

UNITED STATES OF AMERICA

Before the
Securities and Exchange Commission
October 19, 2011

Securities Exchange Act of 1934
Release No. 65592

In the Matter of)	Order Denying NASDAQ OMX
NASDAQ OMX BX, Inc.)	BX, Inc.'s Petition for Review
)	of Division of Trading and Markets
)	Suspension of and Institution of
File No. SR-BX-2011-046)	Proceedings by Delegated Authority
)	of SR-BX-2011-046; Lifting the
)	Automatic Stay; and Notice of
)	Designation of a Longer Comment
)	Period for the Proceedings

Pursuant to Rule 431(b)(2) of the Rules of Practice,¹ it is ORDERED that the petition² of Boston Options Exchange Group LLC, an options trading facility of NASDAQ OMX BX, Inc., (“BOX”) for review of the temporary suspension and institution of proceedings by the Division of Trading and Markets (the “Division”) by delegated authority of SR-BX-2011-046³ is hereby denied. It is further ORDERED that the automatic stay of delegated action pursuant to Rule 431(e) of the Rules of Practice⁴ is hereby lifted.

The Commission hereby is also extending the length of the period for market participants to submit comments related to SR-BX-2011-046 until November 17, 2011 and the length of the period for submission of rebuttal comments until December 14, 2011.

On July 15, 2011, NASDAQ OMX BX, Inc. filed, pursuant to Section 19(b)(1) of the Exchange Act⁵ and Rule 19b-4 thereunder,⁶ a proposed rule change that amended the BOX Fee

¹ 17 CFR 201.431(b)(2)

² Petition for Review of Action by Delegated Authority from BOX, dated September 27, 2011 (“BOX Petition”).

³ See Securities Exchange Act Release No. 65330 (September 13, 2011), 76 FR 58065 (September 19, 2011) (“Suspension Order”).

⁴ 17 CFR 201.431(e).

⁵ 15 U.S.C. 78s(b)(1).

⁶ 17 CFR 240.19b-4.

Schedule to increase the credits and fees for certain transactions in the BOX Price Improvement Period (“PIP”).⁷

The Division, pursuant to delegated authority,⁸ published BOX’s proposed rule change for notice and comment on August 3, 2011.⁹ The Commission received four comment letters on the proposal, three urging the Commission to suspend the proposal and institute proceedings, and one urging the Commission not to take such action.¹⁰ BOX filed a response to comments.¹¹ As evidenced by these letters, market participants have differing views on the impact of the proposal and whether it is consistent with the Act. In recognition of the issues raised by commenters and in view of the significant legal and policy issues raised by the proposal, on September 13, 2011, the Division, pursuant to delegated authority,¹² temporarily suspended BOX’s proposal and simultaneously instituted proceedings to determine whether to approve or disapprove the proposal.¹³

⁷ The PIP is a mechanism in which members submit an agency order on behalf of a customer for price improvement over the BOX BBO, paired with a contra-order guaranteeing execution of the agency order at or better than the NBBO. The contra-order could be for the account of the member, or an order solicited from someone else. The agency order is exposed for a 1-second auction in which members may submit competing interest at the same price or better. The initiating member 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.

⁸ 17 CFR 200.30-3(a)(12).

⁹ See Securities Exchange Act Release No. 64981 (July 28, 2011), 76 FR 46858 (August 3, 2011).

¹⁰ 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”).

¹¹ See letter to Elizabeth Murphy, Secretary, Commission, from Anthony D. McCormick, Chief Executive Officer, BOX, dated September 9, 2011 (“BOX Letter”). BOX filed its response to comments on Friday, September 9, 2011, two business days prior to the end of the 60 day period during which the Commission could act to suspend the filing and institute proceedings, and 16 days after the close of the original comment period for the filing.

¹² 17 CFR 200.30–3(a)(57) and (58).

¹³ See Suspension Order, supra note 3. Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), provides the statutory standard by which the Commission may temporarily suspend an immediately effective proposed rule change. Specifically, Section

In the Suspension Order, the Division, pursuant to delegated authority, states its belief that it is appropriate to evaluate the effect of the proposed rule change on competition among different types of market participants and on market quality, and that it intends to assess whether the potential fee disparity between BOX Participants who initiate a PIP auction (“PIP Initiators”) and BOX Participants who respond to a PIP auction (“PIP Responders”) is consistent with the statutory requirements applicable to a national securities exchange under the Act,¹⁴ in particular the standards 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, 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.¹⁵ The Suspension Order 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 and that it is appropriate in the public interest to institute disapproval proceedings in view of the significant legal and policy issues raised by the proposal.¹⁶

On September 20, 2011, BOX filed a notice of intention to petition for review from BOX stating that, pursuant to the Commission Rule of Practice 430(b),¹⁷ BOX appeals to the Commission the Division’s action to institute proceedings by delegated authority. Pursuant to Rule of Practice 431(e), a notice of intention to petition for review results in an automatic stay of the action by delegated authority.¹⁸ On September 27, 2011, BOX filed a petition to review the

19(b)(3)(C) provides that the Commission may take such action “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].” 15 U.S.C. 78s(b)(3)(C). If the Commission temporarily suspends a rule change, it must institute proceedings under Section 19(b)(2)(B) of the Act. See 15 U.S.C. 78s(b)(3)(C).

¹⁴ See Suspension Order, supra note 3, at 58067. 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. The disparity between the net fees charged to a PIP Initiator and those charged to a PIP Responder could be as high as \$0.90 per contract. See id. at 58066-58067.

¹⁵ See id. at 58067.

¹⁶ See id.

¹⁷ 17 CFR 201.430(b).

¹⁸ 17 CFR 201.431(e).

Division's action by delegated authority instituting proceedings to determine whether to approve or disapprove the filing.¹⁹

In considering whether to accept or reject the BOX Petition, Rule 411(b)(2) of the Rules of Practice²⁰ requires that the Commission determine whether:

- (i) a prejudicial error was committed by the Division in the conduct of the proceeding; or
- (ii) the Division's decision embodies:
 - (A) a finding or conclusion of material fact that is clearly erroneous; or
 - (B) a conclusion of law that is erroneous; or
 - (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

For the reasons discussed below, the Commission finds that BOX has not made a reasonable showing that the Division committed a prejudicial error or that the Division's delegated action involved an error of fact or law that would provide an appropriate basis for Commission review.

First, the BOX Petition does not allege that the Division committed any prejudicial error in the conduct of the proceedings, including the decision to temporarily suspend and institute proceedings to determine whether to approve or disapprove the proposal. The Commission recognizes the issues raised as to the impact of the fee change and the differing views of market participants outlined in the comments received. The Division's action through the Suspension Order provides an opportunity for the Commission to receive more focused comment and data on the issues raised, as well as an opportunity for the Commission to more fully assess the issues raised and whether the filing is consistent with the Act. Based on the proposed rule change as filed, the comments received, and BOX's response to comments, the Commission finds that the Division acted appropriately in finding 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 filing.²¹ Accordingly, the Commission finds that the Division did not commit any prejudicial error in temporarily suspending and instituting proceedings with respect to BOX's proposed rule change.

Second, the Division's action to suspend the filing and institute proceedings is an interim step in the Commission's consideration of substantive issues raised by the filing, and one that did not embody a finding of material fact. The Suspension Order therefore is incapable of embodying a finding or conclusion of material fact that is erroneous. Although BOX notes that it

¹⁹ See BOX Petition, *supra* note 2.

²⁰ 17 CFR 201.411(b)(2).

²¹ Pursuant to the provisions of Section 19(b)(3)(C) of the Act, the Commission must institute proceedings to determine whether to approve or disapprove an immediately effective rule change if it suspends such rule change. See 15 U.S.C. 78s(b)(3)(C).

provided the Division with data relating to six weeks of trading in the BOX PIP that BOX believes supports a finding that its fees are consistent with the Act,²² the Division also received data from a commenter purporting to show a decline in average price improvement and average percentage of contracts price improved in the PIP.²³ The Suspension Order states that the Commission has not reached any conclusions with respect to the issues involved.²⁴ To the contrary, the Suspension Order seeks additional comment and data with respect to the issues raised by the filing,²⁵ and the institution of proceedings will provide the Commission the opportunity to more fully assess the issues raised, including a further assessment of the facts underlying the issues.

Third, the Division's action pursuant to delegated authority to suspend the filing and institute proceedings is an interim step that does not involve a conclusion of law that is clearly erroneous. The Suspension Order states that the Commission has not reached any conclusions with respect to the issues involved,²⁶ and no finding as to whether the proposed rule change is consistent with the Act was made in the Suspension Order. To the contrary, the Suspension Order seeks additional comment and data with respect to the issues raised by the filing, which will help the Commission further assess the proposed rule change and inform its ultimate decision as to whether the proposed rule change is consistent with the Act. Based on the proposed rule change as filed, the comments received, and BOX's response to comments, the Commission finds that the Division acted appropriately in finding 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 filing.²⁷

Fourth, the BOX Petition does not specifically allege that the Division's action pursuant to delegated authority was an exercise of discretion or decision of law or policy that is important and that the Commission should review pursuant to the standard of Rule 431(b)(2). For purposes of determining whether to grant de novo review of the Division's exercise of delegated authority with respect to the Suspension Order, the Commission does not believe that the act of suspending and instituting proceedings in this filing embodies an exercise of discretion or a decision of law or policy that is important and that the Commission should review. The Commission believes that the Division acted appropriately, based on the record, in determining that the underlying BOX proposed rule change does merit additional opportunity for comment and Commission

²² The Division noted this data in the Suspension Order. See Suspension Order, supra note 3, at 58067.

²³ See Citadel Letter, supra note 10, at 3.

²⁴ See Suspension Order, supra note 3, at 58067.

²⁵ See id. at 58067-68.

²⁶ See id. at 58067.

²⁷ Pursuant to the provisions of Section 19(b)(3)(C) of the Act, the Commission must institute proceedings to determine whether to approve or disapprove an immediately effective rule change if it suspends such rule change. See 15 U.S.C. 78s(b)(3)(C).

consideration. The Division's Suspension Order is the proper statutory mechanism to commence that process and conduct such review.

Finally, in its petition, BOX requests, if the Commission does determine to institute proceedings to determine whether to approve or disapprove the proposal, that the Commission not stay the effectiveness of the PIP fee during the course of the proceedings.²⁸ BOX notes its belief that the proposed fees allow it to compete with larger options exchanges that charge payment for order flow fees that, in BOX's view, are substantially similar to the proposed fees and that suspension of the fees would cause unfair harm to BOX.²⁹ However, under Section 19(b)(3)(C) of the Act,³⁰ the Commission cannot institute proceedings to determine whether to approve or disapprove an immediately effective rule change unless it first suspends the rule change. The Commission does not find a sufficient basis in the BOX Petition to diverge from the process contemplated in the statute in this case by lifting the suspension of the BOX PIP fee while it conducts the proceedings to determine whether to approve or disapprove BOX's proposed rule change. Importantly, commenters have raised material concerns (including one who presented supporting data) that call into question whether BOX's proposal unduly burdens competition and whether it is consistent with the Act. Among other things, the Commission will consider these issues, as well as BOX's assertion that its proposed fees are comparable to fees in effect at other options exchanges, during the conduct of the proceedings on BOX's proposal.

By the Commission.

Elizabeth M. Murphy
Secretary

²⁸ See BOX Petition, *supra* note 2, at 10.

²⁹ See *id.* at 9-10.

³⁰ See 15 U.S.C. 78s(b)(3)(C).