

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65330; File No. SR-BX-2011-046)

September 13, 2011

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the BOX Fee Schedule with Respect to Credits and Fees for Transactions in the BOX Price Improvement Period

I. Introduction

On July 15, 2011, NASDAQ OMX BX, Inc. (the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Fee Schedule of the Boston Options Exchange Group, LLC (“BOX”) to increase the credits and fees for certain transactions in the BOX Price Improvement Period (“PIP”).³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ Notice of filing of the proposed rule change was published in the Federal Register on August 3, 2011.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The PIP is a mechanism in which a BOX Options Participant submits an agency order on behalf of a customer for price improvement, paired with a contra-order guaranteeing execution of the agency order at or better than the National Best Bid or Offer (“NBBO”). The contra-order could be for the account of the Options Participant, or an order solicited from someone else. The agency order is exposed for a one-second auction in which other BOX Options Participants may submit competing interest at the same price or better. The initiating BOX Options Participant is guaranteed 40% of the order (after public customers) at the final price for the PIP order, assuming it is at the best price. See Chapter V, Section 18 of the BOX Rules.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ See Securities Exchange Act Release No. 64981 (July 28, 2011) 76 FR 46858 (“Notice”).

Under Section 19(b)(3)(C) of the Act, the Commission is (1) hereby temporarily suspending File No. SR-BX-2011-046, and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-BX-2011-046.

II. Summary of the Proposed Rule Change

The Exchange proposes to increase the credits and fees for certain transactions in the PIP by modifying Section 7d of the BOX Fee Schedule. Specifically, the Exchange proposes to: (1) increase both the credits and the fees for PIP transactions in classes that are not subject to the Penny Pilot (“Non-Penny classes”) from \$0.30 to \$0.75 per contract; and (2) increase both the credits and the fees for PIP transactions in Penny Pilot classes where the trade price is equal to or greater than \$3.00 per contract (other than in QQQQ, SPY, and IWM) from \$0.30 to \$0.75 per contract. The credits and the fees for PIP transactions in QQQQ, SPY, and IWM and in all other Penny Pilot classes where the trade price is less than \$3.00 per contract will remain at \$0.30 per contract. The credits are paid by the Exchange on the agency order that is submitted to the PIP auction on behalf of a customer. The fees are charged by the Exchange to the order that is executed against the agency order, whether such order is a paired order submitted by the BOX Options Participant that also submitted the agency order or an order submitted by another BOX Options Participant in response to the PIP auction. The credits and fees are in addition to any applicable trading fees, as described in Sections 1 through 3 of the BOX Fee Schedule.⁶

⁶ Sections 1 through 3 of the Box Fee Schedule include a \$0.25 per contract transaction fee for contracts traded in the PIP. Depending on its average daily volume (“ADV”), a Participant who initiates PIP auctions may be charged a lower per contract fee. See Section 7d. of the Box Fee Schedule. See also infra note 9.

III. Suspension of SR-BX-2011-046

Pursuant to Section 19(b)(3)(C) of the Act,⁷ at any time within 60 days of the date of filing a proposed rule change pursuant to Section 19(b)(1) of the Act,⁸ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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.

The Commission believes it is appropriate to evaluate the effect of the proposed rule change on competition among different types of market participants and on market quality, particularly with respect to the net fee differential that it would place on BOX Options Participants that respond to a PIP auction (“PIP Responders”) compared to a BOX Options Participant that initiated the PIP auction (“PIP Initiator”). Under the proposed rule change, the Exchange would charge both the PIP Initiator and the PIP Responder the same fee for executing an order in the PIP. However, if the PIP Initiator also submits the agency order into the PIP, the PIP Initiator receives the rebate paid to the agency order that is auctioned in the PIP. As a result, if the fee the PIP Initiator pays is aggregated with the rebate the PIP Initiator receives for the agency order (i.e., a “net” fee), the PIP Initiator would pay a lower net fee compared to PIP Responders. For example, under the proposal, a PIP Initiator that executes 100% of the PIP Order in a Non-Penny class would be charged a \$0.10 per contract base transaction fee (at the highest volume tier)⁹ plus a liquidity provider fee of \$0.75 per contract, and would receive a

⁷ 15 U.S.C. 78s(b)(3)(C).

⁸ 15 U.S.C. 78s(b)(1).

