

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66071; File Nos. SR-CBOE-2011-107 and SR-NSX-2011-14]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated and National Stock Exchange, Inc.; Order Granting Accelerated Approval to Proposed Rule Changes in Connection with the Proposed Acquisition of the National Stock Exchange, Inc. by CBOE Stock Exchange, LLC

December 29, 2011.

#### I. Introduction

On November 28, 2011, each of the Chicago Board Options Exchange, Incorporated (“CBOE”) and the National Stock Exchange, Inc. (“NSX”) filed with the Securities and Exchange Commission (“Commission”), 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> proposed rule changes in connection with the proposed acquisition of NSX by CBOE Stock Exchange, LLC (“CBSX”) (the “Transaction”). On December 2, 2011, the proposed rule changes were published for comment in the **Federal Register**. <sup>3</sup> The Commission received no comments on either proposed rule change. This order approves each of the proposed rule changes on an accelerated basis.

#### II. Background

##### A. The Transaction

Currently, NSX is wholly and directly owned by NSX Holdings, Inc. (“NSX Holdings”). Under a Purchase Agreement (the “Purchase Agreement”) dated September 28, 2011 by and between NSX, NSX Holdings, and CBSX, CBSX would acquire all of the outstanding capital stock of NSX on the date of or after all conditions precedent to closing have been satisfied or waived, including approval by the Commission of these proposed rule changes. <sup>4</sup>

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

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

<sup>3</sup> See Securities Exchange Act Release Nos. 65843 (November 28, 2011), 76 FR 75577 (December 2, 2011) (SR-CBOE-2011-107) (“CBOE Notice”) and 65842 (November 28, 2011), 76 FR 75586 (December 2, 2011) (SR-NSX-2011-14) (“NSX Notice”).

<sup>4</sup> Conditions precedent to closing the Transaction are formal requirements set forth in the Purchase Agreement and include 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. See NSX Notice, *supra* note 3, at note 1.

Following the completion of the Transaction, NSX would become a wholly-owned subsidiary of CBSX. NSX would remain a Delaware for-profit stock corporation, with the authority to issue 1,000 shares of common stock, 100 shares of which would be issued and would be held in their entirety by CBSX. At all times, all of the outstanding stock of NSX would be owned by CBSX. NSX would remain registered as a national securities exchange under Section 6 of the Act, <sup>5</sup> and accordingly, NSX would remain a self-regulatory organization (“SRO”). <sup>6</sup>

NSX has proposed to amend its Certificate of Incorporation and By-Laws to reflect and address the acquisition of NSX by CBSX following the Transaction. In addition, NSX has proposed other changes to its governing documents that are not directly related to the Transaction to update and enhance the governing documents and generally make them consistent with parallel provisions contained in the governing documents of other SROs. These changes are discussed below.

##### B. CBSX

In 2007, the Commission approved the establishment of CBSX as a facility <sup>7</sup> of CBOE. <sup>8</sup> As the SRO for CBSX, CBOE has regulatory responsibility for the activities of CBSX. CBSX administers the CBOE Stock Exchange, a fully automated trading platform for securities other than options (the “CBSX Trading Facility”). As a limited liability company, the governance structure and operating authority of CBSX are set forth in the Operating Agreement of CBSX (“CBSX Operating Agreement”) and the CBSX Certificate of Formation. In connection with the establishment of the CBSX Trading Facility, CBOE adopted Rule 3.32 pertaining to ownership concentration and affiliation limitations. <sup>9</sup>

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

<sup>6</sup> NSX would continue to adhere to the undertakings in the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Act, Making Findings, and Imposing Sanctions, including those related to a Regulatory Oversight Committee and the separation of the regulatory functions from the commercial interests of NSX. See Securities Exchange Act Release No. 51714 (May 19, 2005).

<sup>7</sup> 15 U.S.C. 78c(a)(2).

<sup>8</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”).

<sup>9</sup> CBOE Rule 3.32(a) provides, in part: For as long as CBSX LLC operates as a facility of CBOE, no Trading Permit Holder, either alone or together with its Affiliates, at any time, may own, directly or

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>10</sup> of CBSX, representing just under 50% of all outstanding shares of CBSX. <sup>11</sup> The outstanding “Series B” Voting Shares of CBSX are held by nine broker-dealers.

