

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-49434; File No. SR-BSE-2004-10)

March 17, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Amendment of its Constitution to Permit the Separation of the Chairman and Chief Executive Officer Positions

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> notice is hereby given that on March 2, 2004 the Boston Stock Exchange, Inc. (“BSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by BSE. 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

The Exchange seeks to amend its Constitution to permit the separation of the Chairman and Chief Executive Officer roles. The proposed rule change is attached as Exhibit A hereto.

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

In its filing with the Commission, BSE 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. BSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

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

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

1. Purpose

The BSE proposes to amend its Constitution to permit the separation of the Chairman and Chief Executive Officer functions. The separation would not be mandatory, but would be an option to be utilized by the Exchange's Board of Governors (the "Board") as deemed necessary and/or prudent to enhance the governance of the Exchange. The separation would also allow for the disconnection and independence of the Exchange's regulatory function from the exchange's marketplace function.

The BSE is not proposing this constitutional change due to any internal issues arising from its current governance structure. Rather, the Exchange is seeking to be proactive in concert with changes occurring in the control mechanisms of other market centers, particularly the New York Stock Exchange ("NYSE"). For that reason, the BSE is seeking effectiveness of the changes proposed by its next Board meeting in April 2004. However, the BSE, as a regional exchange, does not propose all of the changes recently enacted by the NYSE, primarily due to the fact that the BSE's size alone would make such a governance structure unwieldy and unworkable. The changes the Exchange proposes, though, do seek to achieve the same overall result of the separation of the Exchange's regulatory and marketplace functions, as warranted.

Moreover, in order to maintain flexibility in its primary governing document, the Exchange is purposefully not constitutionally mandating the separation of the Chairman and Chief Executive Officer roles, but is providing for their separation in the event that the Board determines such a separation to be practical, in light of current internal or external events. Presently, the Chairman has determined, and the Board has concurred, that it is desirous of more flexibility within the

Exchange's Constitution so that it will be able to separate the Chairman and Chief Executive Officer roles.

As envisioned, the separation of the Chairman and Chief Executive Officer of the Exchange would provide for the independence of the BSE's regulatory function from any potentially inappropriate linkage with the marketplace function. Yet, the regulatory function would retain sufficient proximity to the marketplace to assure the market sensitivity that is fundamental to effective regulation. If the Chairman and Chief Executive Officer of the Exchange are not the same person, then the present intention is that the Chairman, as an executive officer of the Exchange, would (1) preside over all meetings of the Board; (2) be responsible to the Board for the management of the BSE's regulatory affairs; (3) be responsible for the oversight of all exchange facilities,<sup>3</sup> subsidiaries, or other legal entities to which the Exchange is a party; and, (4) act as Board liaison to the Exchange's Chief Executive Officer and management. The Chief Executive Officer, according to present intention, would (1) be responsible for the management and administration of the affairs of the Exchange's marketplace functions; (2) not participate in executive sessions of the Board; and, (3) be subject to the authority of the Board.

The Exchange believes that the proposed governance architecture provides the best model for the BSE. It will permit the BSE, as a relatively small exchange, to resolve and manage conflicts of interest inherent in self-regulation while maintaining the marketplace proximity requisite for optimizing regulatory intervention in market mechanisms. Moreover, it will allow the Exchange to

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<sup>3</sup> Under the Act, "the term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction to an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service." See 15 U.S.C. 78c(a)(2).

remain flexible in regard to its governance structure if and when future events may require a response.

## 2. Statutory Basis

The statutory basis for the proposed rule change is the requirement under Section 6(b)(1) of the Act<sup>4</sup> that an exchange be organized and have the capacity to be able to carry out the purposes of the Act, the requirement under Section 6(b)(3) of the Act<sup>5</sup> that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and the requirement under Section 6(b)(5) of the Act<sup>6</sup> to have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, to remove impediments to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds

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<sup>4</sup> 15 U.S.C. 78f(b)(1).

<sup>5</sup> 15 U.S.C. 78f(b)(3).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-BSE-2004-10. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 will also be available for inspection and copying at the principal office of the BSE.

