

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52169; File No. SR-BSE-2005-21)

July 29, 2005

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to Proposal to Transfer a Portion of Ownership Interest in Boston Options Exchange Facility

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 July 27, 2005, 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 the self-regulatory organization. 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 proposes to transfer a portion of its ownership interest in its Boston Options Exchange facility (“BOX”) such that its aggregate percentage interest will fall below 20%.

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

In its filing with the Commission, the Exchange 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 III below. The Exchange 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

On January 13, 2004, the Commission approved four BSE proposals that together established BOX as a facility of the Exchange.<sup>3</sup> This proposal relates to Section 8.4(f) of the operating agreement of BOX LLC (the "LLC Agreement"), which requires that any Transfer<sup>4</sup> that would result in a reduction of BSE's aggregate Percentage Interest<sup>5</sup> in BOX LLC to below 20% be subject to the rule filing process pursuant to Section 19(b)(1) of the Act<sup>6</sup> and Rule 19b-4 thereunder.<sup>7</sup>

The BSE is proposing to Transfer a portion of its Units, which would result in the BSE's Percentage Interest falling below the 20% threshold. Any such Transfer would be subject to the various limitations set forth elsewhere in the LLC Agreement, throughout Article 8 and elsewhere, regarding suitability and other regulatory and business requirements.<sup>8</sup> Although the

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<sup>3</sup> See Securities Exchange Act Release Nos. 49066 (January 13, 2004), 69 FR 2773 (January 20, 2004) (establishing a fee schedule for the proposed BOX facility); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (creating Boston Options Exchange Regulation LLC to which the BSE would delegate its self regulatory functions with respect to the BOX facility); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (approving trading rules for the BOX facility); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (approving certain regulatory provisions of the operating agreement of BOX LLC).

<sup>4</sup> Under the terms of the LLC Agreement, a "Transfer" occurs when any LLC member would "dispose of, sell, alienate, assign, exchange, participate, subparticipate, encumber, or otherwise transfer in any manner...all or any part portion of its Units" (ownership interests).

<sup>5</sup> Under the terms of the LLC Agreement, "Percentage Interest" is defined as the ratio of the number of Units held by an LLC member to the total of all of the issued Units, expressed as a percentage.

<sup>6</sup> 15 U.S.C. 78s(b)(1).

<sup>7</sup> 17 CFR 240.19b-4.

<sup>8</sup> For example, the BSE would be prohibited, under Section 8.1(d), from Transferring any

BSE does not presently have a transferee designated, any such transferee would need to sign and be bound by the provisions of the LLC Agreement. The purpose of the Transfer would be to assist the BSE to fund its equities-related business interests and initiatives related thereto.

Nothing about BSE's transfer of Units will affect additional provisions of the LLC Agreement that make special accommodations for BSE as the SRO of the BOX facility. For example, Section 4.4(a) of the LLC Agreement provides that BOX may not take any major action unless such action is approved by a majority of the BOX LLC Board, including the affirmative vote of all of the directors designated by the BSE. Section 4.1(b) of the LLC Agreement provides that, with its present ownership interest, BSE is entitled to maintain two seats on the Board. Since the BSE does not at this time anticipate that any foreseen Transfers would result in BSE's Percentage Interest of BOX LLC going below 8.00% (the threshold established in this Section to maintain at least two directors on the Board), then this entitlement will remain. Nevertheless, Section 4.1(b) also gives the BSE a perpetual right to designate at least one director on the BOX LLC Board regardless of whether it maintains any ownership interest.

In addition, although BOX LLC itself will not carry out any regulatory functions, all of its activities must be consistent with the Act. For example, provisions set forth in Sections 4.2(a) and 5.3 of the LLC Agreement state that each unitholder and director of BOX cooperate with the Commission and the BSE in carrying out their regulatory responsibilities. These provisions reinforce the notion that BOX, as a facility of an exchange, is not solely a commercial enterprise; it is an integral part of an SRO registered pursuant to the Act, and is subject to the obligations

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of its Units to anyone other than a Member, affiliate of a Member, or IB (according to the terms set forth in Section 8.6(d)), until after the earlier of the second anniversary of the Launch Date of BOX or the date on which IB's percentage interest has been reduced to no more than 8.00%.

imposed by the Act. These obligations endure so long as BOX is a facility of the Exchange, regardless of the size of BSE's ownership interest in BOX LLC.

The Commission has stated, in a similar case involving the establishment of ArcaEx as a facility of the Pacific Exchange ("PCX"), that a national securities exchange need not have a significant ownership interest in the operator of one of its facilities.<sup>9</sup> In fact, the Act does not require that an SRO have any ownership interest in the operator of one of its facilities. Nevertheless, the BSE intends to maintain an ongoing ownership interest in BOX LLC, the operator of its BOX facility. However, regardless of this intention, the BSE is the SRO for the BOX facility, and the BSE will, independent of its ownership interest, ensure that BOX LLC will conduct the facility's business in a manner consistent with the regulatory and oversight responsibilities of the BSE and with the Act.

Moreover, nothing in the Exchange's proposal will alter or modify in any way the terms or the enforcement of the LLC Agreement. In addition, the actual transfer of any BSE units will not alter or modify the terms or the enforcement of the LLC Agreement. The BSE also represents that, should there be any changes in the terms of the LLC Agreement between the date of the publication of this proposal and the transfer of BSE's Units which would result in the BSE's Percentage Interest falling below the 20% threshold, then the Exchange will resubmit this filing in order for the Commission to consider the transfer of Units in light of any changes made to the LLC Agreement.

## 2. Statutory Basis

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<sup>9</sup> See Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55229-30 (November 1, 2001) (approving SR-PCX-00-25). ArcaEx is operated by Archipelago Exchange LLC ("Arca LLC"). At the time of its approval, PCX's ownership interest in Arca LLC consisted solely of a 10% interest in Archipelago Holdings LLC, the parent company of Arca LLC. See 66 FR at 55225.

The Exchange believes that this filing is consistent with Section 6(b)<sup>10</sup> of the Act, in general, and furthers the objectives of Section 6(b)(1),<sup>11</sup> in particular, in that it ensures that the Exchange is so organized and has the capacity to carry out the purposes of the Act and to comply and to enforce compliance by the Exchange's members with the Act, the rules and regulations of the Act, and the rules of the Exchange; and Section 6(b)(5),<sup>12</sup> in particular, in that it is designed to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; 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.

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

The Exchange does not believe that the proposed rule change will impose 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

No written comments were either solicited or 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 such longer

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

<sup>11</sup> 15 U.S.C. 78f(b)(1)

<sup>12</sup> 15 U.S.C. 78f(b)(5).

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, as amended, is consistent with the Act.

Comments may be submitted by any of the following methods:

##### 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](mailto:rule-comments@sec.gov). Please include File Number SR-BSE-2005-21 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-2005-21. 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 the 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-2005-21 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).