

Commission finds that the proposed amendment is consistent with the requirements of Section 11A of the Act,⁵ and Rule 608 of Regulation NMS.⁶ The Plan established appropriate procedures for market centers to follow in making their monthly reports required pursuant to Rule 605 of Regulation NMS available to the public in a uniform, readily accessible, and usable electronic format. The amendment to include BYX as a participant in the Joint-SRO Plan should contribute to the maintenance of fair and orderly markets and remove impediments to and perfect the mechanisms of a national market system by facilitating the uniform public disclosure of order execution information by all market centers. The Commission believes that it is necessary and appropriate in the public interest, for the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system to allow BYX to become a participant in the Joint-SRO Plan. The Commission finds, therefore, that approving the amendment to the Joint-SRO Plan is appropriate and consistent with Section 11A of the Act.⁷

III. Conclusion

It is therefore ordered, pursuant to Section 11A(a)(3)(B) of the Act⁸ and Rule 608 of Regulation NMS,⁹ that the amendment to the Joint-SRO Plan to add BYX as a participant is approved and BYX is authorized to act jointly with the other participants to the Joint-SRO Plan in planning, developing, operating, or regulating the Plan as a means of facilitating a national market system.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Elizabeth M. Murphy,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63731; File No. SR-BX-2010-083]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change Relating to the Price Improvement Period To Permit an Initiating Participant To Designate a PIP Surrender Quantity

January 19, 2011.

On November 24, 2010, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to the Rules of the Boston Options Exchange Group, LLC ("BOX") to permit an Options Participant initiating a Price Improvement Period ("PIP") to designate a PIP Surrender Quantity. Notice of the proposed rule change was published for comment in the **Federal Register** on December 8, 2010.³ The Commission received no comments on the proposal.

Currently, the BOX rules that govern the PIP ("PIP Rules")⁴ generally allow an Options Participant initiating a PIP ("Initiating Participant") to retain priority and trade allocation privileges for forty percent (40%) of the size of a PIP Order upon conclusion of the PIP auction.⁵ This proposed rule change will permit an Initiating Participant, when starting a PIP auction, to submit the Primary Improvement Order to BOX with a designation to specify a quantity of contracts that it is willing to "surrender" from the number of contracts to which it is entitled to other Options Participants ("PIP Surrender Quantity").⁶ By designating a PIP Surrender Quantity, the Initiating Participant could potentially be allocated less than the forty percent (40%) to which it may be entitled under BOX Rules.⁷

¹ 17 CFR 242.608.

² 17 CFR 200.30-3(a)(29).

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

⁵ See Securities Exchange Act Release No. 63416 (December 2, 2010), 75 FR 76503.

⁶ See Chapter V, Section 18 of the Rules of the Boston Options Exchange Group, LLC ("BOX Rules").

⁷ See *id.*, paragraphs f(i)-f(ii).

⁸ The Initiating Participant would specify the PIP Surrender Quantity as a number of contracts, not as a percentage of the total PIP Order. Telephone conversation between Michael Burbach, Vice President of Legal Affairs, BOX and Ira Brandriss,

The proposed rule change further makes clear that in no case shall the Initiating Participant's use of the Surrender Quantity function result in an allocation to the Initiating Participant that would be greater than the maximum allowable allocation the Initiating Participant would otherwise receive in accordance with the allocation procedures set forth in the PIP Rules.⁸ The proposal specifies that the PIP Surrender Quantity shall not be effective for an amount that is lesser than or equal to sixty percent (60%) of the size of the PIP Order.

Additionally, the proposed rule change will modify the BOX Trading Host's trade allocation at the conclusion of the PIP auction to account for the PIP Surrender Quantity. The proposal specifies that when the BOX Trading Host determines the priority and trade allocation amounts for the Initiating Participant upon the conclusion of the PIP auction, the Trading Host will automatically adjust the trade allocations to the other PIP Participants according to the priority set forth generally in the PIP Rules,⁹ providing a total amount to the other PIP Participants up to the PIP Surrender Quantity. Under the proposal, the Primary Improvement Order is allocated the remaining size of the PIP Order, if any. If the aggregate size of other PIP Participants' contra orders is not equal to or greater than the PIP Surrender Quantity, then the remaining PIP Surrender Quantity shall be left unfilled by those participants and the Primary Improvement Order shall be allocated the remaining size of the PIP Order as set forth in the PIP Rules.¹⁰ The Exchange has stated that it will provide Options Participants with three (3) business days notice, via Information Circular, about the implementation date of the PIP Surrender Quantity prior to

