

Vendor and OPRA until the effective date of the Vendor's termination.<sup>9</sup>

#### D. Section 21: "Assignment" Provision

Section 21 of the Vendor Agreement currently states that the Vendor may not assign the Vendor Agreement without the consent of OPRA "except to a successor corporation upon merger or consolidation of Vendor, or to a corporation acquiring all or substantially all of the property, assets and business of Vendor." OPRA is proposing to modify that language to accommodate other business entities in addition to corporations.

### III. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder.<sup>10</sup> Specifically, the Commission finds that the proposed OPRA Plan amendment is consistent with Section 11A of the Act<sup>11</sup> and Rule 608 thereunder<sup>12</sup> in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and to remove impediments to, and perfect the mechanism of, a national market system.

The Commission notes that OPRA's proposed changes to the definition of the term "Nonprofessional" are designed to add clarity to the definition and better align the definition language with Vendors' and Subscribers' current understanding of the term. In addition, the Commission notes that OPRA's proposed changes to Sections 14, 19, and 21 are designed to add clarity and specificity to these provisions. The Commission believes that the proposed OPRA Plan amendment should help to assure the availability of information with respect to quotations and transactions in listed options and would thereby further one of the principal objectives for a national market system set forth in Section 11A(a)(1)(C)(iii) of the Act. Therefore, the Commission believes that OPRA's proposal is consistent with Section 11A of the Act<sup>13</sup> and Rule 608 thereunder.<sup>14</sup>

<sup>9</sup>OPRA also proposes to delete current paragraph 19(b) (modifications relating Electronic Subscriber Agreement) and paragraph 19(c).

<sup>10</sup>In approving this proposed OPRA Plan Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78k-1.

<sup>12</sup> 17 CFR 242.608.

<sup>13</sup> 15 U.S.C. 78k-1.

<sup>14</sup> 17 CFR 242.608.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 11A of the Act,<sup>15</sup> and Rule 608 thereunder,<sup>16</sup> that the proposed OPRA Plan amendment (SR-OPRA-2008-02), as modified by Amendment No. 1, be, and it hereby is, approved.

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

**Florence E. Harmon,**

*Acting Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58425; File No. SR-CBOE-2008-88]

#### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to the Demutualization of Chicago Board Options Exchange, Incorporated

August 26, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act" or "Exchange Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 21, 2008, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission (the "Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

CBOE is filing this proposed rule change in connection with its plan to restructure from a Delaware non-stock corporation to a Delaware stock corporation that will be a wholly owned subsidiary of CBOE Holdings, Inc. ("CBOE Holdings"), a holding company organized as a Delaware stock corporation. As part of this Restructuring Transaction, a Certificate of Incorporation and Bylaws will be adopted for CBOE Holdings.<sup>3</sup> In

<sup>15</sup> 15 U.S.C. 78k-1.

<sup>16</sup> 17 CFR 242.608.

<sup>17</sup> 17 CFR 200.30-3(a)(29).

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

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

<sup>3</sup> The term "Restructuring Transaction" is defined in proposed CBOE Rule 1.1(hhh) as "the

addition, the Exchange's Certificate of Incorporation and Constitution will be replaced with a new Certificate of Incorporation and Bylaws as a result of the Restructuring Transaction. Finally, the Exchange's Rules will be amended to address, among other things, trading access to the Exchange after the Restructuring Transaction.<sup>4</sup>

The text of the proposed Certificate of Incorporation of CBOE Holdings, the proposed Bylaws of CBOE Holdings, the proposed Certificate of Incorporation of the Exchange, the proposed amendments to the Rules of the Exchange, the proposed Voting Agreement between CBOE Holdings and the Exchange, and the proposed deletion of the Constitution of the Exchange is available on CBOE's Web site (<http://www.cboe.org/Legal>), at CBOE's Office of the Secretary, and at the Commission's Public Reference Room.

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

In its filing with the Commission, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE 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 the Statutory Basis for, the Proposed Rule Change

###### Purpose

###### (1) The Restructuring Transaction

CBOE is filing this proposed rule change in connection with its plan to restructure from a Delaware non-stock corporation owned by its members to a

restructuring of the Exchange from a non-stock corporation to a stock corporation and wholly owned subsidiary of CBOE Holdings, Inc."

