

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51765; File No. SR-NSX-2005-02)

May 31, 2005

Self-Regulatory Organizations; National Stock Exchange; Notice of Filing of Proposed Rule Change, and Amendments No. 1 and 2 Thereto, Relating to the Composition of NSX's Board of Directors and Committees

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 March 31, 2005, the National Stock ExchangeSM (the "Exchange" or "NSX"SM) 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 NSX. On March 31, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.³ On May 19, 2005, the Exchange filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend its By-Laws to make modifications to the composition of its Board of Directors ("Board") and committees. These changes are being made in connection with a termination of rights agreement entered into between NSX and the Chicago Board Options Exchange ("CBOE") and in order to comport with industry trends and anticipated changes in regulatory requirements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange corrected page numbering errors in the initial filing. Amendment No. 1 replaced the original filing in its entirety.

⁴ In Amendment No. 2, the Exchange revised the proposed definition of "Independent Director."

Below is the amended text of the proposed rule change. Proposed new language is in italics; proposed deletions are in [brackets].

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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 —

(a) – (e). No change.

(f) The term “CBOE” shall mean the Chicago Board Options Exchange, Incorporated.

(g) The term “CBOE member(s)” shall mean an individual CBOE member or a CBOE member organization that is a regular member of CBOE as described in Article II, Section 2.1(b) of the CBOE Constitution or that is a special member of CBOE as described in Article II Section 2.1(d) of the CBOE Constitution as such CBOE members may exist from time to time.

[(f)] (h) The term “Commission” means the United States Securities and Exchange Commission.

[(g)] (i) The term “Exchange” means National Stock Exchange.

[(h)] (j) The term “Exchange Rules” means those rules adopted by the Exchange pursuant to the provisions of Article X of these By-Laws.

(k) The term “Independent Director” means a member of the Board that the Board has determined to have no material relationship with the Exchange or any affiliate of the Exchange, any member of the Exchange or any affiliate of any such member, other than as a member of the Board.

[(i)] (l) The term “person” means a natural person, company, government, or political subdivision, agency or instrumentality of a government.

[(j)] (m) The terms “person associated with a member” or “associated person of a member” mean any partner, officer, director, or branch manager of a member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with the member, of any employee of such member, except that any person associated with a member whose functions are solely clerical or ministerial shall not be included in the meaning of such terms.

[(k)] (n) 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.

[(l)] (o) The term “statutory disqualification” shall mean any statutory disqualification as defined in the Act.

[(m) The term “CBOE” shall mean the Chicago Board Options Exchange, Incorporated.]

[(n) The term “CBOE member(s)” shall mean an individual CBOE member or a CBOE member organization that is a regular member of CBOE as described in Article II, Section 2.1(b)

of the CBOE Constitution or that is a special member of CBOE as described in Article II Section 2.1(d) of the CBOE Constitution as such CBOE members may exist from time to time, except that in the case of a transferable regular CBOE membership which is subject to a lease agreement, the lessee and not the lessor shall be deemed to be the CBOE member].

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ARTICLE V. Exchange Organization and Administration

Section 1. Board of Directors

[1.1. General]

(a) General Composition. The management and administration of the affairs of the Exchange shall be vested in a Board of Directors, which shall be composed of thirteen (subject to Section 1(b)) voting Directors (a majority of whom will be independent pursuant to Section 1(b)), as follows:

[(a)] (i) the Chief Executive Officer of the Exchange [President];

[(b) two] (ii) three Proprietary Members, or executive officers of Proprietary Member organizations[, who are Designated Dealers in the National Securities Trading System (“Designated Dealer Directors”); (c) one Proprietary Member or an executive officer of a Proprietary Member organization, who conducts a nonmember public customer business on the Exchange (“At-Large] (“Member Directors”);

(iii) six Independent Directors (subject to increase under Section 1(b) below); and

[(d) the Chairman of CBOE (“CBOE Director”); (e) the President of CBOE (“CBOE Director”); (f) four] (iv) three executive officers of CBOE, 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 Director”)].

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.

(b) Changes in Composition on the Occurrence of Certain Events.

