

Washington, DC 20549-0609. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR-BSE-2003-04 and should be submitted by February 10, 2004.

## V. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>75</sup> that the proposed rule change (File No. SR-BSE-2003-04), as amended by Amendment No. 1, be, and hereby is, approved, and Amendment No. 2 and Amendment No. 3 are approved on an accelerated basis.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49066; File No. SR-BSE-2003-17]

### Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change Establishing Fees for the Boston Options Exchange Facility and Approving the Portion of the Proposed Rule Change Relating to Linkage Fees on a Pilot Basis Until January 31, 2004

January 13, 2004.

## I. Introduction

On November 14, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change that would establish fees for the Exchange's options trading facility, Boston Options Exchange ("BOX").<sup>3</sup> On November 20, 2003, the Exchange's rule proposal was published for comment in the **Federal Register**.<sup>4</sup> No comment

<sup>75</sup> Exchange Act Section 19(b)(2), 15 U.S.C. 78s(b)(2).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 49066 (January 13, 2004).

<sup>4</sup> See Securities Exchange Act Release No. 48787 (November 14, 2003), 68 FR 65477 (November 20, 2003).

letters were received on the proposal. This order approves the proposed rule change and approves the portion of the proposed rule change relating to linkage fees on a pilot basis until January 31, 2004.

## II. Description of Proposal

In conjunction with its proposal to operate a new options facility—BOX—the BSE proposes a fee schedule relating to the BOX market.

### A. BOX Trading Fees

The BSE proposes to establish trading fees related to the BOX market. The fees would apply to Public Customers,<sup>5</sup> broker-dealers, and Market Makers.<sup>6</sup>

#### 1. Per Contract Fees

Executions of Public Customer orders would not be subject to a trading fee. Executions of orders for broker-dealer proprietary accounts and BOX Market Maker accounts would be charged a \$0.20 per contract trade execution fee, or a \$0.40 per contract fee for trades against an order that BOX's automatic trading system ("Trading Host") filters to prevent trading through the NBBO, pursuant to the NBBO filter procedures set forth in Chapter V, Section 16(b) of the BOX Rules. The BSE proposes to assess the \$0.40 per contract fee to Market Makers as an incentive for Market Makers to post competitive quotations, and to broker-dealers for the cost of providing a service that is not available to broker-dealers on other exchanges. In addition, executions on behalf of broker-dealer proprietary accounts and BOX Market Maker accounts would be charged any passed-through licensing fees for Exchange Traded Funds ("ETFs"), if applicable. At BOX's launch, the only applicable surcharge on ETFs would be a \$0.10 per contract fee for options on the Nasdaq 100 ("QQQ").

#### 2. Alternative Trading Fees: BOX Minimum Activity Charge

The pricing model proposed for Market Makers includes a Minimum Activity Charge ("MAC") for each class to which a Market Maker is appointed. The MAC would vary depending on the total trading volume across all options exchanges, as determined by the Options Clearing Corporation ("OCC") clearing data,<sup>7</sup> in a particular class, and

would be equal to approximately \$0.20 times the number of contracts equaling 1% of the total industry-wide volume. As noted above, the per contract trading fee for a Market Maker is \$0.20 per contract. If the total per contract trading fees for a Market Maker in a given month do not exceed the total MAC for all classes for which that Market Maker holds appointments, that Market Maker would be charged the total MAC, rather than the trading fee. Thus, if a Market Maker's monthly trading activity is low, the MAC may be applicable. If, however, a Market Maker's total trading fees exceed the MAC, the Market Maker would pay the trading fees.

The MAC would not be applied during the first three calendar months following BOX's launch. Subsequently, the MAC would be "indexed" to BOX's overall market share as determined by OCC clearing volumes. Specifically, at the beginning of each calendar month, BOX would calculate its market share for the previous month (market share equals the total BOX traded volume divided by the total OCC cleared volume for the classes that BOX has listed). If BOX's overall market share is less than 10%, BOX would reduce the MAC applicable to each Market Maker as follows: (1) If BOX's market share were less than 5%, the MAC would be 33.3% of the full MAC; and (2) if BOX's market share were between 5% and 10%, the MAC would be 66.7% of the full MAC.

#### 3. Volume Discounts

The Exchange would provide certain volume discounts if a Market Maker's average daily volume in a given month exceeds certain thresholds.

