

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65842; File No. SR-NSX-2011-14)

November 28, 2011

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to the Proposed Rule Change in Connection with the Proposed Purchase and Sale of the National Stock Exchange, Inc. to CBOE Stock Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") 15 U.S.C.78s(b)(1), notice is hereby given that on November 28, 2011, the National Stock Exchange, Inc. filed with the Securities and Exchange Commission ("Commission") the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. ("NSX<sup>®</sup>" or the "Exchange") is submitting this rule filing in connection with the proposed purchase and sale of the Exchange (the "Transaction") to CBOE Stock Exchange, LLC ("CBSX"). If the Transaction is completed, NSX will become a wholly owned subsidiary of CBSX. The proposed rule change, if approved, will not be operative until consummation of the Transaction.

The Exchange is proposing that, pursuant to the Transaction, NSX will become a wholly owned subsidiary of CBSX. In addition, the Exchange is proposing that in connection with the Transaction, the Securities and Exchange Commission (the "Commission") approve certain amendments to the organizational documents of NSX and CBSX.

The text of the proposed rule change is available on the Exchange's website at <http://www.nsx.com>, at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's website at <http://www.sec.gov>.

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 IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

Description of the Transaction

Currently, the Exchange is wholly and directly owned by NSX Holdings, Inc., a Delaware corporation (“Holdings”). Under a Purchase Agreement (the “Purchase Agreement”) dated September 28, 2011 by and between the Exchange, Holdings and CBOE Stock Exchange, LLC, a Delaware limited liability company (“CBSX”), all of the outstanding capital stock of NSX is proposed to be acquired by CBSX on the date of or after all conditions precedent to closing<sup>1</sup> have been satisfied or waived, including approval by the Commission of the instant rule filing. The post-closing corporate structure of NSX and CBSX, respectively, are described below.

a. NSX

Following the Transaction, NSX would be a wholly owned subsidiary of CBSX. NSX would remain a Delaware for-profit stock corporation, with the authority to issue 1,000 shares of

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<sup>1</sup> Conditions precedent to closing the Transaction are formal requirements set forth in the Purchase Agreement and include, without limitation, delivery of certain documents (such as officers’ certificates, legal opinions, and agreements), compliance by each party with specified representations, warranties and covenants, and receipt of necessary approvals by each party.

common stock, 100 shares of which would be held by CBSX. At all times, all of the outstanding stock of NSX would be owned by CBSX.<sup>2</sup> NSX would remain an entity registered as a national securities exchange under Section 6 of the Securities Exchange Act of 1934 (the “Act”)<sup>3</sup> and, accordingly, NSX would remain a self-regulatory organization (“SRO”).<sup>4</sup>

i. Governing Documents

The proposed Amended and Restated NSX Certificate of Incorporation (the “A&R Certificate”) and Second Amended and Restated NSX By-Laws (the “A&R By-Laws”), amended as described below, and NSX Rules (which are proposed to remain unchanged) would continue to govern the activities of NSX. These rules and governance documents would reflect, among other things, NSX’s status as a wholly-owned subsidiary of CBSX, continued management of NSX by the NSX Board of Directors (“NSX Board”) and designated officers, and the Exchange’s continuing discharge of its self-regulatory responsibilities pursuant to NSX’s registration under Section 6 of the Act. NSX’s proposed governance structure is designed to be consistent with its current governance structure, with certain changes as described below.

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<sup>2</sup> See proposed NSX Amended and Restated Certificate of Incorporation, Article Fourth, which deletes reference to NSX Holdings, Inc. and provides “At all times, all of the outstanding stock of the Corporation shall be owned by CBOE Stock Exchange, LLC, a Delaware limited liability company.”

<sup>3</sup> 15 U.S.C. 78f.

<sup>4</sup> NSX would continue to adhere to the undertakings in the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(b) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Sanctions, entered by the Commission on May 19, 2005 (see Securities Exchange Act Release No. 51714, May 19, 2005) (the “Order”). The Order provides for certain structural protections to ensure that the regulatory functions are independent from the commercial interests of the Exchange, including, among other things, that the Chief Regulatory Officer reports directly to the NSX Board and the Regulatory Oversight Committee; see section IIF2.a of the Order.

ii. Board of Directors

Currently, the NSX Board consists of 13 director positions, of which seven are Independent, three are ETP Holder, two are At Large, and one is the Exchange Chief Executive Officer. The Transaction contemplates that all current Exchange directors and committee members, including the Chief Executive Officer, will resign from the Board and committees, as applicable, effective upon closing. At such time, the vacancies on the Board and committees of the Board will be filled in accordance with applicable procedures contained in the A&R By-Laws. Candidates with the necessary qualifications will be appointed in accordance with Sections 3 or 5, as applicable, of the A&R By-Laws to fulfill the expired portion of any vacancies created by the resignation. Thereafter, directors and committee members will be nominated and elected in accordance with the A&R By-Laws.

b. CBSX

In 2007, the Commission approved the establishment of the CBOE Stock Exchange as a facility, as defined in Section 3(a)(2) of the Act,<sup>5</sup> of the Chicago Board Options Exchange, Incorporated (“CBOE”).<sup>6</sup> As the SRO for CBSX, CBOE has regulatory responsibility for the activities of CBSX. CBSX administers a fully automated trading platform for securities other than options (the “Facility”). As a limited liability company, the governance structure and

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<sup>5</sup> 15 U.S.C. 78c(a)(2).

