For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1082 Filed 1–16–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49049; File No. SR–Amex–2003–103]

Self-Regulatory Organizations; American Stock Exchange, LLC; Order Granting Accelerated Approval to Proposed Rule Change Relating to Issuer Fees

January 9, 2004.

On November 25, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1034 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend sections 140, 141, 142, and 144 of the Amex *Company Guide* to designate as non-refundable the current one-time $5,000 application processing fee, establish a late change of $2,500 payable by issuers whose annual listing fees are more than 60 days past due, and increase fees for listing additional shares. The Exchange further proposed to amend Sections 141 and 142 of the Amex *Company Guide* to clarify that annual listing fees and additional listing fees do not apply to Nasdaq National Market securities to which the Exchange has extended unlisted trading privileges.

The proposed rule change was published for comment in the **Federal Register** on December 11, 2003.[3] The Commission received no comments on the proposal.

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 and, in particular, the requirement of Section 6(b)(4) of the Act that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charged among its members and issuers and other persons using its facilities.[4]

Furthermore, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register.** Specifically, the Commission notes the Exchange has represented that these fee changes are necessary to adequately fund the Exchange's listed equities business and develop value-added services for Amex listed issuers.[5] The Exchange also represents that it has experienced a surge in listing applications and needs to implement the fee changes in an expeditious manner in order to provide appropriate funding for its application review process.[6] Accordingly, the Commission finds good cause, consistent with sections 6(b)(4) and 19(b)(2) of the Act,[7] to approve the proposed rule change on an accelerated basis.[8]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–Amex–2003–103) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–1118 Filed 1–16–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49067; File No. SR–BSE–2003–19]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendments No. 1 and 2 Thereto by the Boston Stock Exchange, Inc. Relating to the LLC Operating Agreement of the Proposed New Exchange Facility To Be Operated by the Boston Options Exchange Group LLC

January 13, 2004.

On October 16, 2003, 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'')[1] and Rule 19b–4 thereunder,[2] a proposal to establish, through an operating agreement among its owners, a Delaware limited liability company known as the Boston Options Exchange Group LLC (''BOX LLC''). BOX LLC would operate a new options trading facility of the Exchange. On October 23, 2003, the Commission published the proposal in the **Federal Register**.[3] The Commission received one comment on the proposal.[4] On November 14, 2003, BSE submitted Amendment No. 1 to the proposal.[5] On January 9, 2004, BSE submitted Amendment No. 2 to the proposal.[6] This order approves the proposed rule change, issues notice of and solicits comment on Amendments No. 1 and 2, and approves Amendments No. 1 and 2 on an accelerated basis.

I. Description of the Proposal

A. Corporate Organization of BOX LLC

Through a series of related filings, BSE is proposing to establish a new options trading facility[7] to be known as the Boston Options Exchange (''BOX'').[8] In this filing, BSE is seeking the Commission's approval of the operating agreement of BOX LLC (the ''LLCOA''). Unlike a corporation's charter or bylaws, the LLCOA is a signed contract between the owners of BOX LLC

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48886 (December 5, 2003), 68 FR 69095.

[4] 15 U.S.C. 78f(b)(4).

[5] *See* SR–Amex–2003–103.

[6] Telephone conversation between Eric Van Allen, Assistant General Counsel, Amex, and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission, on January 6, 2004.

[7] 15 U.S.C. 78f(b)(4) and 78s(b)(2).

[8] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48650 (October 17, 2003), 68 FR 60731 (''Notice'').

[4] *See infra* Section II.

[5] *See* letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division of Market Regulation (''Division''), Commission, dated November 13, 2003 (''Amendment No. 1''). In Amendment No. 1, BSE proposes a technical change to substitute the term ''BSE'' for the phrase ''Regulatory Services Provider and its Affiliates.''

[6] *See* letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division, Commission, dated January 9, 2004 (''Amendment No. 2''). In Amendment No. 2, BSE proposes to clarify the restrictions on the Transfer of BOX LLC units and to clarify the Commission's jurisdiction over the owners of BOX LLC.

[7] *See* Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2).

[8] Today the Commission is approving three other BSE proposals that together establish the BOX facility. *See* Securities Exchange Act Release Nos. 49066 (January 13, 2004) (SR–BSE–2003–17) (establishing fee schedule for proposed BOX facility); 49065 (January 13, 2004) (SR–BSE–2003–04) creating Boston Options Exchange Regulation LLC to which BSE would delegate its self-regulatory functions with respect to BOX facility); and 49068 (January 13, 2004) (SR–BSE–2002–15) (approving trading rules for BOX facility) (''BOX Rules''). In addition, the Commission previously approved BSE rules providing for the allocation of market maker appointments in the BOX facility. *See* Securities Exchange Act Release No. 48644 (October 16, 2003), 68 FR 60423 (October 22, 2003) (SR–BSE–2003–13).

