

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51821; File No. SR-BSE-2004-51)

June 10, 2005

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 Thereto Relating to the Trading of Market Orders on the Boston Options Exchange

I. Introduction

On December 15, 2004, the Boston Stock Exchange, Inc. (“BSE” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² to amend the rules of the Boston Options Exchange (“BOX”) to allow market orders to trade on BOX. On January 5, 2005, April 19, 2005 and April 21, 2005, BSE filed Amendment Nos. 1, 2 and 3, respectively, to the proposal. The proposed rule change, as amended, was published for comment in the Federal Register on April 28, 2005.³ The Commission received no comments on the proposal. On June 2, 2005, BSE filed Amendment No. 4 to the proposed rule change.⁴ This order approves the proposed rule change, as amended, provides notice of filing of Amendment No. 4, grants accelerated approval to Amendment No. 4, and solicits comments from interested persons on Amendment No. 4.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51597 (April 21, 2005), 70 FR 22156 (“Notice”).

⁴ In Amendment No. 4, BSE made simplifying and clarifying revisions to a portion of the proposed rule text and represented that BSE will provide certain information to the Commission as discussed further below.

II. Description of the Proposal

BSE proposes to allow an additional order type, “Market Orders,” to trade on BOX, governed by detailed procedures as set forth in the proposed rule change. BSE also proposes to clarify how BOX-Top Orders are treated in certain situations.

A. Trading of Market Orders on BOX

The proposed Market Orders would be similar to, but differ from, Market-on-Opening Orders and BOX-Top Orders, two other order types currently available on BOX.⁵ Market Orders submitted to BOX would be executed at the best price available in the market for the total quantity available from any contra side bid or offer. Unlike Market-on-Opening and BOX-Top Orders, however, if the full quantity of a Market Order could not be executed at the initial execution price, the remaining quantity of the Market Order would then execute at the next best price available from any contra side bid or offer, and the process would continue until the Market Order was fully executed. To avoid trading through the national best bid or offer (“NBBO”), Market Orders would be filtered prior to execution at each price level pursuant to the procedures set forth in Chapter V, Section 16(b) of the BOX Rules.

At the opening, Market Orders would have priority over Market-on-Opening and Limit Orders. In the case where the lowest offer for any options contract is \$.05, and a BOX Participant enters a Market Order to sell that series, any such Market Order would be treated as a

⁵ Market-on-Opening Orders, which are valid only during the pre-opening and opening match phases of the market, are executed on the market opening at the best price available in the market until all volume required to fill the order on the opposite side of the market has been traded or the order quantity has been exhausted. BOX-Top Orders, which may be submitted only during the continuous trading phase of the market, are executed at the best price available in the market for the total quantity available from any contra side bid or offer. In general, in the case of both Market-on-Opening Orders and BOX-Top Orders, any residual volume left after part of the order has been executed is automatically converted to a limit order at the price at which the original Market-on-Opening Order and BOX-Top Order was executed.

Limit Order to sell at a price of \$.05.

Under the proposal, a Market Order could be designated as a Minimum Volume (“MV”) order (an order type that currently exists on BOX) and in such case would only be executed if the specified minimum volume is immediately available to trade.⁶ Market Orders also would be eligible to be submitted for price improvement through the PIP.⁷

B. Market Orders and BOX-Top Orders Submitted During a PIP

The BOX Rules currently provide that in cases when an executable unrelated order is submitted to BOX during a PIP on the same side as the customer order, such that the unrelated order would cause an execution to occur prior to the end of the PIP, the PIP is deemed concluded and the customer order is matched pursuant to the relevant PIP provisions. The proposed rule change would set forth specifically that the submission to BOX of a Market Order or BOX-Top Order on the same side as a PIP Order will prematurely terminate the PIP when, at the time of the submission of the Market Order or BOX-Top Order, the best Improvement Order is equal to or better than the NBBO.⁸ In Amendment No. 4, BSE added language to clarify that “NBBO” in this proposed provision refers to the NBBO “on the same side of the market as the best

⁶ If a volume equal to or greater than the specified minimum volume of an MV order trades, the residual volume would be filtered against trading through the NBBO according to the procedures set forth in Section 16(b) of Chapter V of the BOX Rules and, if applicable, executed with any orders on the BOX Book.

⁷ In general, the PIP is a three-second auction starting at a price better than the current NBBO during which BOX Participants compete to participate in the execution of a customer order submitted to the PIP (newly termed under the proposal as a “PIP Order”), by submitting specially designated orders called Improvement Orders in one-penny increments that are valid only in the PIP process. For a more complete description of the PIP process, see Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (approving establishment of trading rules for BOX, including the PIP process).

⁸ Proposed change to Paragraph (i) of Section 18 of Chapter V of the BOX Rules.

Improvement Order.”⁹ When the PIP is terminated, the PIP Order would be matched against the best prevailing orders on BOX (whether Improvement Orders or unrelated orders received by BOX during the PIP),¹⁰ pursuant to Paragraph (e)(iii) of Section 18 of Chapter V of the BOX Rules. Following the execution of the PIP Order, any remaining Improvement Orders would be cancelled and the Market Order or BOX-Top Order would be filtered pursuant to Paragraph (b) of Section 16 of Chapter V of the BOX Rules.