<sup>6</sup> See Securities Exchange Act Release No. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (SR-CBOE-2006-110) (the “CBSX Approval Order”). See also Securities Exchange Act Release No. 55172 (January 25, 2007), 72 FR 4745 (February 1, 2007) (SR-CBOE-2006-110) (the “CBSX Notice of Filing”). All information contained herein with respect to the corporate structure, governance, ownership and operations of CBSX and CBOE is based on the Exchange’s information and belief as disclosed in the CBSX Approval Order and CBSX Notice of Filing and pursuant to communications with CBSX personnel prior to the submission of this filing.

operating authority of CBSX are set forth in the Second Amended and Restated Operating Agreement of CBSX (“Operating Agreement”) and the CBSX Certificate of Formation. In connection with the establishment of the Facility, CBOE adopted Rule 3.32 pertaining to ownership concentration and affiliation limitations.<sup>7</sup>

As a limited liability company, ownership of CBSX is represented by limited liability membership interests. The holders of such interests are referred to as “Owners.”

CBOE is one of the Owners of CBSX, and owns all outstanding “Series A” Voting Shares<sup>8</sup> of CBSX, representing just under 50% of all outstanding shares of CBSX.<sup>9</sup> The outstanding “Series B” Voting Shares of CBSX are held by nine broker-dealers.

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<sup>7</sup> See CBSX Approval Order. CBOE Rule 3.32 provides, in part:

“For as long as CBSX LLC operates as a facility of the Exchange, no Trading Permit Holder, either alone or together with its Affiliates, at any time, may own, directly or indirectly, of record or beneficially, an aggregate amount of Shares that would result in a greater than twenty percent (20%) Percentage Interest in CBSX LLC (the “Concentration Limitation”).”

In addition, the Certificate of Incorporation of CBOE Holdings, Inc., the owner of CBOE, provides that no person (either alone or together with its related persons) may beneficially own more than 20% of the total outstanding shares of CBOE Holdings stock. See Article Sixth (b) of the Amended and Restated Certificate of Incorporation of CBOE Holdings, Inc.; see also Securities Exchange Act Release No. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (SR-CBOE-2008-88).

<sup>8</sup> “Voting Shares” means those Shares entitled to vote on matters submitted to the Owners, which Voting Shares are held by the Voting Owners. See Section 2.1(a)(28) of the Operating Agreement.

<sup>9</sup> As noted in Section 3.2 of the Operating Agreement, it is the intention of the Owners that no other members of CBSX (other than Affiliates of CBOE) be owners of Series A Voting Shares, and that no additional Series A Voting Shares be authorized, created or issued for such purpose; provided however, that this provision is not intended to limit or restrict any rights of CBOE to transfer any of its Series A Voting Shares with the prior approval of the Commission as provided for in Article VI, including Section 6.14, of the Operating Agreement, or any other provision thereof, or any rights to be acquired by a transferee of those Shares as provided therein.

As provided in Section 8.9 of the Operating Agreement, the outstanding Series A Voting Shares, in the aggregate (and without being deemed to be a voting trust), are entitled to a number of votes equal to 50% of the total number of Voting Shares outstanding, on each matter submitted to a vote of the Owners. Each outstanding Series B Voting Share is entitled to one vote on each matter submitted to a vote of the Owners.<sup>10</sup>

The CBSX Approval Order and the CBSX Notice of Filing describe various characteristics of CBSX, including the relationship between CBSX and CBOE; changes in control of CBSX; the regulatory jurisdiction of the Commission and CBOE over the controlling parties and the Owners; and the ownership and voting restrictions on Owners.<sup>11</sup> These provisions, as contained in the Operating Agreement and applicable CBOE rules, will remain unchanged after the Transaction except as otherwise described below.

#### Summary of Proposed Rule Change

Except as described below, the Exchange's governing documents, rules and manner of operation, restrictions on ownership and transfer, registration as a national securities exchange under Section 6 of the Act and the continuance of the Exchange as an SRO<sup>12</sup> are proposed to

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<sup>10</sup> The Operating Agreement also creates a Series C Non-Voting Restricted Shares; however, these Shares are not entitled to vote on any matter submitted to a vote of the Owners, and there are currently no Series C shares outstanding. See Section 8.9 of the Operating Agreement.

<sup>11</sup> Section 6.12(a) of the Operating Agreement provides that no person (other than CBOE), either alone or together with its Affiliates, may directly or indirectly own more than a 20% Percentage Interest in CBSX ("Concentration Limitation"). In addition, Section 8.10 provides that if an Owner of Voting Shares, alone or together with any Related Persons, owns more than 20% of the Outstanding Voting Shares ("Excess Shares"), such Owner and Related Persons shall have no voting rights with respect to the Excess Shares.