As provided in Section 8.9 of the CBSX Operating Agreement, the outstanding Series A Voting Shares, in the aggregate, 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>12</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>13</sup> These provisions, as

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 (“CBOE Holdings”), 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>10</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 CBSX Operating Agreement.

<sup>11</sup> As noted in Section 3.2 of the CBSX 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 CBSX Operating Agreement, or any other provision thereof, or any rights to be acquired by a transferee of those Shares as provided therein.

<sup>12</sup> The CBSX Operating Agreement also provides for Series C Non-Voting Restricted Shares. Such 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 CBSX Operating Agreement.

<sup>13</sup> Section 6.12(a) of the CBSX Operating Agreement provides that no person (other than CBOE), either alone or together with its Affiliates, may directly or indirectly own an aggregate amount

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contained in the CBSX Operating Agreement and applicable CBOE rules, will remain unchanged after the Transaction except as otherwise described below.

In connection with the Transaction, CBOE proposes to amend and restate the CBSX Operating Agreement to be effective as of the closing of the Transaction. CBOE also proposes to adopt new CBOE Rule 2.50 regarding its policy with respect to NSX. These changes are discussed below.

### III. Discussion and Commission Findings

After careful consideration, the Commission finds that each proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>14</sup> In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(1) of the Act,<sup>15</sup> which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. Further, the Commission finds that the proposed rule changes are consistent with Section 6(b)(3) of the Act,<sup>16</sup> which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission also finds that the proposed rule change are consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and

of Shares that would result in a greater than 20% Percentage Interest in CBSX. In addition, Section 8.10 provides that if an Owner of Series B Voting Shares that is also a CBOE member owns more than 20% of the outstanding Voting Shares ("Excess Shares"), alone or together with any Affiliate, such Owner will have no voting rights with respect to the Excess Shares.

<sup>14</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>16</sup> 15 U.S.C. 78f(b)(3).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; 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.

As noted above, following the Transaction, NSX will be a wholly-owned subsidiary of CBSX. NSX will remain registered as a national securities exchange under Section 6 of the Act,<sup>18</sup> and, accordingly, NSX will remain an SRO. The Commission believes that the ownership of NSX by CBSX would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>19</sup> Though CBSX is not itself an SRO, as a holding company of an SRO, its activities with respect to the operation of NSX must be consistent with, and must not interfere with, the self-regulatory obligations of NSX.

#### A. CBOE-2011-107

##### 1. Changes To Accommodate CBSX's Ownership of NSX

CBOE's proposed rule change includes several amendments designed to accommodate CBSX's ownership of NSX. These amendments address the fact that CBSX will effectively serve as a holding company for NSX after the Transaction to the extent related to CBSX's control of NSX. The changes also clarify CBSX's rights and responsibilities relating to its role as a holding company of a registered national securities exchange. For example, CBOE's proposal amends Section 1.6 of the CBSX Operating Agreement to reflect CBSX's new purpose to act as a holding company of NSX (in addition to its current purpose to act as a trading market for securities other than options as a facility of CBOE). The proposal also amends several provisions in the CBSX Operating Agreement to clarify that certain references to CBSX include its subsidiaries, including NSX.<sup>20</sup>

In addition, the proposal amends Section 6.12 of the CBSX Operating Agreement to provide that the Ownership Concentration Limitation described in that section, which currently carves out CBOE (because CBOE owns greater than 20% of CBSX) does not apply to CBOE Holdings as well (because CBOE Holdings indirectly owns CBOE). It also expands the

<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(8).

<sup>20</sup> See, e.g., Sections 1.6 and 9.15(a)(9) and (10) of the CBSX Operating Agreement.

applicability of the Concentration Limitation to persons and the broader category of their "Related Persons"<sup>21</sup> rather than to persons and their "Affiliates."<sup>22</sup> The proposal also amends Section 6.12(c) and (e) of the CBSX Operating Agreement to impose on NSX equity trading permit holders the Ownership Concentration Limitation prohibitions described in those paragraphs, which are currently only imposed on CBOE Trading Permit Holders. This change recognizes CBSX's new ownership of NSX and is intended to guard against members of NSX obtaining an ownership stake in CBSX that could potentially be used to influence the performance by NSX of regulatory authority over such members or others. The Commission finds that these changes, which are necessary to reflect the change in ownership of NSX after the Transaction, are consistent with the Act.

