

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50796; File No. SR-NSX-2004-12)

December 6, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Stock Exchange to Eliminate the “CBOE Exerciser Member” Membership Class, to Eliminate the Exchange’s Special Nominating Committee, and to Remove Certain Special Limitations on Changes to Certain By-Laws and Rules

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 21, 2004, National Stock Exchange (“NSX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III 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.

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

NSX is proposing to amend its By-Laws and Rules in order to eliminate the right of the Chicago Board Options Exchange, Incorporated (“CBOE”) members to become NSX members without purchasing membership certificates, to eliminate NSX’s Special Nominating Committee, and to remove certain special limitations on changes to certain By-Laws and Rules. The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in [brackets].

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

* * * * *

CODE OF REGULATIONS (BY-LAWS)

OF

NATIONAL STOCK EXCHANGE

ARTICLE I. Definitions

Section 1. When used in this Code of Regulations (By-Laws), unless the context otherwise requires —

* * * * *

(k) The term "Proprietary Member" means a person who was a "Regular Member" prior to the effective date of these By-Laws or a person who, pursuant to the provisions of Article II of these By-Laws, has applied for, and been admitted to, membership as a proprietary member subsequent to the effective date of these By-Laws. [References contained in these By-Laws to Proprietary Members shall be deemed to refer to both Proprietary Members with certificates and Proprietary Members without certificates unless expressly provided otherwise.]

* * * * *

[(m) The term "Protected Provisions" shall mean the provisions contained in Articles I, II, V, VI, VII, VIII, IX, X, XII, and XIII of these By-Laws and Rules 11.9 and 11.10 of the Exchange Rules as in effect on the effective date of this provision of these By-Laws.]

[(n)] No change.

[(o)] No change.

* * * * *

ARTICLE II. Exchange Membership

Section 1. Classes of Exchange Members

The membership of the Exchange shall be comprised of [~~three~~two] classes of members:

- (i) Proprietary Members[with certificates]
- (ii) [~~Proprietary Members without certificates~~
- (iii)] Access Participant Members ("Access Participants")

* * * * *

Section 5. Restrictions on Admittance to or Continuance in Membership and Association

* * * * *

5.2. Certain Restrictions Applicable to Proprietary Members Only

(a) No applicant for proprietary membership[, except an applicant who is a CBOE member,] who fails to purchase and own a certificate of proprietary membership after the Exchange has approved such person's application shall become a Proprietary Member of the Exchange. A CBOE member [shall be eligible to become]who became a Proprietary Member without certificate prior to the effective date of this provision of these By-Laws ("CBOE Exerciser Member") shall have ninety days from such effective date to purchase a certificate of proprietary membership[of the Exchange without having to purchase and own a certificate of proprietary membership, provided such CBOE member meets all other requirements for eligibility set forth in these By-Laws]. During such ninety day period, a CBOE Exerciser Member who has not yet purchased a certificate of proprietary membership shall have the rights and obligations of a Proprietary Member without certificate as such rights and obligations were in effect prior to the

effective date of this provision of these By-Laws. At the conclusion of the ninety day period, any CBOE Exerciser Member who does not then own a certificate of proprietary membership shall cease to be a Proprietary Member of the Exchange, and may not again become a Proprietary Member of the Exchange without first complying with all of the procedures and requirements for proprietary membership set forth in these By-Laws and the Exchange Rules.

* * * * *

Section 9. Transfer, Cancellation or Sale of Membership

9.1. Transfer and Cancellation

Access Participants [and Proprietary Members without certificates]may not transfer or sell or encumber their memberships or any interest therein. [The Exchange membership of a Proprietary member without a certificate automatically shall be cancelled when he ceases to be a CBOE member.]

9.2. Proprietary Membership Lien

Every certificate of proprietary membership shall be subject to a lien, prior to any others, to secure, first, payment in full of all indebtedness of the member to the Exchange, and second, payment in full of all indebtedness of the member to any member of the Exchange to the extent allowed by the Board. [As a substitute for such a lien, Proprietary Members without certificates shall meet such requirements as the Board may establish.]