<sup>12</sup> See 15 U.S.C. 78c(a)(26).

remain unchanged.<sup>13</sup> The instant rule change proposes changes to the Exchange's Certificate of Incorporation and By-Laws as described below to reflect the change of ownership due to the Transaction. In addition, several other amendments are proposed to the Exchange governance documents in order to enhance governance mechanisms and generally make them generally consistent with the parallel provisions of the current governance documents of other SROs. Certain provisions of the current NSX By-Laws that are historic in nature are also proposed to be deleted as no longer applicable. In addition, certain amendments, as described below and in conjunction with a contemporaneous rule filing submitted by CBOE, are proposed to the CBSX Operating Agreement in connection with the Transaction. In the aggregate, the proposed amendments are intended to enable NSX to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. The proposed amendments will also enhance the ownership and voting limitations applicable to SROs in order to preclude undue influence over or interference with the SROs' regulatory functions and fulfillment of regulatory duties under the Act.

a. Amended and Restated Certificate of Incorporation of NSX

Under the proposed rule change, the requirement that the Exchange be at all times wholly owned by Holdings is proposed to be changed to allow for the consummation of the Transaction and acquisition of all of the outstanding NSX stock by CBSX. To make clear that NSX will be entirely owned by CBSX (regardless of whether outstanding NSX stock is voting or non-voting), the proposed A&R Certificate would be modified in Article IV to provide that, at all times, all of the outstanding stock of the Exchange shall be owned by CBSX.

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<sup>13</sup> As described in the Commission's order approving the Exchange's demutualization; see Securities Exchange Act Release No. 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03).

In addition, new language is proposed to be added to Articles VII and XI of the NSX Certificate of Incorporation designed to enable the Exchange Board and the Commission to continue to exercise appropriate oversight of the Exchange. In conformity with similar language in the recently approved charter documents of other exchanges,<sup>14</sup> a provision is proposed to be added to each of Articles VII and XI to make clear that before any amendment to, or repeal of, any provision of the Exchange By-Laws and/or Certificate of Incorporation shall be effective, those changes shall be submitted to the Exchange Board and, if such amendment or repeal must be filed with or filed with and approved by the Commission, then the proposed changes shall not become effective until filed with or filed with and approved by the Commission.<sup>15</sup> For purposes of clarity regarding Commission approval of Exchange rule filings, specific reference to Section 19 of the Act and the rules promulgated thereunder is also introduced to Articles VII and XI.

Finally, consistent with similar provisions in the charter documents of other exchanges,<sup>16</sup> the proposed A&R Certificate in Article V is amended to allow directors (other than ETP Holder Directors) to be removed with or without cause by a majority vote of stockholders. This amendment is intended to promote more efficient Exchange governance while continuing to preserve the fair representation of ETP Holders through the ETP Holder Director election process contained in the Exchange's By-Laws.

b. Second Amended and Restated By-Laws of NSX

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<sup>14</sup> See Article 6 of the Certificate of Incorporation of EDGA Exchange, Inc.; and Article 9 of Certificate of Incorporation of C2 Options Exchange, Inc.

<sup>15</sup> See A&R Certificate of Incorporation, Articles Seventh and Eleventh.

<sup>16</sup> See A&R Certificate of Incorporation, Article Fifth, (b); see also Article II, Section 7(a) of the Amended and Restated By-Laws of BATS Exchange, Inc.; and Article II, Section 7(a) of the Amended and Restated Bylaws of EDGA Exchange, Inc.

Under the proposed rule change, due to the transfer of ownership of the Exchange from Holdings to CBSX, references in the Exchange By-Laws specific to Holdings are proposed to be replaced with references to CBSX. Specifically, Section 3.2(c) is proposed to be modified to provide that no two or more directors of NSX may be partners, officers or directors of the same person or be affiliated with the same person, unless such affiliation is with a national securities exchange or CBSX. In addition, Section 10.2 is proposed to be modified to provide that in no event shall members of the CBSX Board who are not also members of the NSX Board, or any officers, staff, counsel or advisors of CBSX who are not also officers, staff, counsel or advisors of NSX (or any committees of NSX), be allowed to participate in any meetings of the NSX Board (or any committee of NSX) pertaining to the self-regulatory function of NSX (including disciplinary matters). These amendments recognize CBSX as direct owner of the Exchange while preserving a mechanism to prevent undue influence over the Exchange's self-regulatory functions.

In connection with the ownership of NSX by CBSX, an additional Section 10.1(b) is proposed to be added to provide that, for so long as CBSX controls NSX, NSX shall promptly inform the CBSX board of directors, in writing, in the event that NSX has, or experiences, a deficiency related to its ability to carry out its obligations as a national securities exchange under the Act, including if NSX does not have or is not appropriately allocating such financial, technological, technical and personnel resources as may be necessary or appropriate for NSX to meet its obligations under the Act.

In addition, in conformity with the board composition provisions of other more recent

approvals involving other market centers,<sup>17</sup> certain NSX Board composition changes are proposed in order to streamline and promote the efficiency and effectiveness of NSX Board governance. Specifically, By-Law provisions regarding the number of directors on the NSX Board are proposed to be amended to allow any number between (and including) seven (7) and twenty-five (25). In addition, the requirement that at least 50% of NSX Board members be “Independent” Directors is proposed to be replaced with a requirement that at least 50% of NSX Board members be “Non-Industry” Directors, at least one of whom must qualify as Independent.<sup>18</sup> The category of “At Large” Directors, which under current By-Laws means directors who are not Independent, is eliminated as unnecessary.<sup>19</sup> Finally, the category of CBOE Director, and corresponding provisions discussing CBOE ownership of Class B stock and related Board representation, are proposed to be deleted as obsolete.<sup>20</sup>

As a result, the proposed NSX Board composition after the closing of the Transaction will consist of not fewer than seven (7) and not more than twenty-five (25) directors<sup>21</sup> and at all times shall include the Chief Executive Officer of the Exchange; at least 50% Non-Industry Directors (at least one of whom shall be an Independent Director); and such number of ETP

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<sup>17</sup> See Third Amended and Restated Bylaws of the C2 Options Exchange, Inc.; Second Amended and Restated By-Laws of CBOE; Amended and Restated By-Laws of BATS Exchange, Inc.; and the Amended and Restated Bylaws of EDGA Exchange, Inc.