(''unitholders'').[9] BSE has asserted that certain provisions of the LLCOA do not constitute ''rules of an exchange'' within the meaning of Section 3(a)(27) of the Act[10] and Rule 19b–4. Accordingly, BSE did not file, and the Commission is not addressing, these provisions.

B. Current Ownership and Control of BOX LLC

Currently, there are three unitholders who have a direct controlling interest in BOX (''direct controlling parties''): Bourse de Montréal Inc. (''Bourse'') (31.27%), the largest derivatives exchange in Canada; BSE (26.89%); and Interactive Brokers Group LLC (''IBG'') (22.41%), a registered broker-dealer that intends to apply to be an Option Participant in the BOX facility.[11] None of the remaining unitholders holds more than a 5% interest in BOX LLC. There is one person that has an indirect controlling interest in BOX LLC (*i.e.*, is an ''indirect controlling party''): Mr. Thomas Peterffy, who holds a controlling interest in IBG, which has a direct controlling interest in BOX LLC. No person or entity has a controlling interest in either BSE or Bourse.

C. Changes in Ownership of BOX LLC

Section 8.1(a) of the LLCOA defines a Transfer broadly to be any disposition of, sale, assignment, exchange, participation, subparticipation, encumbrance, or other transfer of units, and provides that, except in certain limited circumstances, no Person may directly or indirectly Transfer any BOX LLC units, or any rights arising thereunder, without the prior approval of the board of directors of BOX LLC.[12] To be eligible for such approval, the proposed transferee must be: (1) Of high professional and financial standing; (2) able to carry out its duties as a unitholder under the LLCOA; and (3) under no regulatory or governmental disqualification. Section 8.1(b) provides, in addition, that a Person shall be admitted to BOX only if such Person, among other things, accepts in writing the terms and provisions of the LLCOA and the BOX Board accepts it by resolution. Section 8.4(a) provides that no Transfer of BOX LLC units shall take place if such transaction is prohibited by the LLCOA or any state, federal, or provincial securities law. Section 8.4(d) provides that any Transfer of BOX LLC units that contravenes Article 8 of the LLCOA shall be void and ineffectual and shall not bind or be recognized by BOX LLC.

Section 8.4(e) of the LLCOA provides that, beginning after Commission approval of this proposed rule change, BOX LLC must provide the Commission with written notice ten days prior to the closing date of any acquisition that results in a unitholder's percentage ownership interest in BOX LLC, alone or together with any affiliate,[13] meeting or crossing either the 5%, 10%, or 15% thresholds. Section 8.4(f) provides that any Transfer of BOX LLC units that results in the acquisition and holding by any unitholder, alone or together with any affiliate, of an interest that meets or crosses the 20% threshold or any successive 5% threshold (*i.e.*, 25%, 30%, *etc.*), would trigger an amendment to the LLCOA that would constitute a proposed rule change that BSE would have to file with the Commission under Section 19(b) of the Act.[14] In addition, Section 8.4(f) provides that an amendment to the LLCOA resulting from a Transfer of BOX LLC units that reduces BSE's ownership in BOX LLC to below the 20% threshold would constitute a proposed rule change under Section 19(b) of the Act.

Section 8.4(g) of the LLCOA provides for indirect changes in control of BOX LLC. Any person that acquires a controlling interest (*i.e.*, an interest of 25% or greater) in a unitholder that holds 20% or more of the BOX LLC units would be required to agree to become a party to the LLCOA and abide by its terms.[15] The amendment to the LLCOA caused by the addition of the indirect controlling party would trigger a proposed rule change that BSE would have to file with the Commission pursuant to Section 19(b) of the Act. The rights and privileges of the direct controlling party would be suspended until this proposed rule change becomes effective under the Act or until the indirect controlling party ceases to have a controlling interest in the direct controlling party.

In addition to the requirements for proposed rule changes relating to direct and indirect changes in control of BOX LLC, Section 4.3(b) of the LLCOA prohibits unitholders from entering into voting trust agreements with respect to their ownership interests in BOX LLC.

D. Commission Jurisdiction Over Owners of BOX LLC

In Section 19.6(a), each unitholder of BOX LLC acknowledges that, to the extent that they are related to BOX activities, the books, records, premises, officers, directors, agents, and employees of the unitholder shall be deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. In Section 19.6(b), each unitholder and the officers, directors, agents, and employees thereof irrevocably submit to the exclusive jurisdiction of the U.S. federal courts, the Commission, and BSE[16] for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of or relating to BOX activities or Section 19.6(a). Also as provided in Section 19.6(b) of the LLCOA, each unitholder and the officers, directors, agents, and employees thereof waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claim that they are not personally subject to the jurisdiction of the

[9] While ownership interests in a corporation are generally referred to as ''shares'' or ''stock,'' ownership interests in an LLC are referred to as ''units.'' Therefore, the owners of BOX LLC are referred to as ''unitholders.''

[10] 15 U.S.C. 78c(a)(27).