The proposal makes similar amendments to Section 8.10 of the CBSX Operating Agreement to expand applicability of the voting restriction described in that section to persons and their Related Persons and to provide that if any person, not just a CBOE Trading Permit Holder, exceeds the Concentration Limitation set forth in Section 6.12 of the CBSX Operating Agreement, then the Owner and its Related Persons will have no voting rights with respect to the shares in excess of such limitation unless it satisfies certain requirements set forth in proposed Section 8.10(b) through (d) of the CBSX Operating Agreement. The proposed rule change also extends the applicability of the voting restriction in Section 8.10 of the CBSX Operating Agreement to cover voting agreements, plans, and arrangements.

Further, the proposal amends Section 9.15(a)(9) of the CBSX Operating Agreement to clarify that with respect to the sale of material assets or ownership interests that requires approval pursuant to Section 9.15, "material assets or ownership interests" includes subsidiaries of CBSX. In addition, the proposed rule change adds Section 15.19 to the CBSX Operating Agreement

<sup>21</sup> See Section 2.1(a)(23) of the CBSX Operating Agreement defining "Related Person."

<sup>22</sup> Section 2.1(a)(1) of the CBSX 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.

to obligate 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 (a certain class of directors defined in the NSX Bylaws that are intended to provide NSX members with fair representation in the governance of NSX consistent with the Act) that were nominated in accordance with the procedures set forth in NSX's governing documents.

## 2. Preservation of the Self-Regulatory Function of NSX

After the Transaction, NSX would become a subsidiary of CBSX. Although CBSX is not an SRO and, therefore, does not itself have self-regulatory functions, its activities with respect to the operation of NSX must be consistent with, and not interfere with, NSX's self-regulatory obligations. To address this concern, the proposal adds various provisions to the CBSX Operating Agreement that are designed to protect the independence of the self-regulatory function of NSX and to clarify NSX's rights with respect to CBSX.

For example, the proposed rule change adds Section 5.7(b) to the CBSX Operating Agreement, which, among other things:

- Requires CBSX Owners, the CBSX board of directors, CBSX officers, and CBSX employees (for so long as CBSX controls NSX and to the extent related to the activities of NSX) to give due regard to the preservation of the independence of the self-regulatory function of NSX and to NSX's obligations under the Act;
- Prohibits CBSX Owners, the CBSX board of directors, CBSX officers, and CBSX employees 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 amends Section 6.15(a) of the CBSX Operating Agreement to reflect the acquisition by CBSX of the NSX SRO and to ensure access by NSX to the Owners of CBSX that is necessary for NSX to perform its

responsibilities as an SRO.<sup>23</sup>

Specifically, the revisions:

- 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 CBSX Trading Facility; and

- Add a provision in which 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 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 Section 6.15(b) of the CBSX Operating Agreement concerning access by NSX to CBSX personnel and records<sup>24</sup> 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>25</sup>

The proposal also amends Section 6.15(c) of the CBSX Operating Agreement to provide that CBSX and the Owners and their respective officers, directors, agents, and employees,<sup>26</sup> irrevocably submit to the jurisdiction of

<sup>23</sup> Section 6.15(a) of the CBSX 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."

<sup>24</sup> Section 6.15(b) of the CBSX 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>25</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 CBSX Trading 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 Section 13.2 of the CBSX Operating Agreement.

<sup>26</sup> Revisions to Section 6.15(c) (consent to jurisdiction) and (d) (consent in writing to applicability) of the CBSX Operating Agreement also extend the requirements of these provisions to all agents and employees of CBSX and its Owners, rather than only agents and employees whose principal place of business and residence is outside of the United States.

the U.S. federal courts, the Commission, CBOE, and NSX for the 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 CBSX Trading Facility or the CBSX's control of NSX, as applicable.