The proposed rule change would also address the treatment of Market Orders and BOX-Top Orders entered on BOX during a PIP on the opposite side of a PIP Order.¹¹ As rephrased in Amendment No. 4, the proposed rule change would set forth specifically that the submission to BOX of a Market Order or BOX-Top Order on the opposite side as a PIP Order will immediately execute against the PIP Order when, at the time of the submission of the Market Order or BOX-Top Order, the best Improvement Order “does not cross the NBBO on the same side of the market as the PIP Order.”¹² The Market Order or BOX-Top Order would immediately execute

⁹ The above phrase replaces parenthetical language in the proposed rule text as set forth in the Notice, which stated: “If a BOX-Top Order or Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a BOX-Top Order or Market Order is a sell order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is higher than the National Best Bid.” BSE proposed this revision to simplify and clarify the proposed rule text, and represents that the revised language has the same meaning as the language previously proposed.

¹⁰ Excluding unrelated orders that were immediately executed during the interval of the PIP, as described below. See proposed Paragraph (e)(iii) of Section 18 of Chapter V of the BOX Rules.

¹¹ Proposed change to Paragraph (i) of Section 18 of Chapter V of the BOX Rules.

¹² The above phrase replaces the phrase “is equal to or better than the NBBO” in the proposed rule text, as well as the accompanying proposed parenthetical language that stated: “If a BOX-Top Order or Market Order is a buy order, the best Improvement Order is better than the NBBO when the price of the best Improvement Order is lower than the National Best Offer. If a BOX-Top Order or a Market Order is a sell order, the

against the PIP Order up to the lesser of (a) the size of the PIP Order, or (b) the size of the Market Order or BOX-Top Order. The trade would be executed at a price equal to either (i) one penny better than the NBBO, if the best BOX price on the opposite side of the market from the Market Order or BOX-Top Order is equal to the NBBO at the time of the execution, or (ii) the NBBO.¹³ The remainder of the Market Order or BOX-Top Order, if any, would be filtered pursuant to Section 16(b) of Chapter V of the BOX Rules. The remainder of the PIP Order, if any, would continue in the PIP process. In Amendment No. 4, BSE also proposes to clarify that following the execution of the PIP Order, any remaining Improvement Orders would be cancelled.¹⁴

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4, including whether Amendment No. 4 is consistent with the Act. Comments may be submitted by any of the following methods:

best Improvement Order is better than the NBBO when the price of the best Improvement Order is higher than the National Best Bid.” BSE proposed these revisions to simplify and clarify the proposed rule text, and represents that the revised language has the same meaning as the language previously proposed.

¹³ If the PIP Order is to buy, the trade will be priced at the national best bid or one penny more than the national best bid. If the PIP Order is to sell, the trade will be priced at the national best offer or one penny less than the national best offer.

¹⁴ Proposed change to Paragraph (i) of Section 18 of Chapter V of the BOX Rules. A related change would be made to Paragraph (b) of Section 16 of Chapter V of the BOX Rules, which describes how inbound orders to BOX are filtered to avoid trading through the NBBO. BSE proposes to add subparagraph (iv) to clarify that at each step in the filtering process, under certain circumstances if an order (including a Market Order) is an unrelated order on the opposite side of a PIP Order, the order will be immediately executed against the PIP Order as described above, and that any remaining quantity will continue in the filtering process as set forth in Paragraph (b) of Section 16 of Chapter V of the BOX Rules.

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-BSE-2004-51 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-BSE-2004-51. 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 inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of BSE. 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-BSE-2004-51 and should be submitted on or before [insert date 21 days from date of publication].

IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, as amended, and finds that it is consistent with the requirements of Section 6 of the Act¹⁵ and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, in part, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

BSE represents that the majority of BOX's current and prospective order flow providers ("OFPs") have requested the ability to trade Market Orders on BOX because their technology is designed for the use of market orders and their customers prefer market orders over BOX-Top Orders. BOX wishes to accommodate and attract order flow from these OFPs.¹⁸ The Commission notes that other options exchanges accept market orders, and believes that it is consistent with the Act for BOX to accommodate this type of order, as well. The Commission notes, in particular, that Market Orders would be filtered at every price level to prevent trading through the NBBO.

¹⁵ 15 U.S.C. 78f.

¹⁶ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ See Notice.

The Commission further believes that the various related provisions that BSE has proposed regarding the use and handling of Market Orders, including the availability of the MV designation for Market Orders, the ability to submit Market Orders as PIP Orders, and the priority of Market Orders at the opening over Limit Orders and Market-on-Opening Orders, are reasonable and consistent with the Act.