[11] An Options Participant is a firm or organization that is registered with the Exchange to participate in options trading on BOX as an order flow provider and/or as a market maker. *See* BOX Rules, Chapter I, Section 1(a)(40).

[12] In Amendment No. 2, the BSE filed changes to Article 8 to enhance BOX's ability to prevent Transfers of BOX LLC units in contravention of the LLCOA. *See* Amendment No. 2, *supra* note .

[13] The term ''affiliate'' is defined in Section 1.1 of the LLCOA and means, with respect to any person, any other person controlling, controlled by, or under common control with, such person. As used in this definition, the term ''control'' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise with respect to such person. A person is presumed to control any other person, if that person: (1) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting security, or has the power to sell or direct the sale of 25% or more of a class of voting securities of the person; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25% or more of the capital of the partnership.

[14] For example, assume that a unitholder owns a 28% interest in BOX LLC and buys units constituting an additional 3%. Because the unitholder would cross the 30% ownership threshold, the acquisition would trigger an amendment to the LLCOA that BSE would have to submit as a proposed rule change. However, an acquisition of an additional 3% that would raise the unitholder's interest from 31% to 34% would not trigger a proposed rule change.

[15] For example, assume Company XYZ owns a 25% interest in BOX LLC and Firm ABC acquires 35% of Company XYZ. Firm ABC must execute an amendment to the LLCOA whereby Firm ABC agrees to become a new party to the agreement and abide by all of its provisions. Furthermore, a person could become subject to Section 8.4(g) of the LLCOA if it acquires an indirect controlling interest in a direct controlling party of BOX LLC.

[16] Such jurisdiction includes Delaware for matters relating to the organization or internal affairs of BOX LLC, provided that such matter is not related to trading on, or the regulation of, the BOX Market. *See* Section 19.6(b) of the LLCOA; *see also* Amendment No. 2, *supra* note.

Commission; that the suit, action or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter of the suit, action, or proceeding may not be enforced in or by such courts or agency.

Section 19.6(c) of the LLCOA provides that the BSE and each unitholder shall take such action as is necessary to ensure that such unitholder's officers, directors, and employees consent to the application of Section 19.6 with respect to their BOX-related activities.[17] Finally, Section 19.6(c) further provides that the Bourse and the BSE shall take such action as is necessary to ensure that, with respect to their BOX-related activities, the Bourse's officer, directors, and employees consent to the communication of their ''personal information'' by the Bourse to the Commission and the BSE and agree to waive the protection of such ''personal information'' that is provided by the Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q.c.P–39.1 (''Private Sector Privacy Act'').[18]

E. Governance of BOX LLC

Section 4.2(b) of the LLCOA gives the board of directors of BOX LLC the power and responsibility to manage the business of BOX LLC, select and evaluate the performance of the Senior Executive, and establish and monitor capital and operating budgets. Section 4.1(a) provides that the board of BOX LLC will consist of between six and 13 directors. Section 4.1(b) provides that, initially, Bourse, BSE, and IBG will be entitled to designate two directors each. Moreover, for as long as BOX remains a facility of the Exchange, BSE has the right to designate at least one director. Section 4.1(c) provides that any new unitholder that acquires a prescribed percentage interest in BOX LLC also would be entitled to designate one director. Section 4.8 provides that, except as otherwise expressly provided in the LLCOA or as requested by the board, no unitholder shall take part in the day-to-day management or operation of the business or affairs of BOX LLC.

Pursuant to Section 4.1(d) of the LLCOA, a director shall be terminated by the board: (i) In the event such director has violated any provision of the LLCOA; or (ii) if the board determines that such action is necessary or appropriate in the public interest or for the protection of investors. In addition, Section 4.2(a) requires each director to comply with the federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and BSE pursuant to their regulatory authority. Section 4.2(a) also requires each director to take into consideration whether his or her actions as a director would cause BOX LLC to engage in conduct that fosters and does not interfere with its ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest.

F. Regulation of BOX

BSE will operate BOX as a facility of the Exchange. Accordingly, BSE has responsibility under the Act for the BOX facility. In this regard, Sections 12.1 and 15 of the LLCOA each provide that the books, records, premises, officers, directors, agents, and employees of BOX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. Moreover, under Section 5.3 of the LLCOA, each unitholder agrees to comply with the federal securities laws and the rules and regulations thereunder; to cooperate with the Commission and BSE pursuant to their regulatory authority and the provisions of the LLCOA; and to engage in conduct that fosters and does not interfere with BOX LLC's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest.

Section 5.9 of the LLCOA further provides that, after appropriate notice and opportunity for hearing, the board, by a two-thirds vote, including the affirmative vote of BSE and excluding the vote of the unitholder subject to sanction, may suspend or terminate a unitholder's voting privileges or ownership: (i) In the event such unitholder is subject to a statutory disqualification, as defined in Section 3(a)(39) of the Act; (ii) in the event such unitholder has violated any provision of the LLCOA or any federal or state securities law; or (iii) if the board determines that such action is necessary or appropriate in the public interest or for the protection of investors.