Notwithstanding the provisions of Section 1(a) of this Article V:

(i) The current terms of the Directors currently serving as of the effective date of this provision of these By-laws (the “Effective Date”) shall be unchanged.

(ii) Following the Effective Date, the three new Independent Directors who are authorized by Section 1(a)(iii) (“New Independent Directors”) shall be either (as determined by the Board) (y) selected in accordance with Sections 2.1(c) and 2.2(b) of this Article V, except that each candidate for New Independent Director shall be submitted by the Nominating Committee to the Board for approval or disapproval as soon as practical, or (z) appointed in accordance with Sections 2.1(c) and 3 of this Article V.

(iii) On the date of the first Subsequent Closing (as defined below) to occur after January 18, 2005, the number of positions on the Board to be filled by CBOE Directors shall

be reduced from three to two and the number of positions to be filled by Independent Directors shall be increased from six to seven. Following the first Subsequent Closing, a new Independent Director shall be either (as determined by the Board) (y) selected in accordance with Sections 2.1(c) and 2.2(b) of this Article V, except that the candidate for Independent Director shall be submitted by the Nominating Committee to the Board for approval or disapproval as soon as practical, or (z) appointed in accordance with Sections 2.1(c) and 3 of this Article V.

(iv) If no Subsequent Closing has occurred prior to February 15, 2006, then in order to achieve a majority of Independent Directors serving on the Board, the Board may, in its discretion, add up to two new Independent Directors and thereby increase the number of Directors serving on the Board from thirteen to not more than fifteen. In such event the two new Independent Directors authorized hereby shall be either (as determined by the Board) (y) selected in accordance with Sections 2.1(c) and 2.2(b) of this Article V, except that each candidate for Independent Director shall be submitted by the Nominating Committee to the Board for approval or disapproval as soon as practical, or (z) appointed in accordance with Sections 2.1(c) and 3 of this Article V.

(v) On the date of the second Subsequent Closing to occur after January 18, 2005, the number of positions on the Board to be filled by CBOE Directors shall be reduced from two to one, and the Board may, in its discretion, increase by one the number of positions to be filled by either Independent Directors or Member Directors. Following the second Subsequent Closing, a new Director may be either (as determined by the Board) (y) elected or appointed in accordance with Sections 2.1

and 2.2 of this Article V, except that the requisite action may be taken as soon as practical, or (z) appointed in accordance with Sections 2.1 and 3 of this Article V.

(vi) On the earliest to occur of (A) the date on which CBOE owns less than five percent (5%) of the outstanding certificates of proprietary membership of the Exchange or (B) the third anniversary of the fourth Subsequent Closing (the earliest of these to occur being the “CBOE Withdrawal Date”), the number of positions on the Board to be filled by CBOE Directors shall be reduced from one to zero, and the Board may, in its discretion, increase by one the number of positions to be filled by either Independent Directors or Member Directors. The remaining CBOE Director shall be deemed to have resigned from the Board as of the CBOE Withdrawal Date. Following the CBOE Withdrawal Date, a new Director may be either (as determined by the Board) (y) elected or appointed in accordance with Sections 2.1 and 2.2 of this Article V, except that the requisite action may be taken as soon as practical, or (z) appointed in accordance with Sections 2.1 and 3 of this Article V.

(vii) “Subsequent Closing” has the meaning given to it in the Termination of Rights Agreement between CBOE and the Exchange dated as of September 27, 2004.

[1.2. Term

Notwithstanding Paragraphs 1.1 and 2.1 and 2.2 below, from the effective date of this provision of these By-Laws to the first Board of Directors meeting after the annual election meeting in 1988, 1989 or 1990, as appropriate, the initial terms of the Exchange Directors shall be as follows:

Public Director.....	1990
Public Director.....	1989
Public Director.....	1988
President of the Exchange.....	1988
Designated Dealer Director.....	1990
Designated Dealer Director.....	1989
At-Large Director.....	1988
Chairman of CBOE.....	1988
President of CBOE.....	1988
CBOE Director.....	1988]

Section 2. Election of Directors

2.1. Terms of Office

(a) The board term of the Chief Executive Officer shall expire when such individual ceases to be Chief Executive Officer of the Exchange.