<sup>4</sup> The substance of the proposed rule change and its filing under Section 19(b)(2) of the Exchange Act (15 U.S.C. 78s(b)(2)), and Rule 19b-4 thereunder (CFR 240.19b-4), have been approved by the Board of Directors of the Exchange. The Exchange must obtain, but has not yet obtained, formal approval from the Board of Directors of the Exchange, as well as approval from the membership, for the changes set forth in this proposed rule change. Once it has obtained those approvals, the Exchange plans to file a technical amendment to this proposed rule change to reflect those approvals. Once those approvals are obtained, no further action by the Exchange in connection with this proposed rule change will be required.

Delaware stock corporation that will be a wholly owned subsidiary of CBOE Holdings, a holding company organized as a Delaware stock corporation. After the Restructuring Transaction, the owners of membership interests will become stockholders of CBOE Holdings through the conversion of their memberships into shares of common stock of CBOE Holdings. CBOE Holdings will hold all of the outstanding common stock of CBOE. CBOE will continue to function as a self-regulatory organization ("SRO") and to operate its exchange business and facilities.

The Restructuring Transaction will be completed through the following steps:

- The creation of CBOE Holdings as a first-tier, Delaware stock, for-profit subsidiary corporation of CBOE; and the creation of CBOE Merger Sub, Incorporated as a second-tier, Delaware stock, for-profit subsidiary corporation of CBOE (CBOE Merger Sub will be a first-tier subsidiary of CBOE Holdings).<sup>5</sup>

- Pursuant to the Agreement and Plan of Merger to be entered into in the future, CBOE Merger Sub, Incorporated will merge with and into CBOE, with CBOE surviving the merger as a Delaware stock, for-profit corporation, which is referred to as the "Merger."

- Upon the effectiveness of the Merger, the outstanding stock of CBOE Merger Sub, Incorporated will be converted into common stock of CBOE, the memberships in CBOE existing on the date of the Restructuring Transaction will be converted into Class A common stock of CBOE Holdings (described below) and the CBOE Holdings common stock held by CBOE will be cancelled. As a result, CBOE Holdings will become the sole stockholder of CBOE and will be entitled to the exclusive right to receive all dividends and distributions, including proceeds upon liquidation, from CBOE and all associated voting rights.

- Immediately following the Merger, CBOE will dividend up to CBOE Holdings all of the shares or interests CBOE owns in its subsidiaries (CBOE Futures Exchange, LLC, Chicago Options Exchange Building Corporation, CBOE, LLC, CBOE II, LLC, DerivaTech Corporation, Market Data Express, LLC and The Options Exchange, Incorporated) other than CBOE Stock Exchange, LLC, making them first-tier, wholly-owned subsidiaries of CBOE Holdings.<sup>6</sup> CBOE Stock Exchange, LLC

("CBSX") will remain a facility of CBOE in which CBOE holds a 50% interest.<sup>7</sup> CBSX is an equity trading facility of CBOE.

As part of the Restructuring Transaction, each membership in CBOE existing on the date of the Restructuring Transaction will be converted into a certain number of shares of Class A common stock of CBOE Holdings, divided by thirds into shares of Series A-1 common stock, Series A-2 common stock and Series A-3 common stock.<sup>8</sup> As a result, the owners of CBOE memberships outstanding immediately prior to the Restructuring Transaction will own shares of Class A common

futures exchange; Chicago Options Exchange Building Corporation owns the building in which CBOE operates; CBOE, LLC holds a 24.01% interest in OneChicago, LLC, a security futures exchange; CBOE II, LLC recently sold its interest in HedgeStreet, Inc., a derivatives market regulated by the Commodity Futures Trading Commission; DerivaTech Corporation owns certain educational software; Market Data Express, LLC distributes various types of market data; and The Options Exchange, Incorporated currently has no assets or activities. CBOE is in the process of establishing CBOE Execution Services, LLC as a broker-dealer. CBOE Execution Services, LLC will perform various functions in that capacity and will be a first-tier, wholly-owned subsidiary of CBOE Holdings immediately following the Merger.

<sup>7</sup> The remaining 50% interest in CBSX currently is owned by five registered broker-dealers.