### B. Other Fees

#### 1. InterMarket Linkage

The Exchange is proposing on a pilot basis, until January 31, 2004,<sup>8</sup> fees for trades executed via the InterMarket Linkage ("Linkage"). These Linkage fees include charges to Options Participants, such as a \$0.40 per contract charge for a trade in the BOX market, that is

listed by BOX would be divided into six classes, based on the total trading volume of each class across all U.S. options exchanges as determined by OCC data. The classifications would be adjusted at least twice annually (in January and July, based on the average daily volume for the preceding six month period). If exceptional events or news occur in a given class, the Exchange may review the MAC level for that class at anytime. The BSE would file a proposed rule change with the Commission regarding any changes to its fees, including the MAC, pursuant to section 19 of the Act. 15 U.S.C. 78s.

<sup>8</sup> If the BSE seeks to extend the pilot period for the effectiveness of these fees, the BSE would file a proposed rule change pursuant to Section 19(b) of the Act. 15 U.S.C. 78s(b).

<sup>5</sup> A Public Customer is a person that is not a broker or dealer in securities. See BOX Rules, Chapter I, Sec. 1(a)(50).

<sup>6</sup> A Market Maker registered with the Exchange is vested with the rights and responsibilities specified in Chapter VI of the BOX Rules.

<sup>7</sup> For purposes of determining the MAC for each options class listed by BOX, the options classes

triggered by an away market's satisfaction request,<sup>9</sup> as well as a \$0.20 per contract charge levied on away markets for inbound Principal ("P") and Principal as Agent ("PA") orders. This charge to an away market would not be in addition to any other per contract charges on BOX and is comparable to the regular trading fee for Market Maker and broker-dealer accounts on BOX. The side of a BOX trade opposite an inbound P or PA order would be billed as any other BOX trade.

## 2. Compliance Assessment if BSE Is the Designated Options Examining Authority

The BSE also proposes to charge a monthly compliance assessment of \$1,500 for firms for which the BSE assumes examination responsibilities under the inter-exchange allocation process of the Revised Options-related Sales Practice 17d-2 Plan ("17d-2 Plan"),<sup>10</sup> pursuant to Rule 17d-2 under the Act.<sup>11</sup>

## 3. Technology and Other Fees

The BSE would charge fees relating to BOX's Points of Presence ("PoP"), the sites where BOX Participants connect to the BOX network for communication with the BOX Trading Host. Each of these PoPs is operated by a third party supplier under contract to BOX. Through connection fees, BOX would recover the fees charged by each PoP contractor for the use of the facility by a BOX Participant. The amount to be paid by each BOX Participant is variable based on its particular configuration, the determining factors would be the number of physical connections a BOX Participant has and the associated bandwidth.

Additionally, BSE proposes fees relating to certain installation and hosting costs, which are related to the physical installation of equipment (generally routers, though possibly other hardware) at the PoP site. BOX Participants would be required to pay this fee only if they have physical installations at the BOX PoP for which BOX incurs fees from its service suppliers.

BSE also proposes to charge a "Cross Connect" fee per physical connection,

<sup>9</sup> Consistent with the national market system plan governing the operation of the Linkage, no fees will be charged to the parties sending the satisfaction request to BOX. Rather, the fee will be charged to the BOX Options Participant that was responsible for the trade-through that caused the satisfaction request to be sent.

<sup>10</sup> The BSE plans to join the 17d-2 Plan as a participant.

<sup>11</sup> 17 CFR 240.17d-2.

which varies by size from the smallest (T-1) to the largest (CAT 5).<sup>12</sup>

## 4. Fees for Optional Services and Fees for Entities Other Than BOX Participants

BSE proposes a fee for Common Message Switch ("CMS") Order Routing Services offered as an alternative to the FIX protocol and proprietary gateways to the BOX Trading Host. The CMS Gateway is an optional service provided by BOX to those BOX Participants who use the CMS protocol for routing orders. CMS may be used only for agency activities (and not proprietary orders and market maker activities).

BSE also proposes a fee for the use of its Back Office Trade Management Software ("TMS"), an optional software, which BOX Participants may subscribe to in order to manage their BOX trades prior to their transmission by BOX to OCC. TMS is useful only to BOX Participants acting as agent for public customers or other broker-dealer accounts. If a firm is able to include all relevant clearing data on an order prior to sending it to BOX, this software is not required since the order entry formats of BOX messages allow the BOX Participant to achieve straight through processing.