In addition, Section 4.4(a) of the LLCOA provides that BOX LLC may not take any major action unless such action is approved by a majority of the board, including the affirmative vote of all of the directors designated by BSE. A ''major action'' is defined in Section 4.4(b) to include, among other things, a merger or consolidation involving BOX LLC, a sale of any material portion of its assets, the dissolution or winding-up of BOX LLC, entry by BOX into any line of business other than that set forth in the LLCOA, entering into any agreement, commitment, or transaction with an affiliate of a unitholder that is not on commercially reasonable terms, and the purchase of any units of BOX LLC.

Section 16.2(a) of the LLCOA generally provides that a unitholder may not disclose any confidential information of BOX LLC to any person, except as expressly provided by the LLCOA. However, Section 16.2(b) provides exceptions for, among other things, disclosure required by the federal securities laws or in response to a request by the Commission pursuant to the Act or by the BSE. Similarly, Section 16.5 of the LLCOA provides that nothing in the LLCOA should be interpreted as to limit or impede the rights of the Commission, BSE, or BOXR to access or examine BOX Confidential Information, or to limit or impede the ability of unitholders, or their officers, directors, agents, or employees, to disclose BOX Confidential Information to the Commission, BSE, or BOXR.[19]

G. Ownership Restrictions on BOX Unitholders Who Are Also Options Participants

Section 8.4(h) of the LLCOA imposes a ''voting collar'' on any unitholder who, alone or together with an affiliate, has an interest in BOX LLC in excess of 20% and is also an Options Participant in the BOX market. The interests owned by such a unitholder in excess of 20% are deemed ''excess units.'' No unitholder who is also an Options Participant is permitted to vote or give proxy rights to vote with respect to any excess units. However, Section 8.4(h) further provides that the excess units would be considered for quorum purposes of any meeting of the board, and the person presiding over quorum and vote matters would vote the excess

[17] *See* Amendment No. 2, *supra* note.

[18] *Id.*

[19] *See* Amendment No. 2, *supra* note .

units in the same proportion that the units held by the other unitholders are voted.

BSE is proposing a temporary exemption until January 1, 2014 from the voting collar provisions of Section 8.4(h) for IBG, a unitholder that is also an Options Participant. Under the second paragraph of Section 8.4(h), IBG is permitted to vote its excess units, but only with respect to any vote regarding a merger, consolidation, or dissolution of BOX LLC or any sale of all or substantially all of the assets of BOX LLC.

II. Comment Received

The Commission received one comment letter on the proposal, from the Chicago Board Options Exchange (''CBOE'').[20] CBOE's principal concern is that BSE and its partners propose to create a new securities exchange to act as a market for the trading of standardized securities options without registering the new exchange as a national securities exchange. Moreover, CBOE questions whether ''a web of undertakings and provisions embodied in various complex and apparently overlapping agreements (not all of which have been filed with the Commission) will be sufficient to assure the adequacy of regulation and of the Commission's jurisdiction over BOX and its owners,'' and questions ''how the independence of BOX's governance will be assured'' and ''the conflicts between its for-profit structure and its regulatory obligations will be resolved.''

In addition, CBOE criticizes the manner in which BSE presented the LLCOA to the Commission for its review under Section 19(b) of the Act, arguing that BSE should have filed the LLCOA in its entirety, rather than in redacted form. In support of that view, CBOE likens an LLCOA to the articles of incorporation of a corporation and claims that, if an entity organized as a corporation applied for registration as a national securities exchange, it would be required to provide its articles in their entirety. CBOE argues, in addition, that ''the filing does not present a comprehensive description of who are the owners of BOX,'' noting that only the three controlling unitholders that collectively have an ownership interest of 80.67% were listed. CBOE notes that its concerns about the ownership and control of BOX LLC were ''heightened by the fact that BOX's largest single owner is a non-U.S. person.'' CBOE also objects to redactions to the LLCOA regarding the ''major actions'' over which BSE had veto power, arguing that a proper analysis of BOX's governance and regulation could not be performed without the redacted information. CBOE concludes that ''the idea that an applicant can pick and choose which provisions of the [LLCOA] of an exchange to submit for review is wholly inconsistent with the statutory scheme of exchange regulation provided for in the Exchange Act.''

III. Discussion

After careful consideration of the proposal and the comment letter submitted by CBOE, 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.[21] In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,[22] which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade; to facilitate transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.