<sup>8</sup> As of the effective time of the Restructuring Transaction, CBOE Holdings will be authorized to issue (i) a certain number of shares of unrestricted common stock, \$0.01 par value per share, (ii) a certain number of shares of Class A common stock, \$0.01 par value per share, initially divided into three series of restricted Class A common stock, designated Series A-1, A-2 and A-3, (iii) a certain number of shares of Class B non-voting common stock, \$0.01 par value per share, initially divided into three series of Class B non-voting common stock, designated Series B-1, B-2 and B-3, and (iv) up to 20,000,000 shares of preferred stock, \$0.01 par value per share. The unrestricted common stock and the Class A common stock will have the same rights and privileges, except the Class A common stock will be subject to certain transfer restrictions. The unrestricted common stock will be freely transferable. The three series of Class A common stock will be identical, except that the transfer restrictions associated with each series will be of a different duration. The three series of Class B non-voting common stock will be identical, and will have no voting privileges or rights except in certain limited circumstances. The three series of Class B non-voting common stock will convert into Class A common stock upon the public offering of CBOE Holdings Common Stock (defined for purposes of this rule filing as the unrestricted common stock, the Class A common stock and the Class B non-voting common stock). The Class B non-voting common stock will be issued as part of a settlement of certain litigation, which is discussed below. CBOE Holdings will have the ability to issue preferred stock and unrestricted common stock, including in connection with a public offering of shares of stock to investors who were not members of CBOE prior to the Restructuring Transaction and are not holders of Trading Permits in CBOE following the Restructuring Transaction. CBOE Holdings has no current intention to issue any shares of its preferred stock.

stock of CBOE Holdings immediately following the Restructuring Transaction.

The Class A common stock of CBOE Holdings will represent an equity ownership interest in CBOE Holdings and will have traditional features of common stock, including equal per share dividend, voting and liquidation rights. This stock, however, will not provide its holders with physical or electronic access to CBOE and its trading facilities. Following the Restructuring Transaction, physical and electronic access to CBOE and its trading facilities will be available to individuals and organizations that have obtained a Trading Permit from CBOE. Trading Permits are described in more detail below.

(2) Reasons for the Restructuring Transaction

CBOE believes that changing its focus to that of a for-profit business, along with modifying its corporate and governance structures to be more like those of other for-profit businesses, will provide CBOE with greater flexibility to respond to the demands of a rapidly changing business environment. In addition, by being structured as a stock, for-profit corporation, CBOE will be able to pursue strategic opportunities to engage in business combinations and joint ventures with other organizations and to access capital markets in ways that are not available to non-stock, membership corporations. CBOE believes that the Restructuring Transaction will move it one step closer to achieving its key objectives of providing its owners a more liquid investment and creating a framework for a possible future public offering of CBOE Holdings Common Stock.

CBOE also believes, among other things, that the restructuring of the Exchange will enable it to enhance its competitiveness with other options exchanges while preserving its ability to provide trading benefits and opportunities to persons with trading access to the Exchange.

(3) Paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation and the Settlement of Litigation

In connection with the Merger, the Exchange's Certificate of Incorporation and Constitution will be replaced by a new Certificate of Incorporation and Bylaws. While the content of the Exchange's new Certificate of Incorporation and Bylaws will be similar to the content of the Exchange's old Certificate of Incorporation and Constitution, the new Certificate of Incorporation will not contain, among other things, paragraph (b) of Article Fifth of the CBOE Certificate of

<sup>5</sup> CBOE Holdings and CBOE Merger Sub have already been created.

<sup>6</sup> These entities engage in the following activities: CBOE Futures Exchange, LLC operates an electronic

Incorporation (“Article Fifth(b)”).<sup>9</sup> Article Fifth(b) provided the right for full members of The Board of Trade of the City of Chicago, Inc. (“CBOT”) to become members of CBOE without having to separately purchase or lease a membership.<sup>10</sup>

Article Fifth(b) contains a provision that provides that no amendment may be made to it without the prior approval of not less than 80% of (i) the regular members of the Exchange admitted pursuant to Article Fifth(b) and (ii) the regular members of the Exchange admitted other than pursuant to Article Fifth(b), each such category of members voting as a separate class. CBOE has received a legal opinion from its Delaware counsel that under Delaware law because the Restructuring Transaction is structured as a merger, this provision of Article Fifth(b) would not be triggered, and that the Merger and associated amendments to the Exchange’s Certificate of Incorporation and Constitution could be effected through a simple majority vote of the members.