* * * * *

ARTICLE V. Exchange Organization and Administration

Section 1. Board of Directors

1.1. General

The management and administration of the affairs of the Exchange shall be vested in a Board of Directors, which shall be composed of thirteen voting Directors as follows: (a) the Exchange President; (b) two Proprietary Members[with certificates], or executive officers of Proprietary Member organizations[with certificates], who are Designated Dealers in the National Securities Trading System ("Designated Dealer Directors"); (c) one Proprietary Member[with certificate] or an executive officer of a Proprietary Member organization[with certificate], who conducts a nonmember public customer business on the Exchange ("At-Large Director"); (d) the Chairman of CBOE ("CBOE Director"); (e) the President of CBOE ("CBOE Director"); (f) four CBOE members or executive officers of CBOE member organizations ("CBOE Directors"); and (g) three representatives of issuers and investors who shall not be associated with any member of the Exchange or with any registered broker or dealer or with another self-regulatory organization, other than as a public trustee or director ("Public Directors"). Excepting affiliations with national securities exchanges, no two or more Directors may be partners, officers or directors of the same person or be affiliated with the same person.

* * * * *

2.2. Candidate Selection

(a) The three candidates for election to the Board either as Designated Dealer Directors or as At-Large Director shall be selected by the Nominating Committee. The Committee shall select at least one candidate for the position to be voted upon. An additional candidate or candidates may

be nominated by a petition signed by ten percent or more of the Proprietary Members[with certificates] and delivered to the Secretary of the Exchange, provided that such candidate or candidates conforms to the requirements for the open position(s). There shall be an annual election on the second Monday of January of each year (if such day is a legal holiday, then on the next business day), at which only Proprietary Members[with certificates] can vote.

* * * * *

(c) The three Public Directors shall be selected by means of the following process. The Exchange's Chairman shall submit a name or names of a candidate(s) to [a Special]the Nominating Committee[composed of the two Designated Dealer Directors, the At-Large Director and three of the six CBOE Directors]. The [Special]Nominating Committee shall approve the candidate(s) to be submitted to the Board for approval or disapproval at the first Board meeting following the annual membership meeting.

* * * * *

ARTICLE VI. Committees

Section 1. Establishment of Committees

1.1. Committees

There shall be a Membership Committee, a Business Conduct Committee, a Securities Committee, an Appeals Committee, a Nominating Committee, [a Special Nominating Committee]and such other committees as may be established from time to time by the Board. Committees shall have such authority as is vested in them by the By-Laws or Rules or as is delegated to them by the Board. All Committees [except the Special Nominating Committee] are subject to the control and supervision of the Board.

* * * * *

[ARTICLE XII. Special Limitations on Changes to Certain By-Laws and Rules

(a) For two years following the effective date of this provision of these By-Laws, no change may become effective to the Protected Provisions without the unanimous consent of the two Designated Dealer Directors and the one At-Large Director, provided, however, that in the event the SEC approves side-by-side trading of listed securities and options on listed securities, the Board may adopt changes in Rule 11.9 that are reasonably required to participate effectively in such trading without the consent of the two Designated Dealer Directors and the one At-Large Director.

(b) After two years but before ten years following the effective date of this provision of these By-Laws, no change may be made to Section 1 of Article V or to Article XII without the affirmative vote of two-thirds of the total number of both the Proprietary Members with certificates and the Proprietary Members without certificates, voting separately as classes.

(c) After ten years from the effective date of this provision of these By-Laws, no change may be made to Section 1 of Article V or to Article XII without the affirmative vote of two-thirds of all Proprietary Members; such a change(s) may be voted on without the Board approval required under Article IX.]

ARTICLE XII[I]. Off-Exchange Transactions

* * * * *

RULES

OF

NATIONAL STOCK EXCHANGE

* * * * *

CHAPTER XI

Trading Rules

* * * * *

Rule 11.10 National Securities Trading System Fees

A. No change.

B. Membership Fees.

Item	Fee
Yearly Membership Dues (Quarterly Charge \$625)...	\$2,500
New Member Application Fee.....	\$1,000
Transfers	\$350
Responsible Party Change	
Firm Registration/Name Change	
[CBOE Exercise Application.....	\$350]

C. No change.

* * * * *

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 had 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 aspects of such statements.