<sup>18</sup> See A&R By-Laws Section 3.2 (Board composition requirements) and 1.1 (definitions of “Industry Director” and “Non-Industry Director”). See also Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 1; Second Amended and Restated Bylaws of the CBOE Article III, Section 1; and the Amended and Restated By-Laws of BATS Exchange, Inc., Article I.

<sup>19</sup> See A&R By-Laws Section 1.5 (definitions) and deletions to current By-Laws in Sections 3.2(b) and 3.4(e).

<sup>20</sup> See deletions to current By-Laws in Sections 1.5, 3.2(b), 3.3, 3.4(d), 3.5(g) and 3.7.

<sup>21</sup> See A&R By-Laws Section 3.2(a).

Holder Directors as is necessary to comprise at least 20% of the NSX Board.<sup>22</sup> For purposes of calculating the percentage of Non-Industry Directors, the Chief Executive Officer of the Exchange shall be excluded.<sup>23</sup>

By-Law provisions relating to the terms of office of each type of director is also amended from staggered three year terms to one year terms (other than the CEO Director, which individual's term expires upon ceasing to be Exchange Chief Executive Officer).<sup>24</sup> The Exchange believes that the change to annual from staggered three year director terms, which amendment is consistent with the parallel provisions of the current governance documents of other SROs,<sup>25</sup> promotes more efficient Exchange governance and effective ETP Holder representation.

With respect to the filling of vacancies on the NSX Board,<sup>26</sup> the A&R By-Laws are proposed to be amended to differentiate the procedure depending on whether the vacancy is of an ETP Holder Director or another type of director. Under current Exchange By-Laws, no such distinction is made. The Exchange believes a distinction is necessary in order to promote, in the

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<sup>22</sup> See A&R By-Laws Section 3.2(b). See also Third Amended and Restated Bylaws of the C2 Options Exchange, Inc. Article III, Section 3.1; Second Amended and Restated Bylaws of CBOE Section III, Article 3.1; and the Amended and Restated By-Laws of BATS Exchange, Inc., Article III, Section 2.

<sup>23</sup> See Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 3.1; and Second Amended and Restated Bylaws of the CBOE. Section III, Article 3.1.

<sup>24</sup> See A&R By-Laws Section 3.4(a) through (e).

<sup>25</sup> See Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 3.1; Second Amended and Restated Bylaws of the CBOE Article III, Section 3.1.

<sup>26</sup> See A&R By-Laws Section 3.7. See also Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 3.5; Second Amended and Restated Bylaws of the CBOE Section III, Article 3.5; Amended and Restated By-Laws of BATS Exchange, Inc., Article III, Section 6; and Amended and Restated Bylaws of EDGA Exchange, Inc., Article III, Section 6.

event of a vacancy of an ETP Holder Director, the fair representation of ETP Holders on the NSX Board. For non-ETP Holder Directors, the A&R By-Laws provide, consistent with current Exchange By-Laws, that any vacancy may be filled by vote of a majority of the directors then in office, although less than a quorum, or by a sole remaining director, provided such new director qualifies for the category in which the vacancy exists. A director elected to fill a vacancy shall hold office until the next annual meeting of stockholders, subject to the election and qualification of his or her successor and to his or her earlier death, resignation, disqualification or removal.<sup>27</sup> Regarding the filling of vacancies of ETP Holder Directors, the ETP Holder Director Nominating Committee shall either recommend an individual to the NSX Board to be elected to fill such vacancy or provide a list of recommended individuals to the NSX Board from which the NSX Board shall elect the individual to fill such vacancy. The NSX Board shall elect only individuals recommended by the ETP Holder Director Nominating Committee. The proposed amendments conform to the more recently approved analogous provisions of the governance documents of another exchange.<sup>28</sup>

Certain other edits are proposed to the current Exchange By-Laws to promote clarity and efficient governance mechanisms. Such edits conform to the analogous provisions of the charter documents of other more recently approved exchanges. Specifically, edits are proposed with respect to the procedures for election of ETP Holder Directors.<sup>29</sup> In order to promote fair representation among all ETP Holders, A&R By-Laws Section 3.5(d) is proposed to be amended to provide that no ETP Holder, together with its affiliates, may account for more than fifty

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<sup>27</sup> See A&R By-Laws Section 3.7(a)(i).

<sup>28</sup> See Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 3.5.