In addition, issues related to Article Fifth(b) are subject to litigation in Delaware state court and the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”).<sup>11</sup> A settlement has been reached with respect to this litigation that remains subject to various approvals.<sup>12</sup> As a result of the settlement, the trading access of persons who are Temporary Members under Interpretation and Policy .02 of CBOE Rule 3.19 will be preserved as further

described below. In addition, the class members in the litigation will receive cash and Class B non-voting common stock that will convert into Class A common stock upon the public offering of CBOE Holdings Common Stock.<sup>13</sup>

#### (4) Request for Commission Approval Under Section 15.16 of the CBSX Operating Agreement

Under the CBSX Operating Agreement, CBOE is defined as one of the “Owners” of CBSX. Section 15.16 of the CBSX Operating Agreement provides that in the event that a person acquires a 25% or greater interest in an Owner that owns a 20% or greater interest in CBSX, that person must execute an amendment to the Operating Agreement in which that person agrees to be a party to the Operating Agreement and to abide by all of the provisions of the Operating Agreement. Section 15.16 also provides that Commission approval under Section 19 of the Exchange Act is required in connection with such an amendment to the Operating Agreement.<sup>14</sup> Because CBOE owns a 50% interest in CBSX, the establishment of CBOE Holdings as the sole shareholder of CBOE would trigger this Commission approval requirement. Consistent with this requirement in Section 15.16 of the CBSX Operating Agreement, CBOE is requesting as part of this proposed rule change that the Commission provide such approval.

#### (5) Summary of the Proposed Rule Change

Following the Restructuring Transaction, the Exchange’s new Certificate of Incorporation and Bylaws will be similar to the current Certificate of Incorporation and Constitution, except they will reflect CBOE’s new structure as a for-profit stock corporation wholly-owned by CBOE Holdings. In this regard, they will be modified to, among other things, streamline governance and incorporate provisions required by the SEC in the case of for-profit exchanges. The Exchange also proposes to adopt a Certificate of Incorporation and Bylaws for CBOE Holdings that will address, among other things, the operation of the Exchange as an SRO in this new structure.<sup>15</sup> The Rules of the Exchange

also will be amended to reflect the use of Trading Permits to access the Exchange and its trading facilities and to make certain conforming changes.<sup>16</sup> These rule changes are discussed below.

#### (A) CBOE Holdings

As mentioned above, CBOE Holdings will be the parent company and sole shareholder of CBOE. The Certificate of Incorporation and the Bylaws of CBOE Holdings will govern the activities of CBOE Holdings.

#### (i) CBOE Holdings Board of Directors

After the Restructuring Transaction, the business and affairs of CBOE Holdings will be managed by or under the direction of its Board of Directors (“CBOE Holdings Board”). The CBOE Holdings Board will consist of between 11 and 15 directors, and except with respect to the initial CBOE Holdings Board, will be fixed by the CBOE Holdings Board from time to time.<sup>17</sup> After the Restructuring Transaction, the initial CBOE Holdings Board will have 13 directors who will consist of the CBOE Holdings’ Chief Executive Officer and 12 other directors.<sup>18</sup> That initial CBOE Holdings Board will be selected by the Board of Directors of the Exchange existing prior to the Restructuring Transaction (“Prior CBOE Board”) or a committee thereof, and the composition requirements for the CBOE Holdings Board will be satisfied in connection with the selection of directors for that initial CBOE Holdings Board. At all times no less than two-thirds of the directors of CBOE Holdings will satisfy the independence requirements contained in the listing standards of the New York Stock Exchange (“NYSE”) and the independence requirements adopted by the CBOE Holdings Board, as may be modified and amended from time to time.<sup>19</sup>

alteration or repeal will be submitted to the Board of Directors of CBOE, and if 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. See proposed Article Eleventh of the CBOE Holdings Certificate of Incorporation and proposed Article 10.2 of the CBOE Holdings Bylaws.

