

GUSRAE KAPLAN NUSBAUM PLLC

ATTORNEYS AT LAW

DAVID A. GEHN
SCOTT H. GOLDSTEIN
MARTIN H. KAPLAN
MARLEN KRUSHKOV**
LAWRENCE G. NUSBAUM
MARTIN P. RUSSO

120 WALL STREET-25TH FLOOR
NEW YORK, NEW YORK 10005

TEL (212)269-1400

FAX (212)809-5449

OF COUNSEL
ROBERT L. BLESSEY

81 MAIN STREET-SUITE 215
WHITE PLAINS, NEW YORK 10601
(914)644-8323

** MEMBER NY AND NJ BAR

www.gusraekaplan.com

November 18, 2013

VIA E-MAIL: rule-comments@sec.gov

Mr. Kevin M. O'Neill
Deputy Secretary
U.S. Securities and Exchange Commission
100 F Street NE.
Washington, D.C. 20549

Re: File No. SR-CBOE-2013-100
Self—Regulatory Organizations; Chicago Board Options Exchange, Incorporated;
Notice of Filing of a Proposed Rule Change Relating to CBSX Trading Permit
Holder Eligibility

Dear Mr. O'Neill,

This comment letter is submitted in connection with U.S. Securities and Exchange Commission's (the "Commission") solicitation of comments to the Chicago Board Options Exchange, Incorporated ("CBOE") "Proposed Rule Change Relating to CBSX Trading Permit Holder Edibility (the "Proposed Rule"), published on November 12, 2013 in Federal Register, Vol. 78, No. 218. We believe that the Proposed Rule is inconsistent with existing policy pronouncements of the U.S. Securities and Exchange Commission (the "Commission") and other industry practices.

If adopted, the Proposed Rule would require all CBSX Trading Permit Holder to become members of FINRA.¹ The CBOE's stated purpose for the Proposed Rule is to remedy CBOE's

¹ The Proposed Rule provides that all CBSX Trading Permit Holders may become or remain a CBSX Trading Permit Holder only if it is a member of a national securities association. The CBOE recognizes, "Currently,

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current inability to access its members' trading activity executed on venues other than the CBSX's market ("away-trading activity"). The Proposed Rule reasons that by forcing CBSX Trading Permit Holders to be members of FINRA, they will have to adhere to FINRA rules that require each FINRA member to submit order data for its trading on all venues.²

We believe that the Proposed Rule is an inefficient attempt by the CBOE to remedy a fundamental break down in its regulatory structure, as identified by the Commission.³ The Proposed Rule fails to enhance CBOE's regulatory scheme because instead of building up its own surveillance and enforcement departments and abilities, the CBOE is shifting the burden entirely onto its members and FINRA. This is in contravention of the Securities Exchange Act which requires each exchange and association to have in place rules that, among other things, seek to prevent fraudulent and manipulative acts and practices and protect investors and the public interest. See Securities Exchange Act, secs. 6(b)(5) and 15A(b)(6)

Mandatory dual membership with FINRA is an illogical cure to a specifically stated concern, capturing "away-trading activity." Mandating dual FINRA membership places a large burden on members including, but not limited to an additional layer of regulatory costs and being subject to compliance with FINRA rules which have no relevance to proprietary traders who do not have public customers. In a day and age when broker-dealers, other than large institutions, are struggling for economic survival, the imposition of additional costs and irrelevant regulatory provisions is antithetical to maintaining this industry.

The burdens of dual registration on both members and the overall SRO regulatory structure are in contrast to the views expressed in the Commission's 2004 Concept Release Concerning Regulation the Commission (the "Concept Release"). The Commission raised specific concerns relating to the "inefficiencies of multiple SROs," stating, "[T]he existence of multiple SROs can result in duplicative and conflicting SRO rules, rule interpretations, and inspection regimes. The system can also result in redundant SRO regulatory staff and infrastructure across SROs."⁴

Financial Industry Regulatory Authority, Inc. ("FINRA") is the only registered national securities association." *See* Fn. 4, Release No. 34-7086

² *See* Release No. 34-70806

³ The Proposed Rule is in part to satisfy Undertaking O contained in the June 11, 2012 Order Instituting Administrative and a Cease-and-Desist Proceeding involving the CBOE and its affiliate exchange, C2 Option Exchange Incorporated. *See* Release No. 34-7096.