The Commission notes that the proposed rule change sets forth in detail the manner in which Market Orders will interact with other orders in the BOX system, and in particular how such orders, as well as BOX-Top Orders, will be treated if entered while a PIP is in progress. The BOX Rules currently provide that a PIP is concluded early when an unrelated order is submitted to the BOX in certain cases. The proposed rule change specifies the circumstances under which a Market Order or Box-Top Order will cause an early termination, and how the PIP Order and Market Order or Box-Top Order will be executed in these circumstances. The proposed rule change further specifies the circumstances in which a Market Order or Box-Top Order on the opposite side of a PIP Order will execute against the PIP Order before the conclusion of the PIP, and the principles governing what price the PIP Order will receive in these circumstances. These proposed provisions thus clarify for investors and market participants how their orders will be executed in various situations.

While BSE has set forth the reasons why it believes early termination of the PIP and immediate execution of opposite-side Market Orders and Box-Top Orders is necessary in the relevant circumstances,¹⁹ the Commission is cognizant of a concern that premature termination of the PIP could result in a PIP Order being disadvantaged by the premature conclusion of a PIP, in

¹⁹ See Notice.

that the PIP Order would not have received the full three-second auction exposure period in which to receive price improvement. The Commission notes that current Paragraph (i) of Section 18 of Chapter V of the BOX Rules states that it is considered conduct inconsistent with just and equitable principles of trade for any BOX Participant to enter unrelated orders into BOX for the purpose of disrupting or manipulating the Improvement Period process. The Commission believes that this rule should help address the above concern.

In addition, in Amendment No. 4, BSE represents that during the Pilot Period set forth in the BOX Rules relating to aspects of the PIP and reports on the PIP process,²⁰ BOX will provide additional information each month with respect to situations in which the PIP is terminated prematurely or a Market Order or BOX-Top Order interacts with a PIP Order before the PIP's conclusion. This data should aid the Commission in evaluating the effect of these rules. The following information will be provided:

(1) The number of times that a Market Order or BOX-Top Order in the same series on the same side of the market as the PIP Order prematurely terminated the PIP, and (a) the number of times such orders were entered by the same (or affiliated) firm that initiated the PIP that was terminated, and (b) the number of times such orders were entered by a firm (or an affiliate of such firm) that participated in the execution of the PIP Order;

(2) For the orders addressed in each of 1(a) and 1(b) above, the percentage of PIP premature terminations due to the receipt of a Market Order or BOX-Top Order in the same series on the same side of the market as the PIP Order that occurred within one second of the start of the PIP; the percentage that occurred between one and two seconds of the start of the PIP;

²⁰

See Paragraph .01 of Supplemental Material to Section 18 of Chapter V of the BOX Rules and Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004).

and the percentage that occurred between two and three seconds of the start of the PIP; and the average amount of price improvement provided to the PIP Order where the PIP is prematurely terminated during each of these time periods;

(3) The number of times that a Market Order or BOX-Top Order in the same series on the opposite side of the market as the PIP Order immediately executed against the PIP Order, and (a) the number of times such orders were entered by the same (or affiliated) firm that initiated the PIP, and (b) the number of times such orders were entered by a firm (or an affiliate of such firm) that participated in the execution of the PIP Order;

(4) For the orders addressed in each of 3(a) and 3(b) above, the percentage of PIP early executions due to the receipt of a Market Order or BOX-Top Order in the same series on the opposite side of the market as the PIP Order that occurred within one second of the start of the PIP; the percentage that occurred between one and two seconds of the start of the PIP; and the percentage that occurred between two and three seconds of the start of the PIP; and the average amount of price improvement provided to the PIP Order where the PIP Order is immediately executed during each of these time periods; and

(5) The average amount of price improvement provided to the PIP Order when the PIP runs the full three seconds.

V. Accelerated Approval of Amendment No. 4

Pursuant to Section 19(b)(2) of the Act,²¹ the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and do publishes its

²¹ 15 U.S.C. 78s(b)(2).

reasons for so finding. The Commission hereby finds good cause for approving Amendment No. 4 to the proposal prior to the 30th day after publishing notice of Amendment No. 4 in the Federal Register. The Commission believes that the proposed revisions made by Amendment No. 4 simplify and clarify the proposed rule change and do not change its substance. As such, the Commission believes it is appropriate to accelerate approval of Amendment No. 4 so that BSE can implement the proposed rule change without delay. In addition, in Amendment No. 4, BSE represents that it will provide specified information each month that the Commission believes will aid it in its evaluation of the PIP. Accordingly, pursuant to Section 19(b)(2) of the Act,²² the Commission finds good cause to approve Amendment No. 4 prior to the 30th day after notice of Amendment No. 4 is published in the Federal Register.

VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.²³

²² 15 U.S.C. 78s(b)(2).

²³ 15 U.S.C. 78f(b)(5).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁴ that the proposed rule change (SR-BSE-2004-51) and Amendment Nos. 1, 2, and 3 are approved; and that Amendment No. 4 thereto is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁵

J. Lynn Taylor
Assistant Secretary

²⁴ 15 U.S.C. 78s(b)(2).

²⁵ 17 CFR 200.30-3(a)(12).