⁹ See Section 7d. of the BOX Fee Schedule. Section 7d. includes a tiered fee schedule that is assessed on PIP Initiators based on each PIP Initiator ADV for executions in the PIP. This charge ranges from \$0.10 per contract for a PIP Initiator with an ADV of 150,001 or

credit for removing liquidity of \$0.75 for the agency order. This results in a net fee of \$0.10 per contract to a PIP Initiator who executes 100% of its customer's order. In contrast, a PIP Responder in a Non-Penny class would be charged a \$0.25 per contract base transaction fee plus the liquidity provider fee of \$0.75 per contract, for a net fee of \$1.00 per contract. Comparing the net fees charged to PIP Initiators to those charged to PIP Responders, the largest potential disparity is \$0.90 per contract.

In its filing, the Exchange notes its belief that the changes to the PIP transaction fees and credits are “competitive, fair and reasonable, and non-discriminatory in that they apply to all categories of participants and across all account types.”¹⁰ The Exchange further argues that the proposed fee change is reasonable because it “is fair and reasonable as applied only to the specified classes and transactions because such options trade at minimum increments of \$0.05 or \$0.10, providing greater opportunity for market participants to offer additional price improvement.”¹¹ In addition, the Exchange noted that it believes the proposed “credit will attract additional order flow to BOX and to the PIP in particular, to the benefit of all market participants.”¹² The Exchange also stated that the proposal “will allow the fees charged on BOX to remain competitive with other exchanges as well as apply such fees in a manner which is equitable among all BOX Participants.”¹³

greater contracts to \$0.25 per contract for a PIP Initiator with an ADV of less than 20,001 contracts.

¹⁰ See Notice, supra note 5, at 46858.

¹¹ See id. at 46859.

¹² See id.

¹³ See id.

To date, the Commission has received four comment letters on the Exchange's proposed rule change.¹⁴ Three commenters recommend that the Commission temporarily suspend SR-BX-2011-046 and institute proceedings to disapprove the filing.¹⁵ The fourth commenter supports the Exchange's proposed rule change and urges the Commission not to institute proceedings to disapprove the filing.¹⁶ The Commission also has received a letter from the Exchange responding to the comments received.¹⁷

Citadel argues that the magnitude of the disparity between the fees an initiator pays and the fees a competitive responder pays, on a net basis, make it "economically prohibitive for anyone other than the initiator to respond" to a PIP auction. Citadel also provides statistics suggesting that increases to the BOX PIP fees¹⁸ are "reducing price improvement opportunities for customers and turning the PIP and BOX into an NBBO internalization engine."¹⁹ Based on

¹⁴ See letters to Elizabeth Murphy, Secretary, Commission, from John C. Nagel, Managing Director and General Counsel, Citadel Securities LLC ("Citadel"), dated August 12, 2011 ("Citadel Letter"); Andrew Stevens, Legal Counsel, IMC Financial Markets ("IMC"), dated August 15, 2011 ("IMC Letter"); Michael J. Simon, Secretary, International Securities Exchange ("ISE"), dated August 22, 2011 ("ISE Letter"), and Christopher Nagy, Managing Director Order Strategy, TD Ameritrade, Inc. ("TD Ameritrade"), dated September 12, 2011 ("TD Ameritrade Letter").

¹⁵ See Citadel Letter, supra note 14, at 4; IMC Letter, supra note 14, at 4; and ISE Letter, supra note 14, at 5.

¹⁶ See TD Ameritrade Letter, supra note 14, at 2.

¹⁷ See letter to Elizabeth Murphy, Secretary, Commission, from Anthony D. McCormick, Chief Executive Officer, Boston Options Exchange, dated September 9, 2011 ("BOX Letter").

¹⁸ See Securities Exchange Act Release Nos. 62632 (August 3, 2010), 75 FR 47869 (August 9, 2010) (SR-BX-2010-049) (instituting the PIP pricing structure) and 64198 (April 6, 2011), 76 FR 20426 (April 12, 2011) (SR-BX-2011-020) (increasing the fee and credit).