[(a)] (b) The [a Designated Dealer] Member Directors [, At-Large Director or Public Director] shall be divided into three classes, each initially composed of no more than one Member Director. Each Member Director shall be elected for a term expiring at the third successive annual meeting of the membership, or when such Director's successor is thereafter elected and qualified, and shall be identified as being of the same class as the Director such Director succeeds. Notwithstanding the foregoing, in the case of any new Member Director subject to initial election or appointment pursuant to Section 1(b) of this Article V, such Director shall be added to a class, as determined by the Board at the time of such Director's initial election or appointment, and shall have an initial term expiring at the same time as the term of the class to which such Director has been added. In no case will any Member Director be added to a class that is already composed of two Member Directors[years or until a successor is elected and qualified].

(c) The Independent Directors shall be divided into three classes, each initially composed of no more than two Independent Directors. Each Independent Director shall be selected for a term expiring at the third successive annual meeting of the membership or when such Director's successor is thereafter elected and qualified, and shall be identified as being of the same class as the Director such Director succeeds. Notwithstanding the foregoing, in the case of any new Independent Director subject to initial selection or appointment pursuant to Section 1(b) of this Article V, such Director shall be added to a class, as determined by the Board at the time of such Director's initial selection or appointment, and shall have an initial term expiring at the same time as the term of the class to which such Director has been added.

[(b)] (d) The term of a CBOE Director shall be one year or until a successor is elected and qualified.

2.2. Candidate Selection

(a) The [three] candidates for election to the Board [either] as [Designated Dealer Directors or as At-Large] Member Directors 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 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)] during the annual meeting of the membership, at which only Proprietary Members can vote.

(b) The Independent Directors shall be selected by means of the following process. The Nominating Committee shall select, after receipt of input from interested parties, the candidate(s) to be submitted to the Board for approval or disapproval at the first Board meeting following the annual membership meeting.

[(b)] (c) The [four] CBOE Directors [members or executive officers of CBOE member organizations] shall be elected to the Board by the CBOE Board of Directors at their January meeting or as soon thereafter as possible.

[(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 the Nominating Committee. The 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.]

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ARTICLE VI. Committees

Section 1. Establishment of Committees

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1.4. Selection of Members

The membership of such committees shall be chosen in such a way as to assure fair representation of the public and, as appropriate, all classes of members in the administration of the Exchange. Each committee shall be comprised of at least three persons [members, at least one of whom shall be a member of the Board, except that all members of the Executive Committee, if any, shall be members of the Board].

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Section 3. Special Provisions Relating to Certain Committees

3.1. Securities Committee

[(a) The Securities Committee shall have as members at least one Proprietary Member with a certificate and at least one representative of issuers and investors who is not associated with a member or a broker or dealer. Notwithstanding anything in these By-Laws to the contrary, from the effective date of this provision of these By-Laws to the first Board meeting in 1989, the members of the Securities Committee shall be those members appointed to the Committee as of the effective date of this provision of the By-Laws.

(b)] The Securities Committee shall have the authority to adopt operating procedures necessary and appropriate for the Exchange's automated interface with the Intermarket Trading System (ITS). The Securities Committee also may delegate its authority in Rule 11.9 to approve Designated Dealers and Designated Issues to an officer of the Exchange.

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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 proposal and discussed any comments it received on the proposed rule change, as amended. 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, NSX and CBOE entered into an agreement of affiliation pursuant to which CBOE held 162 certificates of proprietary membership in NSX, and CBOE and its members had certain rights associated with NSX.⁵ 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 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 entered into

⁵ See Securities Exchange Act Release No. 24090 (February 12, 1987), 52 FR 5225 (February 19, 1987)(order approving proposed rule change by the Cincinnati Stock Exchange relating to an affiliation with CBOE).

between NSX and CBOE on September 27, 2004 (the “Termination Agreement”).

