

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65804; File No. SR-NSX-2011-012)

November 22, 2011

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend NSX Rules to Conform with Section 957 of the Dodd-Frank Act Prohibiting Members Voting Uninstructed Shares on Certain Matters

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 8, 2011, National Stock Exchange, Inc. (the “Exchange” or “NSX”) 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 comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

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

National Stock Exchange, Inc. (“NSX<sup>®</sup>” or the “Exchange”), proposes to amend NSX Rule 13.3 to conform with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

The Exchange is proposing to amend NSX Rule 13.3 to prohibit ETP Holders from voting uninstructed shares in accordance with the provisions of Section 957 of the Dodd-Frank Act, which was signed by the President on July 21, 2010. Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is proposing to adopt the proposed rule changes pursuant to Section 19(b) of the Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis.

2. Enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Generally, under the text of the current NSX Rule 13.3, an ETP Holder may not give a proxy to vote stock without instructions from the beneficial owner unless pursuant to the rules of another national securities exchange to which the ETP Holder is responsible. The Dodd-Frank Act requires the elimination of broker discretionary voting on matters related to executive compensation, the election of a member of the board of directors of an issuer (other than a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940 (the "Investment Company Act")) or any other significant matter, as determined by the Commission, by rule. Accordingly, the instant rule change proposes to modify the text of Rule 13.3 to conform with the requirements of the Dodd-Frank Act.

Section 957 of the Dodd-Frank Act amends Section 6(b)<sup>3</sup> of the Exchange Act to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12<sup>4</sup> of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote (i) with respect to the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive compensation or (iii) any other significant matter, as determined by the Commission, by rule.

Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to amend NSX Rule 13.3 to prohibit member organizations (referred on the Exchange as “ETP Holders”) from voting uninstructed shares if the matter voted on relates to the election of certain directors, executive compensation, or any other significant matter, as determined by the Commission, by rule. The Dodd-Frank provisions regarding the election of a member of the board of directors, executive compensation and any other significant matters determined by the Commission, by rule, are proposed to be codified in new paragraph (e) of Rule 13.3. This new paragraph (e) would make explicit that notwithstanding the rules of another exchange or association to which the ETP Holder is responsible or any other exception, an ETP Holder may not give a proxy to vote without instructions from the beneficial owners on a matter related to the election of directors, executive compensation, or other significant matter

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<sup>3</sup> 15 U.S.C. 78f(b). Section 957 amends Section 6(b) of the Act by adding Section 6(b)(10).

<sup>4</sup> 15 U.S.C. 781.

determined by the Commission, by rule. The Exchange believes that the Commission has not at this time identified other significant matters with respect to which the Exchange must prohibit member organizations from voting uninstructed shares.

The Exchange also proposes adding a clarifying sentence to existing paragraph (d) of Rule 13.3 to make explicit that, notwithstanding any other exception from the Rule, including changes to equity compensation plans, an ETP Holder may not give or authorize a proxy to vote without instructions from the beneficial owner on a matter relating to executive compensation.

Additionally, the Exchange is proposing to add “or association” to the text of Rule 13.3(b)(2) to include the Financial Industry Regulatory Authority (“FINRA”). Thus, as proposed, Rule 13.3(b)(2) would therefore prohibit an ETP Holder from giving a proxy to vote, unless pursuant to the rules of any national securities exchange or association of which it is a member. Finally, as an administrative edit, the Exchange also proposes deleting the last sentence in Rule 13.3(d) as it is now obsolete.

### 3. Statutory Basis

The statutory basis for the proposed rule change is Section 6 of the Securities Exchange Act of 1934<sup>5</sup> in general, which requires the rules of an exchange to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to 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. More specifically, the proposed rule change is consistent with Section 6(b)(10)<sup>6</sup> of the Act which requires that a national securities exchange’s rules must prohibit any member that is not the beneficial owner of a security registered under Section 12 from granting a proxy to vote the security in connection

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

<sup>6</sup> 15 U.S.C. 78f(b)(10).

with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of a board of directors of any investment company registered under the Investment Company of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The proposed rule change will adopt the prohibition required by Section 6(b)(10).

The proposed rule change is also consistent with Section 6(b)(5)<sup>7</sup> requirements that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The proposed rule change is designed to comply with the requirements of Section 957 of the Dodd-Frank Act, and the Exchange therefore believes the proposed rule changes are consistent with the Act, particularly with respect to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended by the Dodd-Frank 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.

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<sup>7</sup> 15 U.S.C. 78f.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-2011-012 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-2011-012. 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 such filing also will be available for inspection and copying at the principal offices of the Exchange. 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 available publicly. All submissions should refer to File Number SR-NSX-2011-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, NSX requested that the Commission approve the proposal on an accelerated basis so that the Exchange could immediately comply with the requirements imposed by the Dodd-Frank Act. After careful consideration, 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.<sup>8</sup>

The Commission believes that the proposal is consistent with Section 6(b)(10)<sup>9</sup> of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5)<sup>10</sup> of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market

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<sup>8</sup> In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(10).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that “final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.”<sup>11</sup> The proposed rule change will make NSX compliant with the new requirements of Section 6(b)(10) by specifically prohibiting, in NSX’s rule language, ETP Holders, who are not a beneficial owner of a security, from granting a proxy to vote the security in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.<sup>12</sup> The proposed rule language also specifically states that an ETP Holder vote on any executive compensation matter would not be permitted even if such matter would otherwise qualify for an exception from the requirements of the Rule. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted an ETP Holder vote on an

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<sup>11</sup> See S. Rep. No. 111-176, at 136 (2010).

<sup>12</sup> The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect NSX to adopt coordinating rules promptly to comply with the statute.

executive compensation matter, under NSX's existing rule, will no longer be applicable and is superseded by the newly adopted provisions.

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by an ETP Holder that has no such economic interest, which should enhance corporate governance and accountability to shareholders.<sup>13</sup>

Moreover, the Commission notes that the Exchange deleted obsolete language regarding the effectiveness of Rule 13.3(d), which should provide greater clarity in Exchange's rules. The Commission further notes that the Exchange added "or association" to Rule 13.3(b)(2) so that an ETP Holder would be prohibited from giving a proxy to vote, unless pursuant to the rules of any national securities exchange or association of which it is a member. The Commission believes that this is consistent with ISE Rule 421 and BATS-Y Exchange, Inc. Rule 13.3(b).

Based on the above, the Commission finds that the NSX proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

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<sup>13</sup> As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92).

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform NSX Rule 13.3 to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that NSX's proposed change in 13.3(d) and proposed 13.3(e) are identical to NYSE Supplementary Material .11(12) and Nasdaq Rule 2251(d), respectively, which were previously approved by the Commission.<sup>15</sup> Finally, as noted above, NSX's proposed change to Rule 13.3(b)(2) is consistent with ISE Rule 421 and BATS-Y Exchange, Inc. Rule 13.3(b), and the proposed change to Rule 13(d) to eliminate obsolete language provides clarity and helps avoid confusion. Based on the above, the Commission believes the Exchange's proposed rule change raises no new regulatory issues, and therefore finds good cause to accelerate approval.

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<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> See Securities Exchange Act Release Nos. 62874 (September 9, 2010), 75 FR 56152 (September 15, 2010) (SR-NYSE-2010-59) and 62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR-Nasdaq-2010-114).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-NSX-2011-012) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

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