All submissions should refer to file number SR-BSE-2004-10 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).

The text of the proposed rule change appears below. Proposed new language is in *italics*.  
Proposed deletions are in [brackets].

**Boston Stock Exchange, Inc.**

**Constitution**

**Article I**

no change

**Article II**

Secs. 1-2 - no change

Sec. 3.

**General Powers**

The Board of Governors shall be vested with all powers necessary for the government of the Exchange, the regulation of business, the administration of the regulatory functions of the Exchange and the business conduct of its members, allied members, member firms and member corporations and the promotion of the welfare, objects and purposes of the Exchange. In the exercise of its powers it may adopt such rules, issue such orders and directions, and make such decisions, as it may deem appropriate.

Sec. 4 – no change

Sec. 5.

**Procedural Powers**

The Board of Governors shall determine the manner and form by which its proceedings shall be conducted. It shall designate committees and vote on whether to approve the appointments by the

Chairman of members thereof, except with respect to the Nominating Committee, and it shall have original and supervisory jurisdiction over all matters referred to any such committees except the Nominating Committee. It shall appoint a Chairman for such term as the Board may fix and shall delegate, in addition to the powers expressly granted to him by this Constitution, such of its powers as it shall from time to time determine in order that the Chairman may [act as the Chief Executive Officer of the Exchange] carry out his duties as specified by the Board to, among other things, effectively oversee the regulatory affairs of the Exchange. It shall make rules with respect to the matters within its authority and may prescribe penalties for the violation of such rules, of any orders, directions or decisions of the Board, or of any provision of this Constitution where no penalty is otherwise specified.

Secs. 6-12 – no change

### **Article III**

Sec. 1.

Chairman – [Vice Chairman] Chief Executive Officer

The Chairman of the Board of Governors [shall] may be the Chief Executive Officer of the Exchange, responsible to the Board for the management of its business affairs. The Chairman shall be appointed by the Board of Governors to serve at its pleasure and for such compensation as it may from time to time fix. The Board may, in its discretion, appoint a separate Chief Executive Officer of the Exchange. If the Board appoints a separate Chief Executive Officer, the Chairman shall also be an executive officer of the Exchange. The Chairman and Chief Executive Officer, whether the same or separate persons, shall have such duties and authority as shall be delegated to them by the Board from time to time, as the Board determines. If the Chairman is not the Chief Executive Officer, he shall act as liaison officer between the Board and the Chief

Executive Officer. [The Chairman shall not engage in any other business during his incumbency except with the approval of the Board. The Chairman shall, with the Vice Chairman, subject to the approval of the Board, appoint the members of and fill vacancies in all committees of the Exchange, except the Nominating Committee. The Chairman shall be a member, ex officio, of all committees of the Exchange except the Nominating Committee and the Audit Committee. On any appeal to the Board of Governors or any committee from a decision of the Chairman, the Chairman shall not participate in the appeal proceedings except as required by the Board or any such committee.]

The Chairman shall be the presiding officer of the Board of Governors, and shall preside at meetings of the Exchange. The Chairman [shall have such other duties or authority as may be delegated to him by the Board of Governors and] shall have the power to appoint, dismiss, and fix the compensation of all officers (except the Chief Executive Officer and Vice Chairman) and employees of the Exchange.

The Chairman shall not engage in any other business during his incumbency except with the approval of the Board. The Chairman shall, with the Vice Chairman, subject to the approval of the Board, appoint the members of and fill vacancies in all committees of the Exchange, except the Nominating Committee. The Chairman shall be a member, ex officio, of all committees of the Exchange except the Nominating Committee and the Audit Committee. On any appeal to the Board of Governors or any committee from a decision of the Chairman, the Chairman shall not participate in the appeal proceedings except as required by the Board or any such committee.

The Chairman of the Board after taking office shall not be a member of the Exchange or a partner, officer, voting stockholder, or person associated with a member organization of the Exchange, or a broker or dealer, and if the Chairman holds such a position prior to the appointment, the Chairman shall terminate such position under conditions approved by the Board of Governors.