In addition, the proposed rule change amends Sections 9.15(c) and 9.16 of the CBSX Operating Agreement 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 CBSX Operating Agreement. The proposal also amends Section 9.15(c) of the CBSX Operating Agreement 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 CBSX Operating Agreement or the Act.<sup>27</sup> These provisions are designed to foster compliance with the federal securities laws and to emphasize the considerations that are necessary on the part of CBSX's directors to reflect NSX's responsibilities as an SRO.

Additionally, the proposal amends Section 14.1(a) of the CBSX Operating Agreement to provide that, for so long as CBSX controls NSX, before any amendment, alteration, or repeal of any provision of the CBSX 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 CBSX Operating Agreement made pursuant to Section 14.1(a) to provide CBOE and NSX with sufficient opportunity to review any potential regulatory impacts

<sup>27</sup> Interference with respect to the CBSX Trading Facility will be determined by the CBSX board designees of CBOE. See Section 9.15(c) of the CBSX Operating Agreement.

of such amendment, alteration, or repeal before it becomes effective.

Further, to ensure unencumbered access to all relevant information, regardless of whether such information is considered “confidential,” the proposal amends Section 15.2 of the CBSX Operating Agreement to provide that nothing in the CBSX 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 CBSX 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 Section 15.2 of the CBSX Operating Agreement 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 CBSX Trading Facility’s business or NSX’s business, respectively.

### 3. CBOE Rule 2.50

The CBOE proposed rule change proposes to adopt new CBOE Rule 2.50, which is intended to foster and preserve the self-regulatory function of NSX. Specifically, CBOE Rule 2.50(a) proposes a policy that CBOE, as a controlling 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. Additionally, proposed CBOE Rule 2.50(b) provides that CBOE will “exercise its powers as a partial owner of CBSX to support the fulfillment by NSX of its self-regulatory obligations, including the appropriate allocation by NSX of such financial, technological, technical and personnel resources as may be necessary or appropriate for NSX to meet its obligations under the [Act].” The purpose of proposed CBOE Rule 2.50(a) is to provide that CBOE will, through its control interest in CBSX and consistent with its relationship with CBSX, work with NSX to establish and maintain adequate and appropriate resources to enable NSX to perform its self-regulatory obligations.

CBOE Rule 2.50 is designed to facilitate NSX’s ability to fulfill its self-regulatory obligations and, therefore, is consistent with the Act, including Section 6(b)(1) of the Act,<sup>28</sup> which

requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. Proposed Rule 2.50 represents CBOE’s commitment, as a controlling owner of CBSX, to support NSX in the fulfillment of NSX’s role as an SRO.

### 4. CBOE Holdings and Regulated Securities Exchange Subsidiaries

CBOE is wholly-owned by CBOE Holdings, and as discussed above, CBOE owns a controlling interest in CBSX. The CBOE Holdings Certificate of Incorporation contains provisions that are applicable to “Regulated Securities Exchange Subsidiaries” of CBOE Holdings, which entities are defined as “any national securities exchange controlled, directly or indirectly, by [CBOE Holdings], including, but not limited to CBOE.”<sup>29</sup> Various provisions in the CBOE Holdings Certificate of Incorporation reference “Regulated Securities Exchange Subsidiary,” including Articles Sixth (voting and ownership limitations), Eleventh (amendments to the CBOE Holdings Certificate of Incorporation must be submitted to the board of each Regulated Securities Exchange Subsidiary), Twelfth (amendments to the CBOE Holdings Bylaws must be submitted to the board of each Regulated Securities Exchange Subsidiary), Fourteenth (submission to jurisdiction arising out of or relating to Regulated Securities Exchange Subsidiaries’ activities), Fifteenth (confidential information of Regulated Securities Exchange Subsidiaries and access to CBOE Holdings’ books and records by Regulated Securities Exchange Subsidiaries), and Sixteenth (cooperation with the SEC and each Regulated Securities Exchange Subsidiary, consent to applicability of various provisions, due regard to preservation of regulatory independence, and consideration of effect of actions on each Regulated Securities Exchange Subsidiary). NSX, to the extent it is indirectly controlled by CBOE Holdings by virtue of CBOE Holdings’ control of CBOE and CBOE’s controlling interest in CBSX, which in turn will wholly-own NSX after the consummation of the Transaction,

would qualify as a “Regulated Securities Exchange Subsidiary.”