One of the conditions to the initial closing of the Termination Agreement called 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,⁶ the elimination of the Exchange’s Special Nominating Committee, and the removal of certain special limitations on changes to certain By-Laws and Rules. These changes were approved by the Commission on January 13, 2005.⁷

On January 18, 2005, the initial closing under the Termination Agreement took place. As part of that closing, NSX paid CBOE cash consideration in exchange for the relinquishment of three of CBOE’s six NSX Board positions and other rights, as well as the transfer of a number certificates of proprietary membership to the Exchange. The Termination Agreement also anticipates subsequent closings or events whereby NSX shall pay CBOE cash and/or other consideration in exchange for the relinquishment of the remainder of CBOE’s three NSX Board

⁶ As part of the 1986 affiliation agreement between the Exchange and CBOE, the Exchange’s By-Laws had been amended to provide that CBOE members were eligible to become Proprietary Members of NSX without having to purchase and own a certificate of proprietary membership, provided that each such CBOE member met all other eligibility requirements for NSX membership. This class of NSX membership was known as “Proprietary Members without certificates” and these NSX members were commonly referred to as “CBOE Exerciser Members.”

⁷ In eliminating the “CBOE Exerciser Member” class of membership, a ninety day transition period was provided for whereby any CBOE Exerciser Members existing on the effective date, January 13, 2005 (the “Effective Date”), will have ninety days from the Effective Date (which is April 13, 2005) 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 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.

positions and other rights, as well as the transfer of additional certificates of proprietary membership to the Exchange.

As a result of the relinquishment of the three NSX Board positions by CBOE and in anticipation of future relinquishments of NSX Board positions pursuant to the terms of the Termination Agreement, revisions to the NSX By-Laws are necessary to describe changes to the composition of the Board respecting those positions. The Exchange is also proposing additional revisions to its Board composition requirements to include a new category of directors known as “Independent Directors.” This category will replace the current “Public Directors” category. The Exchange is also proposing to provide a transition schedule for making a majority of its thirteen member Board be Independent Directors. These independence-related revisions are being proposed to comport with industry trends and in anticipation of governance requirements that the Commission may be imposing upon self-regulatory organizations.⁸ Various other related changes to the composition of the Board and its committees, which are described below, are also being proposed. The specific changes being proposed are described below.

a. Board Composition, Terms and Candidate Selection

Immediately preceding the initial closing date under the Termination Agreement, the Board consisted of thirteen Directors: (A) the NSX President; (B) two Designated Dealer Directors; (C) an At-Large Member Director; (D) the CBOE Chairman, the CBOE President and four CBOE Member Directors (collectively referred to as the six “CBOE Directors”); and (E)

⁸ To the extent that the proposed rule change, as amended, runs counter to the Commission’s recent governance and transparency proposals, Securities Exchange Act Release No. 50699 (November 18, 2004), 69 CFR 71125 (December 8, 2004), NSX represents that upon adoption of final rulemaking it will conform its By-laws accordingly. Telephone conversation among Jennifer M. Lamie, Assistant General Counsel & Secretary, NSX and Geraldine Idrizi, Attorney, Division of Market Regulation, Commission, on May 23, 2005.

three Public Directors.⁹ The composition of the Board is proposed to be revised to consist of the following Directors: the NSX Chief Executive Officer; three Member Directors; six Independent Directors; and three CBOE Directors.

In sum, the Exchange is proposing to: (A) change the position reserved for the President of the Exchange in favor of the NSX's Chief Executive Officer;¹⁰ (B) combine the two Designated Dealer and one At-Large Member positions into a single "Member Director" category, which would be defined in proposed Article V, Section 1(a)(ii) of the NSX By-Laws as "Proprietary Members or executive officers of Proprietary Member organizations;" (C) eliminate the existing Public Director¹¹ category in favor of an "Independent Director" category, which would be defined in proposed Article I, Section 1(k) of the NSX By-Laws as "a member of the Board that the Board has determined to have no material relationship with the Exchange or any affiliate of the Exchange, any member of the Exchange or any affiliate of any such member, other than as a member of the Board" and increased from three to six positions; and (D) combine the CBOE Chairman, CBOE President and CBOE Member Director categories into a single "CBOE Director" category, which would be defined in proposed Article V, Section 1(a)(iv) of the NSX By-Laws as "executive officers of CBOE, CBOE members or executive officers of

⁹ The current members of the Board are David Colker (NSX President); Peter B. Madoff and Cameron Smith (Designated Dealer Directors); Antoine C. Kemper, Jr. (At-Large Member Director); James M. Anderson, J. Carter Beese and Donald L. Calvin (Public Directors); and William J. Brodsky, Mark F. Duffy and Gary P. Lahey (CBOE Directors). As discussed elsewhere, there are also three vacant CBOE Director positions.