Finally, BSE proposes a fee for testing and support for third party service providers. Third party service providers, generally either Independent Software Vendors ("ISVs"), who provide "front end" trading software systems, or service bureaus, which provide and operate order routing systems for broker-dealers, may connect to the BOX Trading Host test platform. This connection is used by third party service providers both to establish initial compatibility of their software as well as to maintain this connectivity as the BOX Trading Host implements upgrades and evolutions. This fee would be charged directly to the third party service provider, not the BOX Participant, and would not be charged to BOX Participants who connect their proprietary software systems to the BOX Trading Host.

## III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

<sup>12</sup> These fees include one-time charges, not applicable for BOX participants connected prior to the BOX launch, and monthly fees, applicable only after the BOX launch.

securities exchange<sup>13</sup> and, in particular, the requirements of section 6(b)(4) of the Act.<sup>14</sup> Section 6(b)(4) requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission finds that the proposal to establish fees for the BOX facility is consistent with section 6(b)(4) of the Act, in that the proposal is reasonably tailored to apportion fees to BOX Participants and third party service providers based on the services the BOX facility will provide to these users.

The Commission believes that the base trading fees charged to the constituents of the BOX market are reasonable, particularly in light of the trading fees charged by other options exchanges. In addition, the per contract trading fees are the same for all broker-dealers and Market Makers. Moreover, the \$0.40 per contract fee for the execution against the exposure of an order that BOX's Trading Host filters against the NBBO is reasonable as BSE represents that it would be levied against broker-dealers to recover the cost of providing a service, and against Market Makers as an incentive to post competitive quotations.

The Commission believes that the proposed MAC that would be charged if a Market Maker's monthly trading activity were below a certain threshold is reasonable. The Commission notes that the BSE has based the MAC on its evaluation of data from the OCC and plans to review the MAC categories at least twice a year. Even if a BOX Market Maker were to trade a number of contracts less than that required to avoid paying the MAC, the per contract costs associated with trading on BOX would still be comparable to charges imposed by other exchanges.

The Commission also finds that the other fees proposed by BOX are reasonable. The InterMarket Linkage fees proposed by BOX are generally consistent with those charged by the other options exchanges. The monthly compliance assessment for firms for which BSE assumes examination responsibilities is based on the regulatory services that BSE will provide and is consistent with the regulatory fees charged by other exchanges. Finally, the technology fees assessed by BOX are based on the BOX participants' usage of the services

<sup>13</sup> The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

provided, as well as on the costs for the physical installations of equipment.

#### IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>15</sup> that the proposed rule change (File No. SR-BSE-2003-17) is hereby approved and the portion of the proposed rule change relating to linkage fees is approved on a pilot basis until January 31, 2004.

By the Commission.

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49068; File No. SR-BSE-2002-15]

### Self Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 3 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 Thereto by the Boston Stock Exchange, Inc. Establishing Trading Rules for the Boston Options Exchange Facility

January 13, 2004.

#### I. Introduction

On October 31, 2002, the Boston Stock Exchange, Inc. ("BSE" or "Exchange"), submitted to the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish trading rules for the proposed Boston Options Exchange ("BOX")<sup>3</sup> facility. On December 18, 2002, the BSE filed Amendment No. 1 that entirely replaced the original rule filing.<sup>4</sup> On January 9, 2003, the BSE filed Amendment No. 2 that entirely replaced the original rule filing and Amendment No. 1.<sup>5</sup> Amendment No. 2

was published in the **Federal Register** on January 22, 2003 ("BOX Proposing Release").<sup>6</sup>

The Commission received 43 comment letters in response to the January 22, 2003, notice.<sup>7</sup>

<sup>6</sup> Securities Exchange Act Release No. 47186 (January 14, 2003), 68 FR 3062 (January 22, 2003).