### 5. Facility of CBOE

The proposed rule change amends various provisions to clarify that the operations of CBSX that relate to the CBSX Stock Exchange trading facility are a facility of CBOE under the Act, while the aspect of CBSX that relates to its control of NSX will not be a “facility” of CBOE. For example, the proposal amends Section 1.7 of the CBSX Operating Agreement to clarify that the CBSX Trading 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 CBSX Trading Facility will be subject to self-regulation by CBOE, with oversight by the Commission.<sup>30</sup>

### 6. Additional Changes

Finally, the proposed rule change makes several non-substantive technical and conforming changes throughout the CBSX Operating Agreement, including: updating the name and date of the CBSX Operating Agreement; updating the current Owners and their current percentage interests and CBSX shares owned;<sup>31</sup> replacing references to CBOE members with CBOE trading permit holders;<sup>32</sup> updating the table of contents and section references; and adding new defined terms and renumbering the defined terms as necessary.<sup>33</sup> In connection with the updates to reflect the current Owners, the proposed rule change amends the definition of “Super Majority of the Owners” to mean, subject to the regulatory requirements described in Section 1.8 of the CBSX Operating Agreement, the affirmative vote of both (i) all of the Owners of the Series A Voting Shares at the time, and (ii) Owners of the Series B Voting Shares who then retain ownership of Series B Voting Shares and represent at least a twenty (20%) percentage interest in CBSX, which more accurately corresponds to CBSX’s current ownership structure.<sup>34</sup> The Commission finds these non-substantive changes to be consistent with the Act as they are

<sup>30</sup> See also Sections 1.8, 6.2(e), 6.15(c) and (d), 9.2(d), 9.15(a)(14) and 14.1(a) for additional clarifications.

<sup>31</sup> See Section 3.2(d), signature page, and Exhibit A to the CBSX Operating Agreement.

<sup>32</sup> See Sections 6.12(c) and (e) and 8.10 of the CBSX Operating Agreement.

<sup>33</sup> See Section 2.1 of the CBSX Operating Agreement.

<sup>34</sup> See Section 2.1(a)(26). This change is consistent with the original structure of CBSX under which a super majority could be obtained with an affirmative vote of CBOE and two initial owners, who all initially had ten (10%) percentage interests in CBSX.

<sup>28</sup> 15 U.S.C. 78f(b)(1).

<sup>29</sup> See CBOE Holdings Certificate of Incorporation Article Fifth (a)(xi).

necessary to reflect the acquisition by CBSX of NSX following the Transaction.

#### B. NSX-2011-14

NSX proposes to amend its Certificate of Incorporation and By-Laws to reflect and address NSX's proposed new ownership pursuant to which NSX will become wholly-owned by CBSX following the Transaction. In addition, NSX is making several other changes to its governing documents that are not directly related to the Transaction to update and enhance the governing documents and generally make them consistent with parallel provisions contained in the governing 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.

Except as described below, NSX's governing documents, rules, and manner of operation, including restrictions on ownership and transfer, registration as a national securities exchange under Section 6 of the Act, and the continuance of NSX as an SRO<sup>35</sup> will remain unchanged.<sup>36</sup>

In addition, the NSX proposal also contains the CBSX Operating Agreement, as revised in the contemporaneous rule filing CBOE-2011-107 and as described above, since provisions in the CBSX Operating Agreement are relevant to NSX's structure and operations. The proposed amendments to the NSX governing documents and the CBSX Operating Agreement are intended to provide NSX with the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. The proposed amendments also modernize and enhance the ownership and voting limitations in order to guard against undue influence over or interference with the NSX's regulatory functions and fulfillment of its regulatory obligations under the Act.

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 revised documents reflect 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 NSX's continuing self-regulatory responsibilities pursuant to NSX's registration under Section 6 of the Act.

Currently, the NSX Board consists of thirteen director positions, of which seven are Independent, three are ETP Holder, two are At Large, and one is the NSX 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.