¹⁰ The President and Chief Executive Officer are currently the same person.

¹¹ "Public Directors" are defined as "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[.]" Article V, Section 1.1(g) of the NSX By-Laws.

CBOE member organizations” and decreased from six to three positions. Corresponding references throughout the NSX By-Laws are proposed to be amended accordingly.

The ten Directors now serving on the Board shall remain and their current terms shall continue unchanged.¹² As determined by the Board, the three new Independent Directors (who will be replacing the three CBOE Director positions that were vacated as part of the initial closing) will be either (i) selected in accordance with the applicable candidate selection processes set out in proposed Sections 2.1 and 2.2 of Article V of the NSX By-Laws (described below), except that each candidate will be submitted by the Nominating Committee to the Board for approval or disapproval as soon as practical rather than following the annual membership meeting; or (ii) appointed in accordance with proposed Section 2.1 of the NSX By-Laws and the procedures for filling intraterm vacancies set out in Section 3 of Article V of the NSX By-Laws (collectively referred to hereinafter as the “New Director Selection Procedures”). The initial terms of the three new Independent Directors shall be staggered to expire at the same times as the current terms of the three existing Independent Directors in accordance with proposed Article V, Section 2.1(c) of the NSX By-Laws.

The terms of office for the four categories of Director described in Article V, Section 2.1 of the NSX By-Laws will remain for the most part unchanged. The Chief Executive Officer’s board term shall expire when such individual ceases to be Chief Executive Officer, each Member Director and Independent Director will be appointed for a three-year term or until a successor is

¹² The members of the Board immediately following approved of the proposed revisions will be David Colker (NSX Chief Executive Officer); Antoine J. Kemper, Jr., Peter B. Madoff and Cameron Smith (Member Directors); James M. Anderson, J. Carter Beese and Donald L. Calvin (Independent Directors); and William J. Brodsky, Mark F. Duffy and Gary P. Lahey (CBOE Directors). There will also be three new Independent Directors selected in accordance with Article V, Section 2.2 of the NSX By-Laws.

thereafter elected and qualified, and each CBOE Director will be appointed for a one-year term or until a successor is elected and qualified. Modifications to provisions regarding Directors' terms of office are, however, being proposed to add procedures to account for when new Member Directors' and new Independent Directors' initial terms would begin.

The candidate selection process described in Article V, Section 2.2 of the NSX By-Laws will be modified as follows. The procedures for the election of Member Director candidates are proposed to be modified to clarify the language and existing Exchange practice that the annual election, at which Proprietary Members vote for the candidate(s), occurs during the annual meeting of the membership, which occurs in January in accordance with Article II, Section 10.1 of the NSX By-Laws. Reference to the procedures for the selection of Public Directors will be deleted and the proposed procedures for the selection of Independent Directors will be added to provide that the Nominating Committee shall select, after receipt of input from interested parties, the candidate(s) to be submitted to the Board for approval or disapproval at the first Board meeting following the annual membership meeting. The CBOE Directors shall continue to be elected to the NSX Board by the CBOE's board of directors at their January meeting or as soon thereafter as possible.

b. Subsequent Changes in Board Composition

The Termination Agreement anticipates subsequent closings or events whereby NSX shall pay CBOE cash and/or other consideration in exchange for the relinquishment of the remainder of CBOE's three NSX Board positions and other rights, as well as the transfer of additional certificates of proprietary membership to the Exchange. The Exchange is therefore proposing to adopt additional provisions to accommodate the resultant changes in composition to the Board that would occur upon such closing(s) and in order to achieve a majority of

