$20,000.

BX TotalView is optional in that the Exchange is not required to offer it and broker-dealers are not required to purchase it. Firms can discontinue use at any time and for any reason, including an assessment of the fees charged.

The proposed change does not change the cost of any other Exchange product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among 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.”²⁹

Likewise, in *NetCoalition v. Securities and Exchange Commission*³⁰ (“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.³¹ 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.”³²

Further, “[n]o one disputes that competition for order flow is ‘fierce.’

²⁷ 15 U.S.C. 78f(b).

²⁸ 15 U.S.C. 78f(b)(4) and (5).

²⁹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

³⁰ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

³¹ See *NetCoalition*, at 534–535.

³² *Id.* at 537.

¹⁷ See Securities Exchange Act Release No. 73410 (October 23, 2014), 79 FR 64447 (October 29, 2014) (SR–BX–2014–048).

¹⁸ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2014-18>.

¹⁹ See <http://www.nasdaqtrader.com/TraderNews.aspx?id=dtm2017-16>.

²⁰ The Consumer Price Index indicates a price increase of approximately 13 percent between April 2010 and November 2017. See https://www.bls.gov/data/inflation_calculator.htm.

. . . 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 of order flow from broker dealers’. . . .”³³

The Exchange believes that the proposed fee changes are equitable allocations of reasonable dues, fees and other charges in accordance with Section 6(b)(4) of the Act, and not designed to permit unfair discrimination between customers, issuers, brokers, or dealers in accordance with Section 6(b)(5) of the Act. Both the monthly non-display per Subscriber usage fee and the monthly enterprise license fee for non-display usage are equitable allocations because, as has been widely recognized, display and non-display functions provide different value to the consumer, and it has become standard industry practice to charge differing fees for these two different modes of data consumption. In addition, discounts based on high levels of usage such as the enterprise license for non-display usage have routinely been adopted by exchanges and approved as equitable allocations of reasonable dues, fees and other charges.³⁴ As such, the proposed fees vary solely based on reasonable and well-established industry norms regarding types of data usage, as discussed above.

The proposed changes do not permit unfair discrimination between customers, issuers, brokers, or dealers because the Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly-situated recipients. The proposed fees are structured in a manner comparable to the corresponding fees of Nasdaq already in effect, and compare favorably to fees charged by Nasdaq for the same product. The fees are uniform except with respect to reasonable and well-established distinctions among classes of data as discussed above.

The Exchange also distinguishes between usage based on Direct Access and other methods of connection: Non-display usage that is based upon Direct

Access will be charged \$55 per month, while other non-display usage will be charged a total of \$40 per month for all issues. This distinction is an equitable allocation of reasonable dues, fees and other charges because Direct Access provides the customer with source information in the original raw format, which provides customers with certainty that they are receiving data without conflation or manipulation. This distinction does not permit unfair discrimination between customers, issuers, brokers, or dealers because the price differential is based on the difference in value to the customer.

In addition, the Exchange proposes to introduce clarifying language stating that the enterprise license for non-display data will be available only to firms with Direct Access. This is an equitable allocation of reasonable dues, fees and other charges because firms with sufficient activity to purchase an enterprise license have a Direct Access connection. As such, the proposed language simply clarifies how the enterprise license will be used with respect to Direct Access, in a similar manner to the way that Direct Access is addressed in proposed Rules 7023(a)(1) and (a)(2), without affecting the service of any specific customer. This proposed change does not permit unfair discrimination between customers, issuers, brokers, or dealers for the same reason: The proposed language is simply a clarification that will not lead to any actual difference in usage.

The Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. As the Commission has recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”³⁵ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁶ The proposed fees, like all market data fees, are constrained by the Exchange’s need to compete for order flow as discussed below, and are subject to competition from other exchanges and among broker-dealers for customers. If the Exchange is incorrect in its assessment of price, it may lose market share as a result.

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 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.

BX TotalView is a type of depth-of-book product, which consists of “outstanding limit orders to buy stock at prices lower than, or to sell stocks at prices higher than, the best prices on each exchange.”³⁷ The question of whether the prices of depth-of-book products are constrained by competitive forces was examined in 2016 by an Administrative Law Judge in an application for review by the Securities Industry and Financial Markets Association of actions taken by Self-Regulatory Organizations.³⁸ After a four-day hearing and presentation of substantial evidence, the administrative law judge stated that “competition plays a significant role in restraining exchange pricing of depth-of-book products”³⁹ because “depth-of-book products from different exchanges function as substitutes for each other,”⁴⁰ and, as such, “the threat of substitution from depth-of-book customers constrains their depth-of-book prices.”⁴¹ As a result, “[s]hifts in order flow and threats of shifting order flow provide a significant competitive force in the

³³ *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)).

