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November 20,2003

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: File No. SR-BSE-2003-19

Dear Mr. Katz:

The Chicago Board Options Exchange, Incorporated ("CBOE") is pleased to comment on the referenced proposed rule change of the Boston Stock Exchange ("BSE") pertaining to its proposal to create a new exchange designated as "BOX" (described by BSE as an acronym meaning the Boston Options Exchange or Boston Stock Exchange Options Exchange) for the trading of standardized securities options. This filing is the latest in a series of filings that address governance and regulatory aspects of the proposed new exchange.[1]

As we pointed out in our prior comment letters that discussed governance and ownership issues raised by the BOX proposal (these comments are enumerated in note 1 above), our principal concern with this aspect of the BOX proposal was that BSE and its partners are proposing the creation of a new securities exchange to act as a market for the trading of standardized securities options, but without registering the new exchange as a national securities exchange under the Securities Exchange Act of 1934 ("Exchange Act"). As a direct result of this failure, as we also pointed out in our prior comments, nowhere in the various filings that purported to describe the governance and ownership structure of the new exchange was there a submission for public review and comment of such fundamental matters as the basic governing documents of BOX or any comprehensive description of who would be

[1] The first BSE filing to address governance and regulatory issues pertaining to BOX, as well as issues raised by BOX's proposed trading rules, was designated as SR-BSE-2002-15, filed on October 31, 2002, and amended on December 18,2002, January 9,2003, and August 15,2003. The first two of these amendments also pertained to governance and regulatory issues. CBOE commented on these issues along with other issues raised by the BSE proposal in a comment letter dated February 14, 2003. Thereafter, on July 17, 2003, BSE submitted a separate filing designated as SR-BSE-2003-04 that was characterized as addressing only governance and regulatory issues pertaining to BOX, and CBOE commented on the issues raised by this filing in a comment letter dated August 26, 2003. Amendment No. 3 to SR-BSE-2002-15, filed on August 15, 2003, pertained only to issues raised by BOX's proposed trading rules, and CBOE commented on these issues in a comment letter dated September 16, 2003. Now BSE has submitted still another separate filing designated as SR-BSE-2003-19 that is **also** limited to governance and regulatory issues, which is the subject **of** this comment letter.

the owners and members of BOX. Neither did the BSE filings describe the role of the members in the governance of the exchange or how the new exchange would resolve the apparent conflict between its regulatory responsibilities and its for-profit structure.

Finally, in this latest filing, **BSE** has begun to provide some limited information on these issues, but the information is incomplete. The filing does not present a comprehensive description of who are the owners of BOX (the ownership percentages presented in the filing total only 80.67%), and it includes only a redacted version of the Operating Agreement of BOX, LLC. Further, this latest filing describes as its purpose "to focus on only those provisions of the [BOX, LLC] Operating Agreement which are directly related to the BSE's authority for all regulatory functions of its proposed BOX facility...."[2] Thus the filing does not address other concerns over the ownership and governance of BOX raised by ourselves and other commenters, such as how the independence of BOX's governance will be assured, and how the conflicts between its for-profit structure and its regulatory obligations will be resolved. In these and other respects, the filing omits much of what is needed to assure that the requirements of the Exchange Act applicable to self-regulatory organizations are satisfied. For the most part these omissions are directly related to the failure to treat this proposal as one for the creation of a new national securities exchange in conformity with the registration requirements of Section 6 of the Exchange Act.

Because BOX has not applied for registration as a national securities exchange, until this latest filing, BSE has attempted to avoid filing for public comment and SEC review and approval the Operating Agreement of BOX, LLC, the entity that apparently owns the new exchange and is responsible for its management of, the new exchange. This document serves for an LLC as the counterpart of the articles of incorporation of a corporation, and it is the basic organizational document of the new exchange. Clearly this critical document would have had to be filed and approved if BOX had applied for registration as an exchange.[3] However, even in this latest filing, BSE has not filed the complete Operating Agreement of BOX, LLC, but only "[t]he sections of the BOX Operating Agreement the Exchange deems relevant to its [regulatory] authority, ... as well as a majority of the other provisions of the Agreement."[4] Indeed, a perusal of the "Second Amended and Restated Operating Agreement" attached as Exhibit 2 to the filing shows numerous places where the language of the Agreement has been redacted, and replaced by the words "Business confidential."

It is not clear on the face of the latest filing that even those parts of the BOX Operating Agreement that are filed are all subject to Commission review. In its filing BSE states that it "is *submitting those provisions* of the Operating Agreement specifically relating to the control and governance of BOX LLC that will ensure the BSE has the authority within BOX LLC to maintain its responsibility *for all regulatory functions related to the BOX facility.*"[5] This seems to suggest that the non-regulatory provisions of the Operating

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[2] File No. SR-BSE-2003-19, p. 3.
[3] Form 1 under the 1934 Act, the form used to apply for registration as a national securities exchange, requires the filing **of** the constitution and articles of incorporation or association of the applicant as Exhibit **A** to the application.
[4] File No. SR-BSE-2003-19, p. 3.
[5] Ibid.