<sup>29</sup> See A&R By-Laws Section 3.5(d) and (e). See also the Amended and Restated By-Laws of BATS Exchange, Inc., Article III, Section 4.

percent (50%) of the signatures endorsing a particular candidate, and any signatures of such ETP Holder, together with its affiliates, in excess of fifty percent (50%) limitation shall be disregarded. Similarly, in order to promote fair representation among all ETP Holders, in an election among ETP Holders of candidates for ETP Holder Director, A&R By-Laws Section 3.5(e) is proposed to be amended to provide that any vote must be cast for a person duly nominated on the list of candidates and that no ETP Holder, together with its affiliates, may account for more than twenty percent (20%) of the votes cast for a candidate, and any votes cast by such ETP Holder, together with its affiliates, in excess of such twenty percent (20%) limitation shall be disregarded.

In addition, the A&R By-Laws are amended to include a fuller description of the composition and authority of Exchange committees.<sup>30</sup> These edits are intended to promote transparency and efficient governance. The description of the Executive Committee, which has authority to act on behalf of the full NSX Board under certain circumstances, is amended to clarify that the composition requirements of such committee mirror the requirements applicable to the full Board.<sup>31</sup> Regarding other Exchange committees, descriptions of the duties and composition requirements are included for each of the ETP Holder Director Nominating Committee, the Executive Compensation Committee, the Audit Committee, the Governance and Nominating Committee, the Appeals Committee and the Business Conduct Committee. Reference to a Securities Committee is deleted as obsolete.

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<sup>30</sup> See A&R By-Laws Sections 5.5 through 5.13. See also Amended and Restated By-Laws of BATS Exchange, Inc., Article V, Section 6, and Article VI, Section 2.

<sup>31</sup> See A&R By-Laws Section 5.5(a), which provides, in part, that the Executive Committee at all times shall include the Chief Executive Officer of the Exchange, at least 50% Non-Industry Directors, at least one Independent Director and such number of ETP Holder Directors as is necessary to comprise at least 20% of the Executive Committee; see also Amended and Restated By-Laws of BATS Exchange, Inc., Article V, Section 6(e).

Consistent with analogous provisions of recently approved governance documents of other exchanges, the procedures for amendments to the Exchange's By-Laws are also proposed to be amended to provide for NSX Board review and, as necessary, Commission approval prior to the effectiveness of any amendments to Exchange By-Laws.<sup>32</sup>

Consistent with the proposed edits to the A&R Certificate and similar provisions in the charter documents of other exchanges,<sup>33</sup> the proposed A&R By-Laws are further proposed to be modified to allow directors (other than ETP Holder Directors) to be removed with or without cause by a majority vote of stockholders. This amendment, consistent with a parallel proposed amendment to the NSX A&R Certificate, is intended to promote more efficient Exchange governance while maintaining the fair representation of ETP Holders through the ETP Holder Director election process as set forth in the A&R By-Laws.

In addition, to clarify that the confidentiality provisions of Section 10.3 may not be interpreted to limit Commission jurisdiction over NSX books and records, a clarifying statement is proposed to be added to A&R By-Laws Section 10.3 to provide that nothing in Section 10.3 shall be interpreted as to limit or impede the rights of the Commission to access and examine Exchange confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of the Exchange to disclose such confidential information to the Commission.<sup>34</sup>

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<sup>32</sup> See A&R By-Laws Section 8.1. See also Amended and Restated By-Laws of BATS Exchange, Inc., Article IX, Section 1.

<sup>33</sup> See A&R By-Laws Section 3.8; see also Article II, Section 7(a) of the Amended and Restated By-Laws of BATS Exchange, Inc.; and Article II, Section 7(a) of the Amended and Restated Bylaws of EDGA Exchange, Inc.

<sup>34</sup> See A&R By-Laws Section 10.3.

Finally, the proposed A&R By-Laws contain several other non-substantive, conforming edits to the A&R By-Laws that are consistent with the principles outlined above, the Act and the rules promulgated thereunder.<sup>35</sup>

c. CBSX Operating Agreement

i. CBSX's Ownership of NSX

The proposed rule change (for purposes of this Section IIC, as described in conjunction with a parallel rule filing submitted by CBOE) includes several amendments related to CBSX's ownership of NSX. These amendments address the fact that CBSX will become a holding company of NSX after the Transaction to the extent related to CBSX's control of NSX and clarify CBSX's rights and responsibilities related to its role as a holding company of a registered national securities exchange (amendments related to such responsibilities are further discussed below). For example, the proposed rule change amends Operating Agreement Section 1.6 to provide that CBSX's purposes (and any other lawful purposes related to those purposes) will be (1) to act as a trading market for securities other than options and (2) to act as a holding company of NSX. The proposed rule change also amends several Operating Agreement provisions to clarify that certain references to CBSX include its subsidiaries, including NSX.<sup>36</sup>

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<sup>35</sup> Non-substantive, conforming edits to the A&R By-Laws are reflected in the following Sections of the A&R By-Laws: 3.2(d) (clarifying that directors may not serve if subject to statutory disqualification as such term is defined in the Act); 3.7(c) (providing that any grace periods for re-qualification of a director must be for only a reasonable length of time); 3.17 (clarifying that NSX Board authority to interpret Exchange By-Laws remains subject to the Act); 5.2 (clarifying that the composition requirements set forth in description of each committee in Article V control, and that responsibility for maintenance of committee composition in connection with new committee appointments resides with the Chairman); 5.6 (specifying that the Regulatory Oversight Committee shall at all times be comprised entirely of Non-Industry Directors); and 6.3 (clarifying that officer disqualification will terminate an officer's term of office). Relevant definitions are also added to Section 1.1.