<sup>16</sup> The Exchange is not proposing any significant change to its existing operational and trading structure in connection with the demutualization.

<sup>17</sup> See proposed Article Seventh(b) of the CBOE Holdings Certificate of Incorporation and proposed Article 3.2 of the CBOE Holdings Bylaws.

<sup>18</sup> See proposed Article 3.2 of the CBOE Holdings Bylaws.

<sup>19</sup> See proposed Article 3.3 of the CBOE Holdings Bylaws. At the time this rule filing was submitted to the Commission, the requirements to qualify as an “independent director” under the NYSE’s listing

<sup>9</sup> As a result of this change, the Exchange is proposing to delete CBOE Rule 3.16, which addresses certain issues related to Article Fifth(b).

<sup>10</sup> On January 15, 2008, the Securities and Exchange Commission (“SEC” or “Commission”) approved an interpretation of Article Fifth(b) (“Article Fifth(b) Interpretation”) that addressed the impact of the acquisition of CBOT by Chicago Mercantile Exchange Holdings Inc. (“CME/CBOT Transaction”) on the eligibility of persons to become or remain members of CBOE (“exerciser members”) pursuant to Article Fifth(b) (the right provided under this provision is sometimes referred to as the “exercise right”). See Securities Exchange Act Release No. 57159 (Jan. 15, 2008), 73 FR 3769 (Jan. 22, 2008) (order approving File No. SR-CBOE-2006-106). Under the Article Fifth(b) Interpretation, the consummation of the CME/CBOT Transaction resulted in no person any longer qualifying as a member of the CBOT within the meaning of Article Fifth(b) and therefore resulted in the elimination of any person’s eligibility to qualify thereafter to become or remain an exerciser member of the Exchange.

<sup>11</sup> In addition to the Delaware litigation, the Commission’s approval order of the Article Fifth(b) Interpretation has been appealed to the DC Circuit.

<sup>12</sup> Among other things, the appeal of the Commission’s approval order of the Article Fifth(b) Interpretation to the DC Circuit would be withdrawn as part of the settlement. CBOE will keep Commission staff apprised regarding the status of the settlement and the legal proceedings related to the settlement.

<sup>13</sup> In the event of such a public offering, the Class A common stock will be subject to certain transfer restrictions as noted above.

<sup>14</sup> 15 U.S.C. 78s.

<sup>15</sup> While certain provisions of the Certificate of Incorporation and Bylaws for CBOE Holdings are not related to the operation of the Exchange, for so long as CBOE Holdings controls CBOE, before any amendment, alteration or repeal of any provision of the Certificate of Incorporation and Bylaws of CBOE Holdings becomes effective, such amendment,

The CBOE Holdings Board will appoint one of the directors on the CBOE Holdings Board to serve as Chairman of the CBOE Holdings Board.<sup>20</sup> The CBOE Holdings Bylaws do not restrict the Chief Executive Officer of CBOE Holdings from serving in this role.<sup>21</sup> The CBOE Holdings Board also may appoint an independent director to serve as Lead Director, who will perform such duties and possess such powers as the CBOE Holdings Board may from time to time prescribe.<sup>22</sup> The CBOE Holdings Board will be a classified board with staggered terms of office, consisting of two classes of directors, each of which will serve for two-year terms.<sup>23</sup> There is no limit on the number of terms a director may serve on the CBOE Holdings Board.

Except with respect to the initial CBOE Holdings Board, the CBOE Holdings Board or a committee thereof each year will nominate candidates for the class of directors standing for election at the CBOE Holdings annual meeting of shareholders.<sup>24</sup> In this regard, the Nominating and Governance Committee, which is described below, will nominate candidates for the CBOE Holdings Board. Each holder of CBOE Holdings voting stock will be entitled to one vote for each share of voting stock he or she holds, except as otherwise provided by the General Corporation Law of the State of Delaware (“DGCL”) or the Certificate of Incorporation or Bylaws of CBOE Holdings.<sup>25</sup> At each annual meeting of the shareholders of CBOE Holdings at which a quorum is present, the individuals receiving a plurality of the votes cast will be elected directors of CBOE Holdings.<sup>26</sup>

standards were found in Sections 303A.01 and 303A.02 of the NYSE’s Listed Company Manual.