Independent Directors serving on the Board should there be no subsequent closings. These provisions will be reflected in proposed Article V, Section 1(b) of the NSX By-Laws and would provide:

- On the date of the first “Subsequent Closing”¹³ to occur after January 18, 2005, the number of positions on the Board to be filled by CBOE Directors shall be reduced from three to two and the number of positions to be filled by Independent Directors shall be increased from six to seven. Following the first Subsequent Closing, a new Independent Director shall be selected, as determined by the Board, pursuant to the New Director Section Procedures.
- If no Subsequent Closing has occurred prior to February 15, 2006, then in order to achieve a majority of Independent Directors serving on the Board, the Board may, in its discretion, add up to two new Independent Directors and thereby increase the number of Directors serving on the Board from thirteen to not more than fifteen. In such event, the two new Independent Directors shall be selected, as determined by the Board, pursuant to the New Director Selection Procedures.
- On the date of the second Subsequent Closing to occur after January 18, 2005, the number of positions on the Board to be filled by CBOE Directors will be reduced from two to one, and the Board may, in its discretion, increase by one the number of positions to be filled by either Independent Directors or Member Directors. Following the second Subsequent Closing, a new Director may be selected, as determined by the Board, pursuant to the New Director Selection Procedures.

¹³ “Subsequent Closing” would be defined in proposed Article V, Section 1(b)(vii) of the NSX By-Laws to have meaning given to it in the Termination Agreement.

- On the earliest to occur of (A) the date on which CBOE owns less than five percent (5%) of the outstanding certificates of proprietary membership of the Exchange or (B) the third anniversary of the fourth Subsequent Closing (the earliest of these to occur being the “CBOE Withdrawal Date”), the number of positions on the Board to be filled by CBOE Directors shall be reduced from one to zero, and the Board may, in its discretion, increase by one the number of positions to be filled by either Independent Directors or Member Directors. The remaining CBOE Director shall be deemed to have resigned from the Board as of the CBOE Withdrawal Date. Following the CBOE Withdrawal Date, a new Director may be selected, as determined by the Board, pursuant to the New Director Selection Procedures.

c. Changes in Committee Composition

In order to comport with industry practice and anticipated changes in regulatory requirements, the Exchange is proposing to revise the general composition requirements for committees contained in Article VI, Section 1.4 of the NSX By-Laws to provide that membership of such committees shall be chosen in such a way to assure fair representation of the public and, as appropriate, all classes of members. The Exchange is also proposing to delete references in: (i) Article VI, Section 1.4 of the NSX By-Laws to the requirements that at least one member of each committee be a member of the Board and that all members of the Executive Committee be members of the Board, and (ii) Article VI, Section 3.1 of the NSX By-Laws to the requirements that the Securities Committee have at least one Proprietary Member and at least one representative of issuers and investors who is not associated with a member or a broker or dealer, and composition requirements that were no longer applicable after 1989.

d. Definition Changes

As indicated above, the Exchange is proposing to adopt a definition for “Independent Director.” The Exchange is also proposing to modify the definition of “CBOE member(s)” to delete reference to the requirement, in the case of a transferable regular CBOE membership that is subject to a lease agreement, that the lessee and not the lessor be deemed to the CBOE member. Finally, the Exchange is proposing to reorganize the list of definitions in alphabetical order and renumber the provisions accordingly.

2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(5)¹⁵ in particular, in that it is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, generally, in that it protects investors and the public interest. The Exchange believes that the proposed rule change, as amended, also furthers the objectives of Section 6(b)(1),¹⁶ in that it helps to assure that the Exchange is 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, as amended, will impose any inappropriate burden on competition.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ 15 U.S.C. 78f(b)(1).

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

No written comments were solicited or received in connection with the proposed rule change, as amended.

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 the Exchange consents, the Commission will:

- (a) by order approve such proposed rule change, as amended; or
- (b) institute proceedings to determine whether the proposed rule change, as amended, 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, 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. Please include File Number SR-NSX-2005-02 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-2005-02. 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, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 Room. 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 available publicly. All submissions should refer

to File Number SR-NSX-2005-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).