#### 1. Amended and Restated Certificate of Incorporation of NSX

Under the proposed rule change, the requirement that NSX be at all times wholly-owned by NSX 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 NSX shall be owned by CBSX.

In addition, new language is proposed to be added to Articles VII and XI of the NSX Certificate of Incorporation designed to enable NSX Board and the Commission to continue to exercise oversight of NSX. In conformity with similar language in other governing documents of other exchanges,<sup>37</sup> NSX proposes to add a provision to each of Articles VII and XI to make clear that before any amendment to, or repeal of, any provision of the NSX By-Laws and/or Certificate of Incorporation shall be effective, those changes shall be submitted to the NSX 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>38</sup> For purposes of clarity regarding Commission approval of NSX proposed rule changes, 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 governing documents of other exchanges,<sup>39</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 efficient NSX governance while continuing to protect and preserve the fair representation of ETP Holders through the ETP Holder Director election process contained in NSX's By-Laws.

The Commission believes that the proposed A&R Certificate, as amended to accommodate the Transaction, is designed to facilitate the NSX's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes the changes are consistent with Section 6(b)(1) of the Act,<sup>40</sup> which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

#### 2. Second Amended and Restated By-Laws of NSX

Under the proposed rule change, due to the transfer of ownership of NSX from NSX Holdings to CBSX, references in the NSX By-Laws specific to NSX 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,

<sup>38</sup> See A&R Certificate of Incorporation, Articles Seventh and Eleventh.

<sup>39</sup> See A&R Certificate of Incorporation, Article Fifth, (b). See also, e.g., 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>40</sup> 15 U.S.C. 78f(b)(1).

<sup>35</sup> See 15 U.S.C. 78c(a)(26).

<sup>36</sup> See Securities Exchange Act Release No. 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03) (Commission order approving NSX's demutualization).

<sup>37</sup> See, e.g., Article 6 of the Certificate of Incorporation of EDGA Exchange, Inc. and Article 9 of the Certificate of Incorporation of C2 Options Exchange, Inc.

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 NSX while preserving a mechanism to prevent undue influence over NSX's self-regulatory functions.

In connection with the ownership of NSX by CBSX, new Section 10.1(b) will 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. This provision will assist the CBSX board in its oversight of NSX, and will also assist CBOE, pursuant to CBOE Rule 2.50, in CBOE's commitment, as a controlling owner of CBSX, to support NSX in the fulfillment of NSX's role as an SRO.

In addition, in conformity with the board composition provisions of other SROs,<sup>41</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>42</sup> The category of "At Large" Directors, which under current By-Laws means directors who

are not Independent, is eliminated.<sup>43</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>44</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>45</sup> and at all times shall include the Chief Executive Officer of NSX, at least 50% Non-Industry Directors (at least one of whom shall be an Independent Director), and such number of ETP Holder Directors as is necessary to comprise at least 20% of the NSX Board.<sup>46</sup> For purposes of calculating the percentage of Non-Industry Directors, the Chief Executive Officer of NSX is excluded.<sup>47</sup>

By-Law provisions relating to the terms of office of each type of director are 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>48</sup> NSX stated that the change to annual from staggered three-year director terms, which is consistent with provisions of other SROs,<sup>49</sup> promotes efficient Exchange governance and effective ETP Holder representation.<sup>50</sup>

With respect to the filling of vacancies on the NSX Board,<sup>51</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 NSX By-Laws, no such distinction is made. NSX stated

that it believes a distinction is necessary in order to promote, in the event of a vacancy of an ETP Holder Director, the fair representation of ETP Holders on the NSX Board.<sup>52</sup> 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>53</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 analogous provisions of the governance documents of another exchange.<sup>54</sup>

The Commission finds that the proposed changes regarding the composition of the Board are consistent with the Act, including Section 6(b)(1) of the Act,<sup>55</sup> which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act. The Commission notes that the proposed changes are consistent with the board composition provisions of other SROs.<sup>56</sup>

Certain other edits are proposed to the current NSX By-Laws to promote clarity and efficient governance. Such edits generally are intended to conform NSX's governing documents to analogous provisions contained in the governing documents of other exchanges.<sup>57</sup> Specifically, in order to promote fair representation among all ETP Holders,

<sup>41</sup> See, e.g., 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>42</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 e.g., 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>43</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>44</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>45</sup> See A&R By-Laws Section 3.2(a).

