

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-51879; File No. SR-BSE-2004-58)**

**June 20, 2005**

**Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change, and Amendments No. 1, 2, 3, and 4 Thereto, Relating to the Composition of the Board of Directors and Executive Committee of Boston Options Exchange Regulation LLC**

I. Introduction

On December 9, 2004, 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 proposed rule change to amend certain sections of the By-laws of Boston Options Exchange Regulation LLC (“BOXR”) relating to BSE Governor representation on BOXR’s Board of Directors (“BOXR Board”) and Executive Committee. BOXR is a wholly owned subsidiary of the Exchange and the Exchange has delegated certain functions to BOXR so that BOXR is responsible for the regulatory oversight of the Boston Options Exchange, a facility of the BSE.

On December 13, 2004, the BSE filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On December 16, 2004, the BSE filed Amendment No. 2 to the proposed rule change.<sup>4</sup> On

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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> In Amendment No. 1, the Exchange revised the proposed rule text. Amendment No. 1 replaced the BSE’s original filing in its entirety.

<sup>4</sup> In Amendment No. 2, the Exchange withdrew its request that the proposed rule change become immediately effective and requested that the proposed rule change become effective pursuant to Section 19(b)(2) of the Act.

March 8, 2005, the BSE filed Amendment No. 3 to the proposed rule change.<sup>5</sup> On March 10, 2005, the BSE filed Amendment No. 4 to the proposed rule change.<sup>6</sup> The proposed rule change, as amended, was published for comment in the Federal Register on March 24, 2005.<sup>7</sup> The Commission received no comments on the proposal.

## II. Description of the Proposal

The Exchange proposed the following amendments to BOXR's By-laws: (1) replace the requirement in Section 4 that the BSE Chairman be a member of the BOXR Board with the requirement that at least one Governor of the BSE Board of Governors must be a member of the BOXR Board; (2) replace the requirement in Section 14 that the BSE Chairman must be a member of BOXR's Executive Committee with the requirement that at least one Governor of the BSE Board of Governors, who shall also be a member of the BOXR Board, must be a member of BOXR's Executive Committee; and (3) eliminate language in both Sections 3 and 4 that provides that the BSE Chairman shall not be considered a member of the BOXR Board for "qualification purposes." Section 4 of BOXR's By-laws provides that at least 50% of the Directors on the BOXR Board must be Public Directors<sup>8</sup> and at least 20% of the Directors on the BOXR Board must be representatives of BOX Options Participants.<sup>9</sup> However, currently, the BSE Chairman is

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<sup>5</sup> In Amendment No. 3, the Exchange revised the purpose section and rule text of the proposed rule change. Amendment No. 3 replaced Amendment No. 1, as amended by Amendment No. 2, in its entirety.

<sup>6</sup> In Amendment No. 4, the Exchange amended its filing to reflect that Amendment No. 3 was incorrectly filed pursuant to Rule 19(b)(3)(A) of the Act and should have been filed pursuant to Section 19(b)(2) of the Act.

<sup>7</sup> See Securities Exchange Act Release No. 51388 (March 17, 2005), 70 FR 15135.

<sup>8</sup> See Definitions, Paragraph (p) of the BOXR By-laws.

<sup>9</sup> See Definitions, Paragraph (o) of the BOXR By-laws.

not considered to be a Public Director, BOX Options Participant Director or Industry Director<sup>10</sup> and is not taken into account when determining whether the composition of the BOXR Board complies with the composition requirements of Section 4, although the BSE Chairman is a voting member of the BOXR Board. The proposed rule change, however, would require BOXR to consider the BSE Governor representative on the BOXR Board for the purpose of determining compliance with the composition requirements of Section 4, whether the BSE Governor representative is the BSE's Chairman or another member of the BSE Board of Governors.

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>11</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>12</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,<sup>13</sup> in that the proposal is designed so that the Exchange is organized and has the capacity to carry out the purposes of the Act; Section 6(b)(3) of the Act,<sup>14</sup> in that the proposal is designed so the rules of the Exchange assure a fair representation of its members in the selection of its directors and the administration

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<sup>10</sup> See Article II, Section 1 of the BSE Constitution.

<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(1).

<sup>14</sup> 15 U.S.C. 78f(b)(3).

of its affairs; and Section 6(b)(5) of the Act,<sup>15</sup> in that the proposal is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

The Commission notes that the proposal is designed to provide the Exchange with greater flexibility with respect to the appointment of a BSE Governor to serve on the BOXR Board and Executive Committee. The Exchange's Constitution permits, but does not mandate, that the Exchange's Chairman and Chief Executive Officer ("CEO") positions be separated. If the positions are in fact held by two individuals, then the Exchange's Chairman would be responsible for the regulatory functions of the Exchange and it would be consistent with BOXR's regulatory mandate to have the BSE Chairman be a member of the BOXR Board and Executive Committee. However, in the event that the positions are held by a single individual, then the Exchange's Board would be able to appoint a BSE Governor other than the BSE Chairman to the BOXR Board. The Commission considers it appropriate for the Exchange to have a BSE Governor other than the Exchange's Chairman be appointed to the BOXR Board and Executive Committee, particularly in light of the Exchange's goal to maintain an adequate separation between its business and regulatory functions.

In addition, the proposal would allow the BSE Governor that serves on the BOXR Board to be considered for the purpose of determining the qualification percentages of the BOXR Board. The Commission notes that this provision would not alter the current requirement of the BOXR By-laws that at least 20% of the BOXR Directors (but no fewer than two Directors) be officers or directors of a firm approved as a BOX Option Participant. Therefore, in the Commission's view, the proposal is consistent with the Act's requirement that the Exchange

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

assure the fair representation of members in the selection of its directors and administration of its affairs.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-BSE-2004-58), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

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