

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * <input type="text" value="40"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - <input type="text" value="2018"/> - * <input type="text" value="005"/>	Amendment No. (req. for Amendments *) <input type="text"/>
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Filing by NASDAQ BX, Inc.
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	<input type="checkbox"/> 19b-4(f)(6)
			<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposal to modify the fee schedule for BX TotalView to reflect substantial enhancements to the product.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * <input type="text" value="Daniel"/>	Last Name * <input type="text" value="Cantu"/>
Title * <input type="text" value="Associate General Counsel"/>	
E-mail * <input type="text" value="Daniel.Cantu@nasdaq.com"/>	
Telephone * <input type="text" value="(301) 978-8469"/>	Fax <input type="text"/>

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title *)

Date <input type="text" value="01/18/2018"/>	Executive Vice President and General Counsel
By <input type="text" value="Edward S. Knight"/>	<input type="text"/>
(Name *)	<input type="text" value="edward.knight@nasdaq.com"/>

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq BX, Inc. (“BX” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal 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. Specifically, the Exchange proposes to: (i) introduce a monthly non-display usage fee of \$55 per Professional Subscriber for BX TotalView based upon Direct Access; and (ii) increase the monthly enterprise license fee for non-display usage of BX TotalView from \$16,000 to \$20,000 based upon Direct Access. The proposal is described in further detail below.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”) on September 19, 2017. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Daniel A. Cantu
Associate General Counsel
Nasdaq, Inc.
(301) 978-8469

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

a. 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-,

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).

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

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

⁷ See Note 5.

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

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>

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

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>

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. 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:

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.

- 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

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

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-

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).

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-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.

b. 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

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.

²⁷ 15 U.S.C. 78f(b).

²⁸ 15 U.S.C. 78f(b)(4) and (5).

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 Commission³⁰ (“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.’ . . . 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

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.

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.

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.

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.

4. 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

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

³⁶ Id.

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 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

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.

⁴² Id. at 104.

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 (“ATs”), 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

⁴³ Id. at 86.

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.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,⁴⁴ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-BX-2018-005)

January __, 2018

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to amend its fees at Rule 7023.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The 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

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).

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

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

⁷ See Note 5.

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

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>

- 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

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>

- 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. 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

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.

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.

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 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

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

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-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

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.

²⁷ 15 U.S.C. 78f(b).

²⁸ 15 U.S.C. 78f(b)(4) and (5).

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 Commission³⁰ (“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.’ . . . 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

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.

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

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.

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

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

³⁶ Id.

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 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

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.

⁴² Id. at 104.

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 (“ATs”), 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

⁴³ Id. at 86.

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.

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. 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.

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-BX-2018-005. 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 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; 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-2018-005 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.⁴⁵

Eduardo A. Aleman
Assistant Secretary

⁴⁵ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

Rules of Nasdaq BX

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7023. BX TotalView**(a) BX TotalView Entitlement**

The BX TotalView entitlement allows a subscriber to see all individual Nasdaq BX Equities System participant orders and quotes displayed in the system, the aggregate size of such orders and quotes at each price level, and the trade data for executions that occur within the Nasdaq BX Equities System.

(1) Except as provided elsewhere in this rule, for the BX TotalView entitlement there shall be a \$20 monthly charge for each Subscriber of BX TotalView for Nasdaq issues and a \$20 monthly charge for each Subscriber of BX TotalView for NYSE and regional issues for display usage or non-display usage not based upon Direct Access.

(2) Distributors shall pay a monthly fee of \$55 for each Professional Subscriber for non-display usage of BX TotalView for all issues based upon Direct Access.

(3)[(2)] As an alternative to (a)(2)[1]), a market participant may purchase an enterprise license at a rate of \$20,000[16,000] per month for internal use of non-display data, based upon Direct Access. The enterprise license entitles a distributor to provide BX TotalView to an unlimited number of non-display devices within its firm.

(4)[(3)] Free-Trial Offers

(A) – (B) No change.

For the period of any waiver, the BX TotalView fees of \$20 or \$55 per Subscriber per month, as applicable, shall be waived.

(b) – (c) No change.

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