A. BOX as a Facility of the Exchange

The Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Act[24] in that, upon establishing the BOX facility, BSE will remain so organized, and have the capacity to be able, to carry out the purposes of Act. Moreover, the Commission believes that the BSE's proposal to operate BOX as its facility is properly filed under Section 19(b) of the Act and Rule 19b–4 thereunder, and that BOX is not required, separate from BSE, to apply for registration as a national securities exchange pursuant to Section 6(a) of the Act.[25]

BOX LLC is the limited liability company established under Delaware law that will operate the BSE's proposed options trading facility.[26] The BSE is a registered exchange and, therefore, an SRO with obligations to comply with the Act and to enforce compliance by its members and persons associated with its members with the Act, the rules thereunder, and its own rules. As the CBOE points out in its comment letter, the rules of an exchange, as defined in Section 3(a)(27) of the Act, include the constitution, articles of incorporation, bylaws, and rules. Thus, any changes to these BSE instruments would have to be filed pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. The LLCOA, however, is the organizational document of the BOX LLC, not the BSE.

Nevertheless, certain provisions in the LLCOA may be rules of an exchange if they are the stated policies, practices, and interpretations, as defined in Rule 19b–4 of the Act, of the BSE. Any proposed rule or any proposed change in, addition to, or deletion from any such rules of an exchange must be filed pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. In its comment letter, the CBOE contends that the BSE should have filed the entire LLCOA. The Commission, however, does not believe that Section 19(b) of the Act and Rule 19b–4 thereunder requires that all provisions of a document must be filed solely because some provisions of that document are rules of the exchange.[27]

BSE has filed the proposed rule change to establish BOX LLC as the operator of one of its facilities, despite the fact that BSE does not hold the largest ownership interest in BOX LLC. As a preliminary matter, the Commission does not believe that the ownership structure of BOX LLC precludes approval of this proposal. The Act does not require that an SRO have any ownership interest in the operator of one of its facilities.

In a similar prior case involving the establishment of ArcaEx as a facility of the Pacific Exchange (''PCX''), the Commission determined that a national securities exchange need not have a significant ownership interest in the operator of one of its facilities.[28] This

[20] *See* letter from William J. Brodsky, Chairman and Chief Executive Officer, CBOE, to Jonathan G. Katz, Secretary, Commission, dated November 20, 2003.

[21] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78f(b)(1).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(b)(1).

[25] 15 U.S.C. 78f(a).

[26] The Commission notes that the BOX facility includes the server, its hardware and software, wherever located.

[27] The CBOE also states that it assumed that the BSE would only file changes to those provisions of the operating agreement included in this filing. In this regard, the Commission clarifies that whether or not a proposed rule change must be filed under Section 19(b) of the Act is not determined solely on the basis of whether the original rule was filed.

[28] *See* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55229–30 (November 1, 2001) (approving SR–PCX–00–25) (''PCX/Arca Approval Order''). ArcaEx is operated by Archipelago Exchange LLC (''Arca LLC''). At the time of this approval, PCX's ownership interest in Arca LLC consisted solely of a 10% interest in

determination was predicated on the extent to which PCX, as the SRO, regulates and oversees ArcaEx, notwithstanding its limited ownership interest in the operator of the facility. As the Commission stated in the PCX/ ArcaEx Approval Order: ''the PCX will be fully responsible for all activity that takes place through ArcaEx, including its regulation and oversight, because ArcaEx is a part of the Exchange.''[29] Similarly, the Commission believes that BOX LLC can be approved as the operator of the BOX facility on the same basis that it approved Arca LLC as the operator of the ArcaEx facility. BSE will be the SRO for the BOX facility, and BOX LLC will conduct the facility's business operations in a manner consistent with the regulatory and oversight responsibilities of BSE.[30]

Although BOX LLC itself will not carry out any regulatory functions, all of its activities must be consistent with the Act. Under Section 5.3 of the LLCOA, each unitholder of BOX LLC agrees to comply with federal securities law; to cooperate with the Commission and BSE pursuant to their regulatory authority and the provisions of the LLCOA; and to engage in conduct that fosters and does not interfere with BOX LLC's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest. Section 4.2(a) of the LLCOA imposes similar obligations on each director of BOX LLC. Section 4.2(a) also requires each director to cooperate with the Commission and 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, as such, is subject to obligations 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 operator of that facility. The BSE currently owns a controlling interest in the operator of the facility and if, in the future, it wishes to reduce its interest in BOX LLC to below 20%, the amendments to the LLCOA to effect such a Transfer of units would, pursuant to Section 8.4(f)(ii) of the LLCOA, have to be filed as a proposed rule change under Section 19(b) of the Act. The Commission believes that this is a reasonable measure to alert the Commission to a significant reduction of BSE's interest in BOX LLC. Such a reduction could warrant additional review of the LLCOA to ensure that BSE's responsibilities as the SRO of the BOX facility are not compromised.