<sup>36</sup> See proposed Sections 1.6, 9.15(a)(9) and (1) of the Operating Agreement.

In addition, the proposal amends Section 6.12 to provide that the Concentration Limitation described in that section does not apply to CBOE or CBOE Holdings, and to expand applicability of the Concentration Limitation to persons and their Related Persons<sup>37</sup> rather than to persons and their Affiliates.<sup>38</sup> The proposal also amends Operating Agreement Section 6.12(c) and (e) to impose on NSX equity trading permit holders the Concentration Limitation prohibitions described in those paragraphs, which are currently only imposed on CBOE Trading Permit Holders. The proposal makes similar amendments to Operating Agreement Section 8.10 to expand applicability of the voting restriction described in that section to persons and their Related Persons and to provide that if any person and its Related Persons, not just a CBOE Trading Permit Holder, exceed the Concentration Limitation set forth in Section 6.12 of the

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<sup>37</sup> Proposed Rule 2.1(a)(23) of the Operating Agreement defines “Related Person” as (A) with respect to any person, all “affiliates” as such term is defined in Rule 12b-2 of the Exchange Act); (B) any person associated with a member (as the phrase “person associated with a member” is defined under Section 3(a)(21) of the Exchange Act); (C) any two or more persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of CBSX; (D) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b-7 of the Exchange Act) or director of such person and, in the case of a person that is a partnership or a limited liability company, any general partner, managing member or manager of such person, as applicable; (E) in the case of a person that is a natural person, any relative or spouse of such natural person, or any relative of such spouse who has the same home as such natural person or who is a director or officer of CBSX or any of CBSX’s parents or subsidiaries; (F) in the case of a person that is an executive officer (as defined under Rule 3b-7 of the Exchange Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (G) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. Under this definition, Related Persons include Affiliates and thus extends the Concentration Limitation imposed by proposed Rule 6.12 to a broader group of persons.

<sup>38</sup> Rule 2.1(a)(1) of the Operating Agreement defines “Affiliate” as, with respect to any person, any other person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such person. As used in this definition, “control” means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of a person, whether through the ownership of voting securities, by contract or otherwise with respect to such person.

Agreement, then the Owner and its Related Persons will have no voting rights with respect to the shares in excess of such limitation unless such Owner satisfies certain requirements set forth in proposed Section 8.10(b) through (d), which are similar to the requirements set forth in Section 6.12(b), (c) and (e). The proposed rule change also extends the applicability of the voting restriction in Section 8.10 to voting agreements, plans and arrangements.

The proposal also amends Operating Agreement Section 9.15(a)(9) to clarify that with respect to a sale of material assets or ownership interests that requires approval pursuant to Section 9.15, “material assets or ownership interests” include subsidiaries of CBSX. In addition, the proposed rule change adds Operating Agreement Section 15.19 to the Operating Agreement, which obligates CBSX, when voting as NSX’s sole shareholder in an election of the NSX board of directors, to vote in favor of ETP Holder Directors (as defined in the NSX By-Laws) that were nominated in accordance with the procedures set forth in NSX’s Certificate of Incorporation and By-Laws.

ii. Self-Regulatory Function of NSX

The proposed rule change adds various provisions designed to protect the independence of the self-regulatory function of NSX and to clarify NSX’s jurisdiction with respect to CBSX, but only to the extent related to CBSX’s control of NSX.<sup>39</sup> For example, the proposed rule change adds Operating Agreement Section 5.7(b), which, among other things:

- for so long as CBSX controls NSX, only to the extent related to the activities of NSX, requires CBSX Owners, board of directors, officers and employees to give due regard to the preservation of the independence of the self-regulatory function of NSX and to its obligations under the Act;

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<sup>39</sup> See also, infra, footnote 45.

- prohibits these persons from taking any actions that would interfere with the effectuation of any decisions by the NSX board of directors relating to NSX’s regulatory functions, including disciplinary matters, or with NSX’s ability to carry out its responsibilities under the Act; and
- requires CBSX to comply with federal securities laws and the rules and regulations thereunder, and requires CBSX and its officers, directors, employees and agents to cooperate with the Commission and NSX pursuant to and to the extent of their regulatory authority.

In addition, the proposed rule change amends Operating Agreement Section 6.15 to clarify possession of CBSX’s and its Owners books and records by the Facility and NSX in connection with their oversight pursuant to the Act. The proposed rule change amends Operating Agreement Section 6.15(a)<sup>40</sup>:

- to clarify that the Owners acknowledge that the books, records, premises, officers, directors, agents, and employees of the Owners will be deemed to be the books, records, premises, officers, directors, agents, and employees of CBOE for the purpose of and subject to oversight pursuant to the Act, but only to the extent they are related to the Facility; and
- to add the provision that the Owners acknowledge that the books, records, premises, officers, directors, agents, and employees of the Owners will be deemed

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<sup>40</sup> Section 6.15(a) of the Operating Agreement currently provides: “The Owners acknowledge that to the extent they are related to [CBSX’s] activities, the books, records, premises, officers, directors, agents, and employees of the Owners shall be deemed to be the books, records, premises, officers, directors, agents, and employees of CBOE for the purpose of and subject to oversight pursuant to the Exchange Act.”

to be the books, records, premises, officers, directors, agents, and employees of NSX for the purpose of and subject to oversight pursuant to the Act, but only to the extent they are related to the activities of NSX.