¹⁹ See Citadel Letter, supra note 14, at 3. Citadel's statistics show that, since February 2011, the average price improvement per contract and average percentage of contracts price improved in PIP auctions has declined every month. See id. at 3.

its analysis, Citadel argues that the fees proposed by SR-BX-2011-046 are “solely structured to benefit on group of BOX participants over another,” and thus are discriminatory and an undue burden on competition.²⁰

IMC also notes its belief that the BOX PIP fee structure unduly burdens competition and unreasonably discriminates amongst participants.²¹ It argues that the increase in fees is borne solely by PIP competitive responders and “will deter anyone other than the initiator from providing liquidity via the PIP.”²² IMC believes that “the BOX has thus erected an unreasonable barrier to participation, effectively barring certain participants from competing with PIP initiators.”²³ IMC believes that BOX’s fee structure is designed to reduce competition and increase internalization in the PIP, which in turn results in “reduced opportunities for meaningful price improvement.”²⁴

ISE challenges BOX’s assertion that the fees proposed in SR-BX-2011-046 have a uniform application across all members, noting that the differential fees between PIP Initiators and competitive responders is between \$0.75 and \$0.90 per contract.²⁵ ISE also argues that SR-BX-2011-046 is deficient in that it fails to: provide an adequate basis to determine that the proposed rule change is consistent with the Act because it does not address the pricing differential for participants who seek to compete with a PIP Initiator, discuss the burden on

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Id.

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See IMC Letter, supra note 14, at 1-2.

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See IMC Letter, supra note 14, at 2.

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See id.

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See IMC Letter, supra note 14, at 3.

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See ISE Letter, supra note 14, at 1.

competition imposed by the pricing structure, or provide support for its assertion that the fee change will allow it to compete with other exchanges.²⁶

TD Ameritrade applauds the proposed rule change, noting that it has already seen significant benefits to its retail investors.²⁷ TD Ameritrade notes that its clients received over \$600,000 in price improvement over the NBBO on BOX in August 2011 and believes that its customer experience on the BOX strongly indicates that healthy and robust competition exists within the PIP.²⁸ TD Ameritrade states that the BOX fee structure provides incentives for market participants to submit customer order flow to BOX and thus, continues to create a greater opportunity for retail customers to receive additional price improvement.²⁹

In its response letter, BOX argues that its market model and fee structure are intended to benefit retail customers.³⁰ BOX responds to the assertions that the fee structure is discriminatory and impedes competition by providing PIP statistics showing that the retention rate (the amount of an agency order allocated to a PIP Initiator) in nickel classes in July 2011 was approximately 38%.³¹ BOX notes that this retention rate is lower than the 40% guarantee permitted to be allocated to an initiating participant and states that this statistic indicates “definitive competition

²⁶ See ISE Letter, supra note 14, at 5.

²⁷ See TD Ameritrade Letter, supra note 14, at 1.

²⁸ See id.

²⁹ See id. TD Ameritrade suggests that the Commission should recognize that price improvement opportunities in the options markets are not transparent and easy to compare from exchange to exchange and notes its belief that there should be more order execution information transparency in the options markets. See TD Ameritrade Letter, supra note 14, at 2.

³⁰ See BOX Letter, supra note 17, at 2.

³¹ See BOX Letter, supra note 17, at 1.

within the PIP.”³² It also notes that average price improvement per contract in PIP transactions increased from \$0.0062 in July 2011 to \$0.0087 in August 2011, in part as a result of the proposed rule change.³³ BOX responds to the assertion that Initiating Participant can offset any fee with a credit by stating that “most PIP transactions are initiated by a market maker acting independently of a Participant acting as agent for a customer order.”³⁴ Further BOX states that its fee structure in the PIP is more transparent than payment for order flow (“PFOF”) arrangements and notes its belief that the credit to remove liquidity on BOX is generally less than what firms receive through PFOF.³⁵ BOX states that since the PIP began operating in 2004, customers have received more than \$355 million in savings through better executions on BOX, including \$7.3 million in August 2011, and states its belief that the proposal is consistent with the public interest, and with the Exchange Act.³⁶

The Commission intends to assess whether the potential resulting fee disparity between PIP Initiators and PIP Responders (as high as \$0.90 per contract) is consistent with the statutory requirements applicable to a national securities exchange under the Act, as described below. In particular, the Commission will assess whether the proposal satisfies the standards under the Exchange Act and the rules thereunder requiring, among other things, that exchange rules: provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers,

³² See id.

³³ See id.

³⁴ BOX Letter, supra note 17, at 1.

³⁵ See BOX Letter, supra note 17, at 2.

³⁶ See id.

issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.