<sup>46</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>47</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>48</sup> See A&R By-Laws Section 3.4(a) through (e).

<sup>49</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>50</sup> See NSX Notice, *supra* note 3, at 76 FR 75589.

<sup>51</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.

<sup>52</sup> See NSX Notice, *supra* note 3, at 76 FR 75589.

<sup>53</sup> See A&R By-Laws Section 3.7(a)(i).

<sup>54</sup> See Third Amended and Restated Bylaws of the C2 Options Exchange, Inc., Article III, Section 3.5.

<sup>55</sup> 15 U.S.C. 78f(b)(1).

<sup>56</sup> See, e.g., 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 Amended and Restated Bylaws of EDGA Exchange, Inc.

<sup>57</sup> See A&R By-Laws Section 3.5(d) and (e). See also, e.g., Amended and Restated By-Laws of BATS Exchange, Inc., Article III, Section 4.

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 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. These provisions are intended to guard against the exercise of undue influence in the selection of ETP Holder directors.

In addition, the A&R By-Laws have been revised to include a fuller description of the composition and authority of Exchange committees.<sup>58</sup> 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 must mirror the requirements applicable to the full Board.<sup>59</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 was deleted.

Consistent with analogous provisions contained in the governing documents of other exchanges, the procedures for

<sup>58</sup> See A&R By-Laws Sections 5.5 through 5.13. See also, e.g., Amended and Restated By-Laws of BATS Exchange, Inc., Article V, Section 6, and Article VI, Section 2.

<sup>59</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 NSX, 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, e.g., Amended and Restated By-Laws of BATS Exchange, Inc., Article V, Section 6(e).

amendments to NSX's By-Laws are proposed to be amended to provide for NSX Board review and, as necessary, Commission approval, prior to the effectiveness of any amendments to the Exchange's By-Laws.<sup>60</sup>

Consistent with the proposed edits to the A&R Certificate and similar provisions in the governing documents of other exchanges,<sup>61</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 efficient Exchange governance while protecting 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 NSX to disclose such confidential information to the Commission.<sup>62</sup>

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 discussed above, as well as the Act and the rules promulgated thereunder.<sup>63</sup>

<sup>60</sup> See A&R By-Laws Section 8.1. See also, e.g., Amended and Restated By-Laws of BATS Exchange, Inc., Article IX, Section 1.

<sup>61</sup> See A&R By-Laws Section 3.8. See also, e.g., 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>62</sup> See A&R By-Laws Section 10.3.

<sup>63</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

### C. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>64</sup> for approving each of the proposed rule changes prior to the 30th day after the date of publication of notice in the **Federal Register**. Both the NSX Notice and the CBOE Notice were published in the **Federal Register** on December 2, 2011. Pursuant to Section 19(b)(2)(C)(iii) of the Act,<sup>65</sup> the Commission may not approve a proposed rule change earlier than 30 days after the date of publication thereof unless the Commission finds good cause for so doing. In the case of the CBOE and NSX proposals, the 30th day occurs in three days and falls on a non-business day (a Sunday). Further, the comment period on each proposal has closed, and the Commission has not received comment on either proposal. In light of the Commission's findings that the proposals are consistent with the Act, the Commission believes that good cause exists to accelerate approval of each proposal by a few days in order to accommodate the closing of the Transaction in calendar year 2011.

### IV. Conclusion

For the foregoing reasons, the Commission finds that each of the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>66</sup> that the proposed rule changes (SR-CBOE-2011-107 and SR-NSX-2011-14) be and hereby are approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>67</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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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>64</sup> 15 U.S.C. 78s(b)(2).

<sup>65</sup> 15 U.S.C. 78s(b)(2)(C)(iii).

<sup>66</sup> 15 U.S.C. 78s(b)(2).

<sup>67</sup> 17 CFR 200.30-3(a)(12).