The LLCOA includes additional provisions that make special accommodations for BSE as the SRO of the BOX facility. For example, Section 4.4(a) of the LLCOA provides that BOX LLC 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 BSE.[31] Section 4.1(b) of the LLCOA provides that, with its present ownership interest, BSE is entitled to two seats on the board. Section 4.1(b) also gives 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, Section 5.2 of the LLCOA allows BSE to act on behalf of BOX LLC in regulatory matters, despite a general prohibition against unitholders committing or acting on behalf of BOX LLC.[32] Finally, as provided in Amendment No. 2, Sections 16.2(b) and 16.5 of the LLCOA allows BSE, and the other unitholders, their officers, directors, agents, and employees, to disclose to the Commission Confidential Information of BOX.[33]

Because the BSE has proposed to operate BOX as its facility, the BSE's obligations under the Act extend to its members' activities on BOX, as well as to the operation and administration of BOX. The Commission believes that Section 19 of the Act affords the Commission the ability to determine whether the BSE's proposal is consistent with the Act, as would a separate application by BOX to register as a securities exchange.[34] More specifically, the Commission believes that these provisions described above are consistent with the Act and enhance the ability of BSE to carry out its self-regulatory responsibilities with respect to its BOX facility.

B. Changes in Control of BOX LLC

The Commission believes that the restrictions in the LLCOA on direct and indirect changes in control of BOX LLC are sufficient so that BSE is able to carry out its self-regulatory responsibilities and that the Commission can fulfill its responsibilities under the Act. Schedule D of the LLCOA lists all unitholders of BOX LLC, the number of units each holds, and the percentage of ownership in BOX LLC that such units represent. A change to this schedule (as well as to any other provision of the LLCOA) would have to be filed with the Commission if so required under Section 19(b) of the Act and Rule 19b–4 thereunder. In addition, Section 8.4(f) of the LLCOA provides that BSE must file with the Commission as a proposed rule change any amendment to the LLCOA resulting from a proposed acquisition of BOX LLC units that would cause the acquirer to meet or cross the 20% ownership threshold or any subsequent 5% ownership threshold (*e.g.*, 25%, 30%, 35%, *etc.*).

Furthermore, Section 8.4(e) of the LLCOA requires BSE to inform the Commission in writing at least ten days before any proposed acquisition of BOX LLC units that would result in the acquirer meeting or crossing the 5%, 10%, or 15% ownership thresholds. The Commission believes that this approach is consistent with the Act in that it is analogous to the ongoing reporting

Archipelago Holdings LLC, the parent company of Arca LLC. *See* 66 FR at 55225.

[29] *Id.* at 66 FR at 55229 (citation omitted). PCX established a new subsidiary, PCX Equities Inc. (''PCXE''), to which it delegated its authority as an SRO to surveil and regulate the PCX's trading functions. In its approval order, the Commission noted that PCX retained ultimate responsibility for the operation, administration, rules, and regulation of PCXE. The Commission added that PCX must review rulemaking and disciplinary decisions of PCXE and direct PCXE to take action that may be necessary to effectuate the purposes and functions of the Act. *See id.*

[30] BSE—through a newly established wholly owned subsidiary, Boston Options Exchange Regulation LLC (''BOXR'') ''will assume all regulatory responsibilities under the Act for the BOX facility. *See* SR–BSE–2003–04, *supra* note.

[31] CBOE objects to the fact that BSE redacted from the published version of the LLCOA certain of the major actions over which the controlling unitholders and BSE (regardless of whether it remains a controlling unitholder) will have veto power. BSE is not required to file these portions of Section 4.4(b) under Section 19(b) of the Act and Rule 19b-4 thereunder if they do not constitute a material aspect of the operation of the BOX facility, or are otherwise rules of, or stated policies, practices or interpretations, of the exchange. See Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). *See also* 17 CFR 240.19b–4(b).

[32] In the event that BSE ceases to be a unitholder of BOX LLC at some future date, the Commission would have to consider whether this provision should be amended so that BSE could continue to carry out its regulatory responsibilities with respect to BOX.

[33] *See* Amendment No. 2, *supra* note.

[34] This is consistent with the Commission's approval of ArcaEx as the equities trading facility of PCX pursuant to a rule filing submitted by the PCX under Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Rule 19b–4 hereunder, 17 CFR 240.19b–4. *See* PCX/Arca Approval Order, *supra* note.

requirements of Form 1,[35] the application for (and amendments to the application for) registration as a national securities exchange. Exhibit K of Form 1 requires any exchange that is a corporation or partnership to list any persons that have an ownership interest of 5% or more in the exchange;[36] and Rule 6a–2(a)(2) under the Act[37] requires an exchange to update its Form 1 within ten days after any action that renders inaccurate the information previously filed in Exhibit K.

Exhibit K imposes no obligation on an exchange to report parties whose ownership interest in the exchange is less than 5%. Similarly, Section 8.4(e) of the LLCOA requires BSE to notify the Commission of an interest in BOX LLC only when that interest reaches 5% or more. The Commission does not believe that the identity of a party that has less than a 5% interest in a facility of a national securities exchange is a ''rule of the exchange'' that must be filed pursuant to Section 19(b) and Rule 19b–4(b) thereunder. In this regard, the Commission does not agree with CBOE's comment that the filing ''does not present a comprehensive description of who are the owners of BOX.''

In addition, Section 8.4(g) of the LLCOA would require an indirect controlling party to join the LLCOA. This amendment to the agreement would trigger a proposed rule change that BSE must file with the Commission pursuant to Section 19(b) of the Act. The proposed rule change would alert the Commission to the existence of a proposed indirect controlling party and present the Commission and BSE with an opportunity to determine what additional measures, if any, might be necessary to provide sufficient regulatory jurisdiction over the proposed indirect controlling party.[38] The Commission understands that Section 8.4(g) of the LLCOA would apply to any ultimate parent of BOX LLC, no matter how many levels of ownership are involved, provided that a controlling interest exists between each link of the ownership chain.

In conclusion, the Commission believes that Sections 8.4(e), (f), and (g) of the LLCOA, together with the requirements of Section 19(b) of the Act and Rule 19b–4 thereunder, provide the Commission with sufficient authority over changes in control of BOX LLC to enable the Commission to carry out its regulatory oversight responsibilities with respect to BSE and the BOX facility.

C. Regulatory Jurisdiction Over Owners of BOX LLC

The Commission believes that the terms of the LLCOA provide the Commission and BSE with sufficient regulatory jurisdiction over the controlling parties and other unitholders of BOX LLC to carry out their responsibilities under the Act. In Section 19.6(a), each unitholder of BOX LLC acknowledges that—to the extent that they are related to BOX activities—the books, records, premises, officers, directors, agents, and employees of the unitholder are deemed to be the books, records, premises, officers, directors, agents, and employees of BSE itself for the purpose of and subject to oversight pursuant to the Act. Moreover, in Sections 12.1 and 15 of the LLOCA, all of the BOX LLC unitholders acknowledge that the books, records, premises, officers, directors, agents, and employees of BOX are deemed to be the books, records, premises, officers, directors, agents, and employees of BSE for the purpose of and subject to oversight pursuant to the Act. These provisions would enable the Commission to exercise its authority under Section 19(h)(4) of the Act[39] with respect to the officers and directors of BOX LLC and of all unitholders of BOX LLC, since all such officers and directors—to the extent that they are acting in matters related to BOX activities—would be deemed to be the officers and directors of BSE itself. Furthermore, the records of any unitholder—to the extent that they are related to BOX activities—are subject to the Commission's examination authority under Section 17(b)(1) of the Act,[40] as these records would be deemed to be the records of BSE itself.

In addition, in Section 19.6(b) of the LLCOA, each unitholder—and each officer, director, agent, and employee thereof—irrevocably submits to the exclusive jurisdiction of the U.S. federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of or relating to BOX activities. In addition, each unitholder—and each officer, director, agent, and employee thereof—waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claim that it is not personally subject to the jurisdiction of the Commission; that the suit, action or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter of the suit, action, or proceeding may not be enforced in or by such courts or agency. Moreover, pursuant to Section 19.6(c) of the LLCOA, the BSE and each unitholder are required to take such action as is necessary to ensure that such unitholder's officers, directors, and employees consent to the application of these requirements with respect to their BOX-related activities. Section 19.6(c) further requires the Bourse and the BSE to take such action as is necessary to ensure that the Bourse's officers, directors, and employees consent to the communication of their personal information to the Commission and the BSE and agree to waive the protection of such personal information that is provided by the Private Sector Privacy

[35] 17 CFR 249.1 and 17 CFR 249.1a.

[36] This reporting requirement applies only to exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. *See* Form 1, Exhibit K. Exhibit K applies only to the exchange itself, not to entities that operate facilities of the exchange.

[37] 17 CFR 240.6a–2(a)(2).

[38] BOX LLC currently has an indirect controlling party, Mr. Thomas Peterffy, who holds a controlling interest in IBG. Under Section 19.6(a) of the LLCOA, IBG acknowledges that, to the extent that they are related to BOX activities, the officers and directors of IBG are deemed to be the officers and directors of BSE for the purpose of and subject to oversight pursuant to the Act. Because Mr. Peterffy is an officer and director of IBG, he is deemed, with respect to IBG's BOX activities, to be an officer and director of BSE itself, thereby subjecting him to Commission authority under Section 19(h)(4) of the Act, 15 U.S.C. 78s(h)(4). Furthermore, under Section 19.6(b) of the LLCOA, IBG and its officers and directors (including Mr. Peterffy) irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and BSE for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws arising out of or relating to their BOX activities. In addition, as a registered broker-dealer, IBG is subject to Commission authority pursuant to Section 15(b)(4) of the Act, 15 U.S.C. 78o(b)(4). Also, a ''person associated with a broker or dealer'' is defined in Section 3(a)(18) of the Act, 15 U.S.C. 78c(a)(18), to include in part an officer or director of a broker or dealer, as well as any person directly or indirectly controlling such broker or dealer. Under Section 15(b)(6) of the Act, 15 U.S.C. 78o(b)(6), the Commission has the authority to censure a person associated with a broker or dealer, place limitations on such person's activities or functions, suspend such person for a period not exceeding twelve months or bar such person from being associated with a broker or dealer. Mr. Peterffy, as an officer and director of, and the holder of a controlling interest in, IBG, falls within the definition of ''person associated with a broker or dealer'' and therefore is subject to the Commission's authority under Section 15(b)(6) of the Act.