IV. Proceedings to Determine Whether to Approve or Disapprove SR-BX-2011-046

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)³⁷ and 19(b)(2) of the Act³⁸ to determine whether the Exchange's proposed rule change should be approved or disapproved. Pursuant to Section 19(b)(2)(B) of the Act,³⁹ the Commission is providing notice of the grounds for disapproval under consideration. As discussed above, under the proposal, the PIP Initiator could pay a lower net fee compared to PIP Responders. The Exchange Act and the rules thereunder require that exchange rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; that exchange rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and that exchange rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission

³⁷ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

³⁸ 15 U.S.C. 78s(b)(2).

³⁹ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. Id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. Id.

intends to assess whether BOX’s proposal is consistent with these and other Exchange Act standards.

The Commission believes it is appropriate in the public interest to institute disapproval proceedings at this time in view of the significant legal and policy issues raised by the proposal. Institution of disapproval proceedings does not indicate, however, that the Commission has reached any conclusions with respect to the issues involved. The sections of the Act and the rules thereunder that are applicable to the proposed rule change include:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”⁴⁰
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”⁴¹ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”⁴²

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 45 days from date of publication in the Federal Register]. Rebuttal comments should

⁴⁰ 15 U.S.C. 78f(b)(4).

⁴¹ 15 U.S.C. 78f(b)(5).

⁴² 15 U.S.C. 78f(b)(8).

be submitted by [insert date 60 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁴³

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. For example, the Commission seeks comment and specific data on the following:

- Whether, as stated by commenters, the fee structure in the PIP and this proposed fee change, in particular, have impacted or will impact incentives to compete in the PIP and, if so, how specifically have or will the fee structure in the PIP and this proposed fee change impacted incentives to compete;
- Whether the proposed fee change will affect the quality of execution of customer orders in the PIP or the broader market quality, such as quoted spreads or overall execution quality; and if so, how and what type of impact will this have;
- Whether the proposed fee change and PIP fee structure reduce the benefits of exposing an order⁴⁴ and thus potentially create a de facto internalization mechanism; and if so,

⁴³ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding -- either oral or notice and opportunity for written comments -- is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

⁴⁴ The Commission has recognized the benefits of exposure to the market, noting in the context of facilitation mechanisms that an "auction [in which an order is exposed to the market] provides some assurance that the customer's order is executed at the best price

whether, and if so, how, this will adversely impact overall market quality and customer execution quality and whether a de facto internalization mechanism should be of concern to the Commission;

- Whether the proposed fee change, by facilitating internalization of orders on BOX, could or would lead to a shift of order flow from other exchanges and, if so, what is the nature and volume of such order flow and what is the extent to which such order flow currently receives price improvement at the other exchanges or is executed at prices that merely match the NBBO;
- Whether BOX's other fees, specifically the fee to add liquidity to the BOX book,⁴⁵ have an impact on the application or effects of this proposed fee change, and if so, how and what the impact is or will be;
- Whether the filing for SR-BX-2011-046 was sufficient under Section 19(b) of the Act to address issues regarding the effects of the proposed fee change on competition in the PIP;
- Whether the PIP fees, either on a net basis or otherwise, are comparable to any fees or charges on other exchanges, including any PFOF fees and rebates, and, if so, how;

any member in that market is willing to offer.” Competitive Developments in the Options Markets, Securities Exchange Act Release No. 49175, 69 FR 6124 (February 9, 2004), at 6130. The Commission also noted that “[r]ules or practices that permit or encourage internalization may also reduce intramarket price competition and, therefore, cause spreads to widen.” *Id.*

⁴⁵ As of September 1, 2011, BOX charges a \$0.65 fee for adding liquidity in the Non-Penny classes and a \$0.22 fee for adding liquidity in the Penny Pilot classes. See Section 7a. of the BOX Fee Schedule, available at www.bostonoptions.com/pdf/BOX_Fee_Schedule.pdf.

- Whether credits paid on the agency order that is submitted to the PIP auction on behalf of a customer are passed on to the customer or retained by the PIP Initiator and, if passed on, in what form; and
- Whether the Commission should evaluate all fees and all rebates (including PFOF fees and rebates) at all exchanges on a net or aggregate basis to assess their effects on competition or to otherwise assess their consistency with the Exchange Act.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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-2011-046 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2011-046. The 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 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-BX-2011-046 and should be submitted on or before [insert date 45 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 60 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁴⁶ that File No. SR-BX-2011-046, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷

Elizabeth M. Murphy
Secretary

⁴⁶ 15 U.S.C. 78s(b)(3)(C).

⁴⁷ 17 CFR 200.30-3(a)(57) and (58).