⁷ The Primary Improvement Order would also still yield priority to certain competing orders in certain circumstances. See PIP Rules, *supra* note 4, paragraph (f)(iii). In the case of a Max Improvement Primary Improvement Order, see subsection (e)(ii) of the PIP Rules, the Surrender Quantity would be deducted from the number of contracts, if any, remaining for the Initiating Participant at the last level of allocation—i.e., from the 40% share to which the Initiating Participant is entitled at that level—and ceded to any other Options Participants at that level. Thus it is possible, under the proposed rule change, that if the Surrender Quantity is greater than the number of contracts remaining for the Initiating Participant at the last level of allocation, the Initiating Participant will receive no contracts at that level. Telephone conversation between Michael Burbach, Vice President of Legal Affairs, BOX, and Ira Brandriss, Special Counsel and Nicholas Shwayri, Attorney-Advisor, Division of Trading and Markets, Commission, January 19, 2011.

⁸ See, generally *id.*, paragraph (f).

⁹ See *id.*, paragraph (e).

⁵ 15 U.S.C. 78k-1.

⁶ 17 CFR 242.608.

⁷ 15 U.S.C. 78k-1.

⁸ 15 U.S.C. 78k-1(a)(3)(B).

⁹ 17 CFR 242.608.

¹⁰ 17 CFR 200.30-3(a)(29).

its implementation in the BOX trading system.

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 securities exchange.¹¹ In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities 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 for a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission believes that Initiating Participant's use of the Surrender Quantity function could benefit investors by allowing an Initiating Participant the flexibility to designate a lower amount than the forty percent (40%) of the PIP Order to which the Initiating Participant is entitled, thereby providing the other PIP Participants with the opportunity to receive increased trade allocations.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-BX-2010-083), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63732; File No. SR-NASDAQ-2011-007]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Impose a Quarterly Maximum on the Listing of Additional Shares Fees Payable by Closed-End Funds

January 19, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

¹¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ 17 CFR 200.30-3(a)(12).

("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 6, 2011, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to impose a quarterly maximum on the listing of additional shares fees payable by Closed-End Funds. Nasdaq will implement the proposed rule change immediately.

The text of the proposed rule change is below. Proposed new language is in *italics*.

5910. The NASDAQ Global Market

(a) No change.

(b) Additional Shares

(1)–(5) No change.

(6) *The maximum fee charged to an issuer that is a Closed-End Fund in any quarter is \$25,000 per Company.*

(c)–(f) No change.

5920. The Nasdaq Capital Market

(a) No change.

(b) Additional Shares

(1)–(5) No change.

(6) *The maximum fee charged to an issuer that is a Closed-End Fund in any quarter is \$25,000 per Company.*

(c)–(e) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq currently assesses a fee for listing additional shares of an already listed class in the amount of \$5,000 or \$0.01 per additional share, whichever is higher, up to an annual maximum of \$65,000 per listed company.³ There is no fee assessed for issuances of less than 50,000 shares per quarter.⁴ This fee applies to both operating companies and closed-end companies ("Closed-End Funds").

A Closed-End Fund is a type of company regulated under the Investment Company Act of 1940.⁵ Generally, a Closed-End Fund sells a fixed number of shares and invests the proceeds in investments chosen by its investment adviser to achieve the funds stated investment objectives. Shareholders have an interest in the fund's investments, but generally cannot redeem shares from the fund. Instead, the Closed-End Fund's shares are listed and trade at a value which may be greater or less than the fund's assets. Unlike operating companies, a Closed-End Fund is not taxed on its income so long as it generates at least 90% of its income from permissible sources, including dividends on and gains from the sale of stock or securities, and distributes that income to its shareholders.⁶ As a consequence, a Closed-End Fund generally distributes all of its income annually and does not have access to retained earnings for new investment opportunities. A Closed-End Fund, therefore, frequently needs to issue additional shares to raise new capital in order to fund such opportunities. This is in contrast to operating companies, which generally have access to retained earnings to acquire new assets, and as a consequence are not limited to issuing shares.

Given the unique nature of Closed-End Funds, Nasdaq believes it is appropriate to provide them relief from the fee for listing additional shares in the form of a \$25,000 quarterly limit. The quarterly maximum will reduce the likelihood of reaching the existing \$65,000 annual limit and eliminate the possibility of reaching the annual maximum with a single capital raise or

³ See Nasdaq Listing Rule 5910(b), applicable to Nasdaq Global and Global Select Market companies and Nasdaq Listing Rule 5920(b), applicable to Nasdaq Capital Market companies.

⁴ *Id.*

⁵ 15 U.S.C. 80a-5.

⁶ 26 U.S.C. 851–856.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.