<sup>20</sup> See proposed Article 3.6 of the CBOE Holdings Bylaws.

<sup>21</sup> See proposed Article 5.1 of the CBOE Holdings Bylaws.

<sup>22</sup> See proposed Article 3.7 of the CBOE Holdings Bylaws.

<sup>23</sup> See proposed Article 3.2 of the CBOE Holdings Bylaws. With regard to the initial CBOE Holdings Board, the initial term of the Class I directors will end with the first annual stockholders meeting to be held by CBOE Holdings following the Restructuring Transaction, and the initial term of the Class II directors will end with the second annual stockholders meeting following the Restructuring Transaction. The CBOE Holdings Board is authorized to assign members of the CBOE Holdings Board already in office to such classes at the time the classification becomes effective.

<sup>24</sup> See proposed Article 2.11 of the CBOE Holdings Bylaws. Subject to certain conditions, stockholders also have the right under this provision to nominate persons for the CBOE Holdings Board.

<sup>25</sup> See proposed Article 2.8 of the CBOE Holdings Bylaws.

<sup>26</sup> See proposed Article 2.10 of the CBOE Holdings Bylaws. Except as otherwise provided by law or the Certificate of Incorporation or Bylaws of

#### (ii) Committees of CBOE Holdings

CBOE Holdings will have an Executive Committee, an Audit Committee, a Compensation Committee, a Nominating and Governance Committee, as well as such other committees that the CBOE Holdings Board establishes.<sup>27</sup> The Nominating and Governance Committee will consist of at least seven directors, all of whom will be Independent Directors and be recommended by the Nominating and Governance Committee for approval by the CBOE Holdings Board.<sup>28</sup> The initial Nominating and Governance Committee after the Restructuring Transaction will be selected by the Prior CBOE Board or a committee thereof, and the composition requirements for the Nominating and Governance Committee will be satisfied in connection with the selection of members of the initial Nominating and Governance Committee. Members of the Executive, Audit, and Compensation Committees of CBOE Holdings will be recommended by the Nominating and Governance Committee for approval by the CBOE Holdings Board.<sup>29</sup>

The Executive Committee will have and may exercise all the powers and authority of the CBOE Holdings Board in the management of the business and affairs of CBOE Holdings, except it will not have the power or authority of the CBOE Holdings Board in reference to, among other things, amending the CBOE Holdings Certificate of Incorporation, adopting an agreement of merger or consolidation, approving the sale, lease or exchange of all or substantially all of the CBOE Holdings’ property and assets, or approving the dissolution of CBOE Holdings or a revocation of a dissolution.<sup>30</sup> The Audit, Compensation, and Nominating and Governance Committees will have such duties and may exercise such authority

CBOE Holdings, the holders of a majority in voting power of the shares of the capital stock of CBOE Holdings issued and outstanding and entitled to vote at the meeting (after taking into account the effect of any reduction of the number of shares entitled to vote as a result of the voting limitations imposed by Article Sixth of the Certificate of Incorporation of CBOE Holdings, if any), present in person or represented by proxy, will constitute a quorum for the transaction of business. See proposed Article 2.6 of the CBOE Holdings Bylaws. The voting limitations in Article Sixth are discussed below.

<sup>27</sup> See proposed Article 4.1 of the CBOE Holdings Bylaws. The CBOE Holdings Board will designate the members of these other committees and may designate a Chairman and a Vice-Chairman thereof.

<sup>28</sup> See proposed Article 4.5 of the CBOE Holdings Bylaws.

<sup>29</sup> See proposed Articles 4.2, 4.3 and 4.4 of the CBOE Holdings Bylaws.