⁴ SEC's Concept Release Concerning Self-Regulation, Securities Exchange Act Release No. 50700 (November 28, 2004).

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The Commission's approval of the NYSE and NASD merger served the goals espoused in the Concept Release; to consolidate resources and provide better regulatory oversight of members of both NYSE and NASD.

In its proposing release NASD reasoned,

The consolidation will streamline the broker-dealer regulatory system, combine technologies, permit the establishment of a single set of rules and a group examiners with complementary areas of expertise in a single organization – all of which will serve to enhance oversight of U.S. securities firms and help ensure investor protecting. Moreover, the new organization will be committed to reducing regulatory costs and burdens from firms of all sized through greater regulatory efficiency.⁵

Dual registration, and the attendant costs thereto, is inconsistent with the Commissions stated policies as noted above. The Proposed Rule does not consolidate resources with FINRA by handing over enforcement of its rules to FINRA. Rather, CBOE is creating another layer of regulation, rules and costs for its members without increasing regulatory efficiency since both CBOE and FINRA will maintain concurrent jurisdiction to discipline CBSX Trading Permit Holders.

There is no need for dual membership as there are less burdensome alternatives to accomplish the narrow goal set forth in the Proposed Rule. One such solution is that CBOE could adopt a rule requiring its members to submit all trading activity information to FINRA. Alternatively, the CBOE can enter into a regulatory service agreement with FINRA for FINRA to collect trading data from CBOE members and surveille for violations. Such agreement have been entered into by other exchanges, including but not limited the NASDAQ OMX Group, Inc.⁶ and Direct Edge's two licensed stock exchanges⁷, have previously entered into regulatory service

⁵ See S.E.C. Release No. 34-55495, File No. SR-NASD-2007-023. Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate The Consolidation of the member Firm Regulatory Functions of NASD and NYSE Regulatory, Inc. (March 20, 2007).

⁶ NASDAQ OMX BX, Inc. recently filed a proposed rule change to regain some of the surveillance functions they previously contracted out to FINRA. See NASDAQ OMX BX, Inc.; Notice of Filing of a Proposed Rule Change to Assume Operational Responsibility for Certain Surveillance Activity Currently Performed by FINRA under Exchange's Authority and Supervision. SR-BX-2013-47.

⁷ See FINRA News Release, May 22, 2013. "Direct Edge Selects FINRA for Market Surveillance.

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agreements with FINRA to perform certain surveillance and other regulatory functions on the exchanges behalf.⁸

Moreover, as acknowledged in the Proposed Rule, the Commission's adoption of a rule requiring the establishment of a National Market System consolidated audit trail will allow the CBOE to have an audit trail of all "away activity" once such system is implemented.^{9, 10} Thus, CBOE's contention that mandatory FINRA membership is necessary in order to ensure that all "away-trading activity" is captured by an audit trail will be rendered moot once SEC Rule 613 is fully implemented.

Should you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'M. Kaplan', with a long horizontal flourish extending to the right.

Martin H. Kaplan

⁸ The CBOE has been party to regulatory allocation agreements such as, the Agreement for the Allocation of Regulatory Responsibility of Surveillance, Investigation and Enforcement for Insider Trading pursuant to §17(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78a(d), and Rule 17d-2 Thereunder.

⁹ *Id.* Fn. 9.

¹⁰ See 17 C.F.R. Parts 242. The rule is adopted to "require national securities exchanges and national securities associations to submit a national market system plan to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail, with respect to trading of NMS securities, that would capture customer and order event information for orders in NMS Securities, across all markets, from the time of order inception through routing, cancellation, modification and execution. Release No. 24-67457.