<sup>7</sup> See letters to Jonathan G. Katz, Secretary, Commission, from Paul Fred, CEO, PFTC Trading, LLC, dated January 24, 2003; Myron Wood, Statistician, Changes, LLC, dated January 30, 2003; Mike Ianni, dated February 2, 2003; Shawn Gibson, Senior VP, Equity Derivatives, Scott & Stringfellow, dated February 6, 2003; CSFB Next Fund, Inc., Interactive Brokers Group, LLC, LabMorgan Corporation, Salomon Brothers Holding Company, Inc., UBS (USA) Inc., dated February 6, 2003; Sallerson-Troob, LLC, dated February 9, 2003; Christopher D. Bernard, dated February 10, 2003; George Papa, Director, PEAK6 Investments, dated February 10, 2003; Frank Hirsch, CBOE Market Maker, dated February 10, 2003; Richard W. Cusack, Operations Manager, Sparta Group of Chicago, LP, dated February 11, 2003; Paul Britton, CEO, MAKO Global Derivatives LLC, dated February 11, 2003; John Colletti, Samuelson Trading, dated February 11, 2003; Robert S. Smith, Chief Technology Officer, GETCO, LLC, dated February 11, 2003; Phillip Sylvester, CBOE Market Maker, dated February 11, 2003; Keith Fishbe, DRW Holdings, LLC, dated February 11, 2003; Daniel C. Bigelow, President, Monadnock Capital Management, dated February 11, 2003; Erich Tengelsen, Chicago Trading Company, dated February 12, 2003; Thomas Peterffy, Chairman, David M. Battan, Vice President and General Counsel, Interactive Brokers LLC, dated February 12, 2003; John T. Thomas, Van Der Moolen USA LLC, dated February 12, 2003; Robert C. Sheehan, Electronic Brokerage Systems LLC, dated February 12, 2003; Thomas J. Murphy, TJM Investments, LLC, dated February 12, 2003; Meyer S. Frucher, Chairman and Chief Executive Officer, Philadelphia Stock Exchange, Inc. ("Phlx"), dated February 12, 2003 ("Phlx Letter 1"); Michael Resch, dated February 12, 2003; Todd Silverberg, General Counsel, Susquehanna International Group LLP, dated February 12, 2003; Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, Inc. ("ISE"), dated February 12, 2003 ("ISE Letter 1"); Juan Carlos Pinilla, Managing Director, Equity Derivatives Trading, JP Morgan, dated February 12, 2003; Marc J. Liu, Options Specialist, AGS Specialist Partners, dated February 12, 2003; Jan-Joris Hoefnagel, President, Optiver Derivatives Trading, dated February 13, 2003; Steve Tumen, CEO, and David Barclay, General Counsel, Equitec Group, LLC, dated February 14, 2003; Michael J. Ryan, Jr., Executive Vice President & General Counsel, American Stock Exchange LLC ("Amex"), dated February 14, 2003 ("Amex Letter 1"); William J. Brodsky, Chairman and Chief Executive Officer, Chicago Board Options Exchange, Inc. ("CBOE"), dated February 14, 2003 ("CBOE Letter 1"); Paul Roesler, Lead Market Maker, Pacific Exchange, Inc. ("PCX"), dated February 14, 2003; Andrew W. Lo, dated February 15, 2003; Nicholas Bonn, Executive Vice President, State Street Global Markets, LLC, dated February 21, 2003; Robert Bellick, Christopher Gust, Wolverine Trading, LLC, dated February 27, 2003; Philip D. DeFeo, Chairman and CEO, PCX, dated February 27, 2003 ("PCX Letter 1"); Thomas N. McManus, Executive Director and Counsel, Morgan Stanley, dated March 3, 2003; Philip C. Smith, Jr., Vice President, Options, The Interstate Group, dated March 7, 2003; Bryan Rule, dated March 11, 2003; Michael J. Ryan, Jr., Executive Vice President & General Counsel, Amex, dated March 13, 2003 ("Amex Letter 2"); David Hultman, dated March 25, 2003; Stephen D. Barret, dated March 26, 2003; and John Welker, dated June 11, 2003.

In response to the comment letters, the BSE filed Amendment No. 3 to the proposal.<sup>8</sup> The proposed changes were published for comment in the **Federal Register** on August 22, 2003.<sup>9</sup> The Commission received 301 comment letters in response to Amendment No. 3.<sup>10</sup> In response to the comment letters,

<sup>8</sup> See letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division, Commission, dated August 15, 2003 ("Amendment No. 3").

<sup>9</sup> Securities Exchange Act Release No. 48355 (August 15, 2003), 68 FR 50813 (August 22, 2003) ("Amendment No. 3 Notice").