Agreement that are included in the filing are provided for information only, and are not submitted for Commission review. Even if the Commission takes the position that all of the provisions of the Operating Agreement that are set forth in the filing are subject to Commission review, the idea that an applicant can pick and choose which provisions of the operating agreement of an exchange to submit for review is wholly inconsistent with the statutory scheme of exchange regulation provided for in the Exchange Act.

If the BOX is permitted to file only those parts of its Operating Agreement that it deems relevant before it may commence trading, we assume BSE/BOX will likewise take the position that it must comply with Section 19(b) of the Exchange Act pertaining to proposed amendments to the Operating Agreement only when it proposes to amend those provisions that were included in its initial filing, and that it may amend the rest of the Operating Agreement without any public notice and comment or Commission review and approval. Our assumption in this regard is supported by the statement in the filing that "any amendment to the [Operating] Agreement executed pursuant to this section 8.4(g) [having to do with the admission of new Member of BOX, LLC] would be subject to the rule filing process pursuant to Section 19 of the Act. This suggests, by negative implication, that amendments to other provisions of the Operating Agreement would not necessarily be subject to the Section 19(b) process. This is entirely inconsistent with the requirements of the Exchange Act, which treat changes to any part of the articles of incorporation of an exchange, or corresponding instruments, as rule changes subject to being filed for approval under Section 19(b).[6] Clearly the operating agreement of an exchange organized as an LLC constitutes rules of a self-regulatory organization. On the other hand, if the Commission takes the view that amendments to any part of the BOX Operating Agreement will be subject to the filing requirements of Section 19(b), we believe it is consistent with that view for the entire Operating Agreement to be filed for public notice, comment and Commission approval in the first instance.

In the latest BSE/BOX filing, as in all of the prior filings, no substantive reasons are given concerning why the proposed new exchange should not have to be registered as a national securities exchange. Instead, the filing simply states as conclusions, without further explanation, that BOX is an exchange facility of BSE, and that 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. Among other things, BSE points out that the directors of BOX LLC must comply with federal securities laws and are subject to removal by the "Members" of BOX (meaning the owners of the LLC, and not the members of either BSE or BOX as the Exchange Act defines the term "member"). BSE also states it has "veto rights" over certain "Major Actions" that might be taken by the BOX board of directors, as if the ability to veto certain specified changes to the structure and

[6] Section 3(a)(27) of the Exchange Act defines the term "rules of an exchange" to include "the constitution, articles of incorporation, bylaws and rules, or instruments corresponding to the foregoing, of an exchange...." Section 3(a)(28) of the Act defines the term "rules of a self-regulatory organization" to include the rules of an exchange. Section 19(b) of the Act and Rule 19b-4 thereunder require each self-regulatory organization to file with the Commission every "proposed rule, or proposed change in, addition to, or deletion from" its rules, subject to certain exceptions.

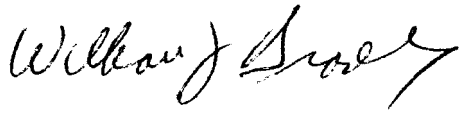
business activities of BOX is tantamount to having control over all of BOX's activities relevant to its operation as an exchange. This reference to BSE's asserted veto right is made more problematic because the redacted Operating Agreement as filed omits certain elements of the definition of what constitutes a "Major Action", and because BSE is not the only Member of BOX that has such a veto. We find it difficult to follow the logic of BSE's argument that these rather meaningless provisions, which fall far short of assuring the independence of BOX's governance and regulation, are an adequate substitute for the protections provided by exchange registration under the Exchange Act.

If the Commission permits BOX to be treated as a facility of BSE simply because that exchange owns a 26% interest in BOX (which is less than the interest owned by the Bourse de Montreal Inc.) and because an affiliate of BSE is responsible for some of the regulatory oversight of BOX, we believe the result will be to seriously undermine the fundamental objectives of the Exchange Act concerning the need to regulate securities markets as stated in Section 2 of the Act and the need to assure fair competition among exchange markets as stated in Section 11A of the Act. Our concerns in this respect are only heightened by the fact that BOX's largest single owner is a non-U.S. person. As we previously pointed out, if such an exception from exchange registration is permitted in this instance, we doubt that any future proposed exchanges will ever apply for registration, but instead will simply "rent" exchange status from an existing exchange willing for a price to allow the new exchange to call itself a "facility" of the existing exchange.

At a time when all registered national securities exchanges and the Commission are reexamining the governance structure and regulatory independence of exchanges, it seems obvious to us that this is not the time for the Commission to permit what even the sponsors of BOX describe as a new exchange to come into existence without requiring that new exchange to satisfy fully the registration requirements of the Exchange Act. As we pointed out previously, it is not as if an exemption from these requirements is needed in order to permit the entry of a competing exchange in what is already an intensely competitive business. The ISE has already demonstrated that it is possible to create a new options exchange by satisfying the registration requirements of the Exchange Act and at the same time to compete successfully with the other options exchanges, all of which are also registered as national securities exchanges. Nothing less should be required of BOX and its sponsors.

As before, we would be pleased to discuss our concerns over these aspects BOX proposal with the Commission and the Staff.

Very truly yours,



cc: Chairman William H. Donaldson
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