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

1. Purpose

On November 14, 1986, the Cincinnati Stock Exchange (“CSE”), now known as NSX, and CBOE entered into an agreement of affiliation pursuant to which CBOE currently holds 162 certificates of proprietary membership of NSX, and CBOE and its members have certain rights associated with NSX.³ Among those rights, the Exchange By-Laws had been amended to provide that CBOE members are eligible to become Proprietary Members of NSX without having to purchase and own a certificate of proprietary membership, provided that each such CBOE member meets all other eligibility requirements for NSX membership. This class of NSX membership is known in NSX’s By-Laws as “Proprietary Members without certificates” and these NSX members are commonly referred to as “CBOE Exerciser Members.”

NSX and CBOE have recently taken steps to terminate or amend certain aspects of their affiliation and, in connection therewith, CBOE has agreed to transfer certain of its certificates to

³ See Securities Exchange Act Release No. 24090 (February 12, 1987), 52 FR 5225 (February 19, 1987)(SR-CSE-86-6)(order approving proposed rule change by CSE relating to an affiliation with CBOE).

NSX and to relinquish certain rights associated with NSX, in exchange for certain cash payments and other undertakings by NSX, subject to the terms and conditions set forth in a termination of rights agreement that NSX and CBOE entered on September 27, 2004. One of the conditions to the initial closing of the termination of rights agreement calls for amendments to the NSX By-Laws to eliminate the right of CBOE members to become NSX members without purchasing membership certificates, and thus the elimination of the CBOE Exerciser Member membership class.

In eliminating this class of membership and related references to Proprietary Members without certificates, the Exchange is proposing a transition period whereby any CBOE Exerciser Members existing on the effective date of the approval of this proposed rule change (the “Effective Date”) will have ninety days from the Effective Date to purchase a certificate of proprietary membership. During the ninety day period, a CBOE Exerciser Member who has not purchased a certificate shall have the rights and obligations of a Proprietary Member without certificate as those rights and obligations existed prior to the Effective Date. At the conclusion of the ninety day period, any CBOE Exerciser Member who does not own a NSX certificate shall automatically cease to qualify for membership on the Exchange and may not again become a member of the Exchange without first complying with all the procedures and requirements set forth in the NSX By-Laws and Rules. Related to the elimination of the CBOE Exerciser Members, NSX is proposing to eliminate the “CBOE Exercise Application” fee contained in Rule 11.10(B).

In addition and also in connection with the termination of rights agreement, NSX is proposing to eliminate provisions in Article XII of the Exchange By-Laws pertaining to special

voting limitations on changes to certain By-Laws and Rules. NSX is also proposing to amend its By-Laws to eliminate the NSX's Special Nominating Committee, which is composed of two Designated Dealer Directors, the At-Large Director and three of the six CBOE Directors and which has the responsibility to approve candidates for Public Director positions to be submitted to the Board for approval, and to re-assign that responsibility to the NSX's Nominating Committee, which selects candidates for Designated Dealer and At-Large Director positions to be submitted to the membership for approval. These special voting limitations and Special Nominating Committee provisions had been incorporated into the Exchange By-Laws as part of the initial affiliation agreement with CBOE and are no longer necessary. The initial closing of the termination of rights agreement is also conditioned on the adoption of these By-Law amendments.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act⁴ in general, and furthers the objectives of Section 6(b)(5)⁵ in particular, in that it is designed 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, generally, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(1),⁶ in that it helps to assure that the Exchange is

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

⁶ 15 U.S.C. 78f(b)(1).

so organized and has the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members, with the Act.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NSX consents, the Commission will:

- (A) by order approve such proposed rule change; or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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. Please include File Number SR-NSX-2004-12 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NSX-2004-12. 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 Web site (<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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSX. 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-2004-12 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Jill M. Peterson
Assistant Secretary

⁷ 17 CFR 200.30-3(a)(12).