³⁴ For example, the Commission has approved pricing discounts for market data under Nasdaq Rule 7023.

³⁵ Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

³⁶ *Id.*

³⁷ *Securities Industry and Financial Markets Association*, Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 at 4 (A.L.J. June 1, 2016) (quoting *NetCoalition v. SEC*, 615F3d 525, 529–30 (D.C. Cir. 2010)).

³⁸ *Id.*

³⁹ *Id.* at 92.

⁴⁰ *Id.*

⁴¹ *Id.* at 93.

pricing of . . . depth-of-book data.”⁴² The judge concluded that “[u]nder the standards articulated by the Commission and D.C. Circuit, the Exchanges have shown that they are subject to significant competitive forces in setting fees for depth-of-book data: The availability of alternatives to the Exchanges’ depth-of-book products, and the Exchanges’ need to attract order flow from market participants constrains prices.”⁴³

The proposed changes will: (i) Introduce a monthly non-display usage fee of \$55 per Subscriber for BX TotalView based upon Direct Access; and (ii) increase the monthly enterprise license fee for non-display usage of BX TotalView based upon Direct Access from \$16,000 to \$20,000. These proposed price changes will not impose any burden on competition because market data fees are but one aspect of the overall competition among exchanges to solicit order flow; if the overall price of interacting with the Exchange rises above competitive levels because of market data fees, market forces would cause the Exchange to lose market share.

Market forces constrain fees for BX TotalView, as well as other market data fees, in the competition among exchanges and other entities to attract order flow and in the competition among Distributors for customers. Order flow is the “life blood” of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers (“BDs”) and various forms of alternative trading systems (“ATSs”), including dark pools and electronic communication networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, REDIBook, Attain, TracECN, BATS Trading and BATS/

Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE American, NYSE Arca, CBOE, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and proprietary data are inextricably linked: A trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with BX and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products. In this manner, the competition for order flow will constrain prices for proprietary data products.

Competition among Distributors provides another form of price discipline for proprietary data products. If the price of BX TotalView were set above competitive levels, Distributors purchasing BX TotalView would be at a disadvantage relative to their competitors, and would therefore either curtail their purchase or forego the product altogether.

Market forces constrain the price of depth-of-book data such as BX TotalView through the competition for order flow and in the competition among vendors for customers. If the changes proposed herein are 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 changes 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.⁴⁴

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, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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- Send an email to rule-comments@sec.gov. Please include File Number SR–BX–2018–005 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–2018–005. This file number should be included on the subject line if email 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

⁴² *Id.* at 104.

⁴³ *Id.* at 86.

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2018-005 and should be submitted on or before February 20, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

Eduardo A. Aleman,
Assistant Secretary.

[FR Doc. 2018-01534 Filed 1-26-18; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32974; 812-14847]

Salt Financial, LLC, et al.

January 23, 2018.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(f) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies ("Funds") to issue shares

redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value ("NAV"); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds ("Funds of Funds") to acquire shares of the Funds.

APPLICANTS: Salt Financial, LLC (the "Initial Adviser"), a Delaware limited liability company that is to be registered as an investment adviser under the Investment Advisers Act of 1940, ETF Series Solutions (the "Trust"), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Quasar Distributors, LLC (the "Distributor"), a Delaware limited liability company and broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act").

FILING DATE: The application was filed on November 29, 2017.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 20, 2018 and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090; Applicants: Salt Financial, LLC, 79 Madison Avenue, 8th Floor, New York, New York 10016; ETF Series Solutions, 615 East Michigan Street, Milwaukee, Wisconsin 53202; Quasar Distributors, LLC, 777 East Wisconsin Avenue, 6th Floor, Milwaukee, Wisconsin 53202.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551-6990, or Robert H. Shapiro, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as index exchange traded funds ("ETFs").¹ Fund shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an "Authorized Participant", which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond generally to the performance of an Underlying Index. In the case of Self-Indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act ("Affiliated Person"), or an affiliated person of an Affiliated Person ("Second-Tier Affiliate"), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.²

¹ Applicants request that the order apply to Salt Financial US Large Cap Magnified Exposure ETF, a new series of the Trust, and any additional series of the Trust and any other open-end management investment company or series thereof (each, included in the term "Fund"), each of which will operate as an ETF and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an "Underlying Index"). Each Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser or its successor (each, an "Adviser") and (b) comply with the terms and conditions of the application. For purposes of the requested Order, "successor" is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

² Each Self-Indexing Fund will post on its website the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing