

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-53817; File No. SR-BSE-2006-05)**

**May 17, 2006**

**Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving a Proposed Rule Change to Modify the Boston Options Exchange's Fee Schedule to Impose Surcharge Fees for Transactions in Options on ETFs on a Retroactive Basis**

On March 15, 2006, 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 proposal to retroactively establish certain Boston Options Exchange ("BOX") licensing fee surcharges applicable to broker-dealer proprietary accounts and market maker accounts for trades in options on certain exchange traded funds ("ETFs"). The proposed rule change was published for comment in the Federal Register on April 13, 2006.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change.

The BOX's Fee Schedule currently has in place a surcharge fee item for transactions in the respective ETF options effected by market makers and broker-dealer proprietary accounts that imposes a \$0.10 per contract fee for transactions in certain licensed options, including Standard & Poor's Depository Receipts (SPY), iShares Russell 2000 Index Fund (IWM), iShares Russell 2000 Growth Index Fund (IWO), and iShares Nasdaq Biotechnology Index Fund (IBB).<sup>4</sup> In addition, the BOX's Fee Schedule currently lists a surcharge fee of \$0.09 per contract fee for transactions in certain licensed options, including S&P Energy Select Sector SPDR Fund (XLE)

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<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. 53607 (April 6, 2006), 71 FR 19221 ("Notice").

<sup>4</sup> The BOX Fee Schedule also contains a \$0.10 surcharge fee per contract for options on the ETF Nasdaq 1000 ("QQQQ"), which is not at issue in this proposed rule change.

and S&P Financial Select Sector SPDR Fund (XLF). The surcharge fees on the licensed options listed above became effective on January 4, 2006.<sup>5</sup> The Exchange is now proposing to retroactively apply these surcharge fees from the Effective Dates listed in Table 1 of the notice<sup>6</sup> (“Effective Dates”) (i.e., the date on which each product commenced trading on BOX) through January 3, 2006.<sup>7</sup>

In addition, the Exchange is proposing to amend the BOX Fee Schedule to clarify the meaning of the current text in Section 4(b) (“InterMarket Linkage”) of the BOX Fee Schedule, which includes an explicit reference to the surcharge with respect to Inbound P and PA orders that are billed per contract.<sup>8</sup> The BSE is also proposing to amend the title of Section 4(b) of the BOX Fee Schedule to provide more clarity as to which party is billed.

After careful consideration of the proposal, 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 securities exchange<sup>9</sup> and, in particular, the requirements of Section 6(b) of the Act and the rules and regulations thereunder.<sup>10</sup> Specifically, the Commission believes that the proposal to retroactively establish a surcharge fee of 9 or 10 cents, as applicable, for certain

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<sup>5</sup> See Securities Exchange Act Release No. 53454 (March 8, 2006), 71 FR 13439 (March 15, 2006) (SR-BSE-2006-01).

<sup>6</sup> See Notice, supra note 3. The Standard & Poor’s Depository Receipts commenced trading on January 10, 2005; the iShares Russell 2000 Index Fund commenced trading on May 2, 2005; the S&P Energy Select Sector SPDR Fund commenced trading on June 6, 2005; and the iShares Russell 2000 Growth Index Fund, the iShares Nasdaq Biotechnology Index Fund, and S&P Financial Select Sector SPDR Fund all commenced trading on June 27, 2005.

<sup>7</sup> BSE represents these fees are only charged to BOX Participants.

<sup>8</sup> Specifically, the Exchange proposes to replace the sentence “Same as if were BOX Participant” with “This charge is the same as that which is applicable to a BOX Participant under Section 2. These orders are also subject to any additional pass-through surcharge fees specified in Section 2(c), as applicable.”

<sup>9</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b).

transactions in options on the above-listed ETFs that occurred on the BOX between each ETF options' Effective Date and January 3, 2006 is consistent with Section 6(b)(4) of the Act,<sup>11</sup> in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members and issuers and other persons using its facilities.

The Commission notes that the BOX Fee Schedule that was in effect when each of these products commenced trading (i.e., on the Effective Dates) stated in Section 2(c) that applicable surcharges applied for options on ETFs that are passed-through by BOX.<sup>12</sup> While the BSE failed to amend in a timely manner its Fee Schedule to specifically list each individual ETF option product and the associated surcharge fee on the BOX Fee Schedule as it was required to do pursuant to Section 19(b) of the Act<sup>13</sup> and Rule 19b-4 thereunder,<sup>14</sup> the Commission notes that the BSE has represented that its Participants: (1) were aware that surcharge fees were applicable for options on the ETFs pursuant to the general language in Section 2(c) of the BOX Fee Schedule that states that surcharge fees apply to transactions in certain licensed options; and (2) were aware of the specific pass-through licensing surcharges for each product via their monthly billing statement.<sup>15</sup> Given this level of transparency with respect to the existence of surcharge fees for licensed products, and in consideration of the fact that options on the applicable ETFs have been listed and traded on BOX since each product's respective Effective Date,<sup>16</sup> the Commission believes that the retroactive extension of the respective surcharge fees to all

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<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> Section 2(c) of the BOX Fee Schedule then stated, as it currently does: "Plus, where applicable, any surcharge for options on ETFs that are passed through by BOX."

<sup>13</sup> 15 U.S.C. 78s(b).

<sup>14</sup> 17 CFR 240.19b-4.

<sup>15</sup> See Notice, supra note 3.

<sup>16</sup> The options on the applicable ETFs began trading on BOX ranging from January 10, 2005 to June 27, 2005. See supra note 6.

applicable transactions occurring since, and as of, the commencement of trading of each product on BOX is equitable in order to defray BSE's licensing costs.

The Commission also believes that the new text in Section 4(b) of the BOX Fee Schedule does not raise any new or novel issues but rather serves as a non-substantive change to the BOX Fee Schedule to clarify the existing text. The Commission notes the Exchange's representation that this change does not impose any new fees on Linkage Orders, that it is consistent with the Linkage Fee pilot program, and that applicable Linkage Orders have always been assessed this surcharge and have been invoiced as such.<sup>17</sup> Further, the Commission believes that the change to the title of Section 4(b) of the BOX Fee Schedule does not raise any new or novel issues and merely is designed to accurately reflect the party which is billed. Accordingly, the Commission believes that the changes to Section 4(b) of the BOX Fee Schedule clarify and expand upon the existing text and do not result in any change in application of the Fee Schedule.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-BSE-2006-05) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Nancy M. Morris  
Secretary

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<sup>17</sup> See id.

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).