[39] 15 U.S.C. 78s(h)(4). Section 19(h)(4) authorizes the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) Willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange.

[40] 15 U.S.C. 78q(b)(1).

Act. Finally, under Section 5.3 of the LLCOA each unitholder of BOX LLC agrees to cooperate with the Commission and BSE pursuant to their regulatory authority.

The Commission also notes that, even in the absence of these provisions of the LLCOA, Section 20(a) of the Act[41] provides that any person with a controlling interest in BOX LLC would be jointly and severally liable with and to the same extent that BOX LLC is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

The Commission believes that, together, these provisions grant the Commission sufficient jurisdictional authority over the controlling parties and other unitholders of BOX LLC. Moreover, BSE is required to enforce compliance with these provisions because they are ''rules of the exchange'' within the meaning of Section 3(a)(27) of the Act.[42] A failure on the part of BSE to enforce its rules could result in suspension or revocation of registration under Section 19(h)(1) of the Act.[43]

D. Ownership Restrictions on BOX Option Participants

The Commission believes that the restriction on voting trust agreements in Section 4.3(b) of the LLCOA is reasonable and consistent with the Act. In the absence of such a provision, unaffiliated parties could act in concert and evade the LLCOA's provisions regarding changes in control of BOX LLC.[44] A voting trust agreement would not necessarily be inconsistent with the Act, but any unitholders wishing to establish a voting trust agreement would first have to amend the LLCOA to enable them to do so. Such amendment would trigger a proposed rule change, thus affording the Commission an opportunity to review the matter.

In addition, the Commission believes that the voting collar provision that prevents a unitholder that is also a BOX Options Participant from voting any excess units of BOX LLC (*i.e.*, units in excess of a 20% aggregate interest) is reasonable and consistent with the Act. It is common for members who trade on an exchange to have ownership interests in the exchange. However, a member's interest could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that is also a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently surveilling the member's conduct or from punishing any conduct that violates the rules of the exchange or the federal securities laws. An exchange also might be reluctant to surveil and enforce its rules zealously against a member that the exchange relies on as its largest source of capital.

The Commission believes that a limited temporary exemption for IBG from the voting collar provision is justified and consistent with the Act. The exemption is designed to afford IBG some ability to protect its investment but also to limit the possibility that the Exchange's ability to carry out its self-regulatory responsibilities would be impaired. Under the exemption, IBG would be permitted to vote its excess units, but only with respect to a merger, consolidation, or dissolution of BOX LLC or a sale of all or substantially all of the assets of BOX LLC. This exemption is substantially similar to an exemption granted to founder members of the International Securities Exchange (''ISE'').[45]

E. Accelerated Approval

Pursuant to Section 19(b)(2) of the Act,[46] the Commission may not approve any proposed rule change, or amendment thereto, before the thirtieth day after publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for making that finding. The Commission hereby finds good cause for approving Amendments No. 1 and 2, prior to the thirtieth day after publishing notice of these amendments in the **Federal Register**. Amendment No. 1 makes only one technical change to the rule text. Amendment No. 2 merely clarifies the restrictions on the Transfer of BOX LLC units and the Commission's jurisdiction over BOX LLC unitholders. The Commission believes that no purpose would be served by delaying approval of the amended proposal, particularly in light of the fact that only one comment letter was received in response to the original notice. Therefore, the Commission finds that good cause exists to accelerate approval of Amendments No. 1 and 2 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 1 and 2, including whether Amendments No. 1 and 2 are 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 also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All submissions should refer to File No. SR–BSE–2003–19. This file number should be included on the subject line if e-mail is used. To help us 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should be submitted by February 10, 2004.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[47] that the proposed rule change (SR–BSE–2003–19) is approved, and Amendments No. 1 and 2 to the proposed rule change are approved on an accelerated basis.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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[41] 15 U.S.C. 78t(a).

[42] 15 U.S.C. 78c(a)(27).

[43] 15 U.S.C. 78s(h)(1).

[44] However, the LLCOA treats as belonging to a single unitholder any BOX LLC units held by affiliated parties of the unitholder. *See* Sections 8.4(e)–(g) of the LLCOA.

[45] *See* Securities Exchange Act Release Nos. 45803 (April 23, 2002), 67 FR 21306, 21307 (April 30, 2002) (approval of SR–ISE–2002–01) (conversion of ISE from an LLC to a corporation); and 42455 (February 24, 2000), 65 FR 11388, 11391–92 (March 2, 2000) (File No. 10–127) (approval of registration of ISE as a national securities exchange).

[46] 15 U.S.C. 78s(b)(2).

[47] 15 U.S.C. 78s(b)(2).