Similarly, the proposed rule change amends Operating Agreement Section 6.15(b)<sup>41</sup>:

- to clarify that the books, records, premises, officers, directors, agents, and employees of CBSX will be deemed to be the books, records, premises, officers, directors, agents, and employees of CBSX for the purpose of and subject to oversight pursuant to the Act, but only to the extent related to the Facility; and
- to add the provision that the books, records, premises, officers, directors, agents, and employees of CBSX will be deemed to be the books, records, premises, officers, directors, agents, and employees of NSX for the purpose of and subject to oversight pursuant to the Act, but only to the extent related to the activities of NSX.<sup>42</sup>

The proposal also amends Operating Agreement Section 6.15(c) to provide that CBSX and the Owners and their respective officers, directors, agents, and employees,<sup>43</sup> irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, CBOE and NSX for the

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<sup>41</sup> Section 6.15(b) of the Operating Agreement currently provides: “The books, records, premises, officers, directors, agents, and employees of [CBSX] shall be deemed to be the books, records, premises, officers, directors, agents, and employees of CBOE for the purpose of and subject to oversight pursuant to the Exchange Act.”

<sup>42</sup> CBSX’s complete records and books of account must be subject at all times to inspection and examination by CBOE (to the extent related to the Facility), NSX (to the extent related to CBSX’s control of NSX), and the Commission at no additional charge to CBOE, NSX and the Commission, as applicable. See proposed Section 13.2 of the Operating Agreement.

<sup>43</sup> Proposed Operating Agreement Section 6.15(c) (consent to jurisdiction) and (d) (consent in writing to applicability) also extend the requirements of these provisions to all agents and employees of the Company and its Owners, rather than only agents and employees whose principal place of business and residence is outside of the United States.

purposes of any suit, action, or proceeding pursuant to U.S. federal securities laws or the rules or regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the Facility or the Company's control of NSX, as applicable.

In addition, the proposed rule change amends Operating Agreement Sections 9.15(c) and 9.16 to provide that CBSX directors agree to comply with the federal securities laws and the rules and regulations thereunder, and to cooperate with the Commission, CBOE, and NSX pursuant to their regulatory authority, as applicable, and the provisions of the Operating Agreement. The proposal also amends Operating Agreement Section 9.15(c) to provide that CBSX directors will take into consideration whether any actions taken or proposed to be taken as a director for or on behalf of CBSX, or any failure or refusal to act, would constitute interference with CBOE's or NSX's regulatory functions and responsibilities, as applicable, in violation of the Operating Agreement or the Act.<sup>44</sup>

Additionally, the proposal amends Operating Agreement Section 14.1(a) to provide that, for so long as CBSX controls NSX, before any amendment, alteration or repeal of any provision of the Operating Agreement, to the extent related to CBSX's control of NSX, will be effective, such amendment, alteration or repeal must be submitted to the NSX board of directors, and if CBOE and the NSX board of directors determine that such amendment, alteration or repeal must be filed with or filed with and approved by the Commission, then such amendment, alteration or repeal will not become effective until filed with or filed with and approved by the Commission, as the case may be. The proposal also adds a 10-day notice provision for any amendment, alteration, or repeal of the Operating Agreement made pursuant to Operating Agreement Section

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<sup>44</sup> Interference with respect to the Facility will be determined by the CBSX board designees of CBOE. See proposed Section 9.15(c) of the Operating Agreement.

14.1(a) to provide CBOE and NSX with sufficient opportunity to review any potential regulatory impacts of such amendment, alteration, or repeal before it becomes effective.

The proposal also amends Operating Agreement Section 15.2 to provide that nothing in the Operating Agreement will be interpreted to limit or impede the rights of the Commission, CBOE, or NSX to access and examine any Confidential Information (as defined in the Operating Agreement) pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of an Owner or an officer, director, agent or employee of an Owner to disclose any Confidential Information to the Commission, CBOE, or NSX. Proposed Operating Agreement Section 15.2 also provides that the obligation of Owners not to disclose Confidential Information described in that section does not apply to CBOE's or NSX's communications with the Commission with respect to the conduct of the Facility's business or NSX's business, respectively. In addition, the proposal amends the representation being made by Owners in Operating Agreement Section 15.17(a) with respect to the validity and enforceability of the Operating Agreement by excepting the requirement, as applicable to the Facility or NSX (with respect to CBSX's control of NSX), that the portions of the Operating Agreement that constitute rules of a facility of an exchange or rules of a self-regulatory organization, as applicable, be filed for public comment and approval by the Commission from that representation.<sup>45</sup>

iii. Facility of CBOE

The proposed rule change amends various provisions to clarify that the part of CBSX that constitutes the Facility is a facility of CBOE under the Act, while the part of CBSX that relates

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<sup>45</sup> The rule change submitted by CBOE in connection with its partial ownership interest in CBSX adds a new rule, CBOE Rule 2.50, to further preserve the self-regulatory function of NSX. For example, among other things, CBOE Rule 2.50 proposes a policy that CBOE, as a partial owner of CBSX, will not take any action related to NSX's activities that would interfere with NSX's efforts to carry out its self-regulatory obligations under the Act and the rules and regulations thereunder.