<sup>10</sup> See letters to Jonathan G. Katz, Secretary, Commission, from R.J. Casey, dated September 2, 2003; Gary Sutton, dated September 2, 2003; Dr. Jay Charles Soper, dated September 2, 2003; Darshan Arora, dated September 2, 2003; Carl Erikson, dated September 2, 2003; Dwayne Logie, dated September 2, 2003; David B. Pincus, dated September 2, 2003; Dmitri Gerasimenko, dated September 2, 2003; Dr. Gary T. Hirst, Chairman, Hirst Investment Management Inc., dated September 2, 2003; Doug Brunner, dated September 2, 2003; David Richardson, dated September 2, 2003; Eddie Wan, dated September 2, 2003; Donald Tolchin, dated September 2, 2003; Austin B. Tucker, dated September 2, 2003; Ilya Dorfman, dated September 2, 2003; Carey Pierce, dated September 2, 2003; David Maple, dated September 2, 2003; Gregory Cone, dated September 2, 2003; Byron Sears, dated September 2, 2003; Chad B. Harris, Managing Director, Sharp People Scottsdale, dated September 2, 2003; Clint Rasschaert, dated September 2, 2003; Michael Burgess, dated September 2, 2003; Edward C. Spengler II, dated September 2, 2003; Basilio Chen, dated September 2, 2003; Sam Wheat, dated September 2, 2003; Wie-Ming Ang, dated September 2, 2003; Douglas A. DeMoss, dated September 2, 2003; Karl Aschenbrenner, dated September 2, 2003; C.E. Sherrod, dated September 2, 2003; Alan Johnson, dated September 2, 2003; John Mazur, dated September 2, 2003; Skylar Christensen, dated September 2, 2003; Rachel Fitz, dated September 2, 2003; Bill Billb, dated September 2, 2003; Damodharan Ramkumar, dated September 3, 2003; Jim McNeil, dated September 3, 2003; Dr. Donald R. Berger, dated September 3, 2003; Scott Alber, dated September 3, 2003; Eric Glasband, dated September 3, 2003; Frank Sandy, dated September 3, 2003; Mu Chou Liu, ITresources, dated September 3, 2003; Vernon Hehn, dated September 3, 2003; Anthony J. Benincasa, dated September 3, 2003; Gregg Richter, dated September 3, 2003; L. Jerry L. Jones, dated September 3, 2003; Francis Borriello, dated September 3, 2003; David D. Smith, dated September 3, 2003; Robert H. Dean, dated September 3, 2003; Joseph Szoecs, dated September 3, 2003; E. Eimas, dated September 3, 2003; Curtis G. Thompson, Black Swan Trading, dated September 3, 2003; Tom Harney, dated September 3, 2003; Jim Schmechel, dated September 3, 2003; Tom Fisher, dated September 3, 2003; Andrew Eisenhower, dated September 3, 2003; David Nemes, dated September 3, 2003; Leland Stevenson, dated September 3, 2003; David Strauss, dated September 3, 2003; Jim Engelken, dated September 3, 2003; Jim Woo, dated September 3, 2003; Marc Poussard, Bae Systems, dated September 3, 2003; William W. Williams, dated September 3, 2003; Steve Sundberg, Software Engineer, General Dynamics Land Systems, dated September 3, 2003; Fang Gu, dated September 3, 2003; Stanley Arron, dated September 3, 2003; Matti Luomanen, dated September 3, 2003; Robert Jinks, dated September 3, 2003; Daniel Torres, dated September 3, 2003; Harvey Michael Vilkin, dated September 3, 2003; Barry Wolfe,

Continued

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

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

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

<sup>3</sup> The term "BOX" means the Boston Options Exchange or Boston Stock Exchange Options Exchange, an options trading facility of the Exchange under section 3(a)(2) of the Act. See proposed BOX Rules, Chapter I, sec. 1(a)(6) (definition of "BOX").

<sup>4</sup> See letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division of Market Regulation ("Division"), Commission, dated December 18, 2002 ("Amendment No. 1").

<sup>5</sup> See letter from George W. Mann, Jr., Executive Vice President and General Counsel, BSE, to Annette Nazareth, Director, Division, Commission, dated January 8, 2003 ("Amendment No. 2").