

consistent with the provisions of Section 6(b)(5) of the Act.<sup>22</sup>

The proposed BOXR By-Laws provide that at least 20 percent (but no fewer than two directors) must be directors who are officers or directors of an Options Participant and are elected by plurality vote of Options Participants, following a nomination process which involves the BOXR Nominating Committee.<sup>23</sup> The Options Participant Directors would be nominated by the BOXR Nominating Committee or by petition of at least 5 Options Participants. When a vote is held, the candidates selected by Options Participants must be supported by a plurality of the Options Participants who cast votes in order to be selected as a candidate for the BOXR Board. Pursuant to the proposed amendments to the Constitution, the BSE, as the sole member, would be required to appoint the Options Participant Directors so chosen and put forth to the BSE Board by the BOXR Nominating Committee.<sup>24</sup>

#### (B) *Management*

BOXR would have a Chairman of the Board and may have a President, either of whom may be the CEO of BOXR. In addition, BOXR would have a Chief Regulatory Officer who would be appointed by, and serve at the pleasure of, the BOXR Board. The officers of BOXR would manage the business and affairs of BOXR, subject to the oversight of the BOXR Board, and, in some cases, subject to the approval of BSE as the sole member and SRO.

#### (C) *BOXR Committees*

In an effort to streamline its management, the BSE has chosen to commence BOXR operations with only two administrative committees, although there are specific provisions in the proposed By-Laws permitting the appointment of additional committees by the BOXR Board, as necessary. There would be a BOXR Nominating Committee and a BOXR Hearing Committee, both of which would provide Options Participant involvement in the administration of the day-to-day operations of BOX.

##### (1) *Nominating Committee*

The BOXR Nominating Committee would be responsible for nominating two candidates for the BOXR Board, one candidate for the BSE Board, and

members for any vacant positions on the Nominating Committee. These candidates would represent Options Participants on the respective Boards. The BOXR Nominating Committee would consist of seven members, six of whom would be elected by ballot. The seventh would be appointed by the BOXR Board, and must be one of that Board's existing Public Directors. Of the six elected members, five shall represent broker-dealer Options Participants of BOX (at least one of which shall also represent a Market Maker on BOX), and one shall be a representative of the public. Thus, of the seven total members of the committee, there would be two members who are representatives of the public. The BOXR Nominating Committee would propose a slate of two eligible nominees for the BOXR Board, one eligible nominee for the BSE Board and the nominees for the BOXR Nominating Committee.

The BSE has also set forth a proposed provision which it believes ensures further fair representation of Options Participants in the nominating process. Options Participants would be able to submit additional nominees for each of the available positions by way of petition for independent nominations. In recognition of the fact that BOX would be an electronic marketplace with geographically diverse Options Participants, the Exchange has proposed that independent nominations may take place by petition of only five Options Participants. This is in contrast to the independent nomination process for the BSE, which requires fifteen BSE Member signatures for an independent nomination to be effected. By lowering the number of signatures required for an independent nomination from Options Participants, the Exchange believes it is encouraging independent nominations, thereby enhancing the potential for more effective representation of Options Participants. This process is proposed for not only the position reserved on the BSE Board for the Options Participant Governor, but for the two positions reserved on the BOXR Board for Options Participant representatives and the nominees for the BOXR Nominating Committee as well.

Furthermore, and perhaps most importantly, Options Participants alone would vote, by plurality, to choose the individuals who would represent them. Only after this vigorous and full nomination and electoral process concludes would the chosen candidates be presented, by the BOXR Nominating Committee, to the BSE Board for appointment. In accordance with the proposed Constitutionally established standards and the proposed BOXR By-

Laws, the BSE Board is then charged with appointing the BOXR Board, as well as accepting the Options Participant Governor candidate for the BSE Board of Governors.

The Exchange believes that its proposal is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(3),<sup>25</sup> in particular, in that it is consistent with the fair representation principles set forth in the Act. Under section 6(b)(3), the rules of an exchange must assure that its members are fairly represented in the selection of its directors and administration of its affairs. The fair representation requirement of section 6(b)(3) allows statutory members to have a voice in an exchange's use of its self-regulatory authority. This statutory requirement also helps ensure that exchange members are protected from unfair, unfettered actions by an exchange pursuant to its rules, and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The BSE believes that the proposals contained in this filing would ensure that Options Participants are treated in a manner consistent with the requirements of section 6(b)(3).

In addition, to make sure that the public interest is adequately represented in an exchange's decision-making process, section 6(b)(3) of the Act states that an exchange's rules must provide that one or more of its directors be representative of issuers and investors, and not associated with a member of the exchange, or with any broker-dealer. The Exchange's proposal would allow a representative of Options Participants to be on the BSE Board, but would not alter the composition of the BSE Board. In particular, the Exchange notes that the 50% public representation on the BSE Board is not affected. The Exchange is in agreement with a long established belief expressed by the Commission on this regard that the inclusion of public representatives on exchange oversight bodies is critical to ensuring that an exchange works to protect the public interest in the exchange governance process. The Exchange values unique, unbiased perspectives on the BSE Board and other governing bodies. In this regard, the proposed nominating process for Options Participant representatives has been made less stringent so as to permit and encourage greater participation by what would be a diverse group of Participants in the BOX marketplace. Therefore, by the combination of Board composition and the nominating/election process, the

<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>23</sup> See discussion of the proposed BOXR Nominating Committee below.

<sup>24</sup> See discussion of the proposed amendments to the BSE Constitution below, which requires the BSE to elect the slate submitted by the BOXR Nominating Committee.

<sup>25</sup> 15 U.S.C. 78f(b)(3).