to its control of NSX will not be a facility of CBOE. For example, the proposal amends Operating Agreement Section 1.7 to clarify that the Facility (and not CBSX to the extent it will act as a holding company for NSX) is a facility of CBOE under the Act, and therefore the Facility will be subject to self-regulation by CBOE and oversight by the Commission. The proposal also amends Operating Agreement Section 1.8 to clarify that only the Facility is a facility of CBOE.<sup>46</sup>

iv. Additional Changes

Finally, the proposed rule change makes several non-substantive technical and conforming changes throughout the Operating Agreement, including: updating the name and date of the Operating Agreement; updating the current Owners and their current percentage interests and CBSX shares owned<sup>47</sup>; replacing references to CBOE members with CBOE trading permit holders<sup>48</sup>; updating the table of contents and section references; and adding new defined terms and renumbering the defined terms as necessary<sup>49</sup>.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6 of the Act<sup>50</sup>, and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of

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<sup>46</sup> See also proposed Sections 6.2(e), 6.15(c) and (d), 9.2(d), 9.15(a)(14) and 14.1(a) for additional such clarifications.

<sup>47</sup> See proposed Section 3.2(d) of and signature page and Exhibit A to the Operating Agreement.

<sup>48</sup> See proposed Sections 6.12(c) and (e) and 8.10 of the Operating Agreement.

<sup>49</sup> See proposed Section 2.1 of the Operating Agreement. Certain other governance amendments not directly related to the Transaction are also proposed to the Operating Agreement, as further described in the CBOE rule filing filed in connection herewith.

<sup>50</sup> 15 U.S.C. 78f.

the Act.<sup>51</sup> Specifically, the Exchange believes the amendments to the CBSX Operating Agreement further the objective of Section 6(b)(1) of the Act because they preserve the independence of each of CBOE's and NSX's self-regulatory functions and allow each SRO to fulfill its self-regulatory duties. In particular, the addition of Operating Agreement Section 5.7(b) described above is intended to preserve the independence of NSX's self-regulatory function and ensure that NSX is able to obtain any information it needs from the specified parties to detect and deter any fraudulent and manipulative acts in its marketplace and carry out its regulatory responsibilities under the Act.<sup>52</sup> Similarly, the amendments to Operating Agreement Section 6.15(a) and (b) as described above (that clarify that CBSX's books and records with respect to the Facility and NSX's activities will be subject to the necessary oversight of the Act) are consistent with Section 6(b)(5) of the Act in that they provide the Commission, CBOE and NSX with access to necessary information that will allow CBOE and NSX to efficiently and effectively enforce compliance with the Act and their respective rules, as well as allow the Commission to provide proper oversight, which will ultimately promote just and equitable principles of trade and protect investors. The amendment to Operating Agreement Section 14.1(a) as described above is intended to make sure that NSX receives notice of any amendment to the Operating Agreement so that NSX can make any filings with the Commission necessary for NSX to fulfill its regulatory duties under the Act.

The Exchange also believes that this proposed rule change furthers the objectives of Section 6(b)(5)<sup>53</sup> of the Act because the amendments summarized in this filing will enable that CBSX and NSX continue to have governance and regulatory structures designed to promote just

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<sup>51</sup> 15 U.S.C. 78f(b).

<sup>52</sup> See also, supra, footnote 45.

<sup>53</sup> 15 U.S.C. 78f(b)(5).

and equitable principles of trade, to remove impediments, 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. The instant rule filing enables NSX to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. The proposed amendments to the Exchange's charter documents and the CBSX Operating Agreement are further intended to enhance the ownership and voting limitations applicable to SROs in order to preclude undue influence over or interference with SRO regulatory functions and fulfillment of regulatory duties under the Act. The proposed rule changes are intended to protect and maintain the integrity of the self-regulatory functions of NSX, and to allow it to carry out its regulatory responsibilities under the Act while allowing CBOE to maintain its regulatory jurisdiction and authority over the Facility.

The Exchange represents that it remains committed to its role as a national securities exchange and does not believe that the proposed change of ownership will undermine its responsibilities for regulating its marketplace. The proposed rule change provides transparency and certainty, and promotes efficiency, with respect to the governance and corporate structure of the Exchange and the status of CBSX as both a facility of CBOE and the holding company of NSX. In so doing, the proposed rule change promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

Moreover, the Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the change in ownership. Instead, NSX represents that the proposed rule change consists of changes to the NSX Certificate of Incorporation and By-Laws, and to the CBSX Operating Agreement, to allow for ownership of NSX by CBSX, to enhance the governance structure of NSX, and to enhance the ability of NSX

and CBOE to fulfill their regulatory functions under the Act. With respect to the proposed amendments to the NSX charter documents, the proposed edits are generally consistent with parallel provisions of other more recently approved SRO governance documents. The Exchange believes that the proposed rule change allows CBOE to maintain its regulatory jurisdiction and authority over the Facility and NSX to remain an independent self-regulatory organization and is consistent with the Act, the rules promulgated thereunder and the principles articulated by the Commission.<sup>54</sup>

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer 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 or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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<sup>54</sup> See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (File No. S7-39-04).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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-NSX-2011-14 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NSX-2011-14. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office. 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 publicly available. All submissions should refer to File Number SR-NSX-2011-14 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>55</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>55</sup> 17 CFR 200.30-3(a)(12).