<sup>30</sup> See proposed Article 4.2 of the CBOE Holdings Bylaws.

as may be prescribed by the CBOE Holdings Board and their respective Charters as adopted by resolution of the CBOE Holdings Board.<sup>31</sup>

#### (iii) Officers of CBOE Holdings

The officers of CBOE Holdings will be the Chief Executive Officer, a Chief Financial Officer, a President, one or more Vice-Presidents (the number thereof to be determined by the CBOE Holdings Board), a Secretary, a Treasurer, and such other officers as the CBOE Holdings Board may determine, including an Assistant Secretary or Assistant Treasurer.<sup>32</sup> The CBOE Holdings Board by an affirmative vote of the majority of the board will appoint the Chief Executive Officer of CBOE Holdings, who will have general charge and supervision of the business of the CBOE Holdings.<sup>33</sup> In general, the other officers of CBOE Holdings will have the duties or powers or both set out in the CBOE Holdings Bylaws, as well as such other duties or powers or both as the CBOE Holdings Board or the Chief Executive Officer may from time to time prescribe.<sup>34</sup>

#### (iv) Shareholder Restrictions

In addition to the restrictions on the ability of certain CBOE Holdings stockholders to transfer their shares prior to and after an initial public offering if such an offering were to occur, the Certificate of Incorporation of CBOE Holdings places certain ownership and voting limits on the holders of CBOE Holdings stock and their Related Persons.<sup>35</sup> These restrictions are intended to address the possibility that a person holding a controlling interest in an SRO could use that interest to affect the SRO’s regulatory responsibilities under the

<sup>31</sup> See proposed Articles 4.3, 4.4 and 4.5 of the CBOE Holdings Bylaws.

<sup>32</sup> See proposed Article 5.1 of the CBOE Holdings Bylaws. A “Trading Permit Holder” is defined in Section 1.1(f) of the Bylaws of the Exchange as: “any individual, corporation, partnership, limited liability company or other entity authorized by the Rules that holds a Trading Permit. If a Trading Permit Holder is an individual, the Trading Permit Holder may also be referred to an ‘individual Trading Permit Holder.’ If a Trading Permit Holder is not an individual, the Trading Permit Holder may also be referred to as a ‘TPH organization.’ A Trading Permit Holder is a ‘member’ solely for purposes of the Act; however, one’s status as a Trading Permit Holder does not confer on that Person any ownership interest in the Exchange.”

<sup>33</sup> See proposed Articles 5.1 and 5.2 of the CBOE Holdings Bylaws.

<sup>34</sup> See proposed Articles 5.3, 5.4, 5.5, 5.6 and 5.7 of the CBOE Holdings Bylaws.

<sup>35</sup> The term “Related Person” is defined in proposed Article Fifth(a)(ix) of the CBOE Holdings Certificate of Incorporation and includes, among other things, persons associated with a Trading Permit Holder.

Exchange Act.<sup>36</sup> In particular, these restrictions provide that:

#### Ownership

- No person (either alone or together with its Related Persons) may beneficially own shares of stock representing in the aggregate more than 10% of the total outstanding shares of CBOE Holdings stock; provided, that, in the event a public offering of common stock is completed, the ownership percentage that a person is permitted to beneficially own will increase from 10% to 20% of the total outstanding shares of CBOE Holdings stock;<sup>37</sup> and

- In the event that a person, either alone or together with its Related Persons, beneficially owns shares of stock representing more than 10% of the outstanding shares of stock (or, in the event that a public offering of common stock has been completed, 20% of the outstanding shares of stock), such person and its Related Persons will be obligated to sell promptly, and CBOE Holdings will be obligated to redeem promptly, at a price equal to the par value of such shares of stock and to the extent that funds are legally available for such redemption, that number of shares of stock necessary so that such person, together with its Related Persons, will beneficially own shares of stock representing in the aggregate no more than 10% of the outstanding shares of stock (or, in the event that a public offering of common stock has been completed, 20% of the outstanding shares of stock), after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.<sup>38</sup>

#### Voting

- No person (either alone or together with its Related Persons) will be entitled to vote or cause the voting of shares of stock beneficially owned by that person or those Related Persons to the extent that those shares would represent in the aggregate more than 10% of the total number of votes entitled to be cast on

any matter, and no person (either alone or together with its Related Persons) will be entitled to vote more than 10% of the total number of votes entitled to be cast on any matter by virtue of agreements entered into by that person or those Related Persons with other persons not to vote shares of outstanding stock; provided, that, in the event a public offering of common stock is completed, the voting percentage that any person is permitted to control, whether through beneficial ownership or other agreement, will increase from 10% to 20% of the total number of votes entitled to be cast on any matter;<sup>39</sup> and

- In the event that a person, either alone or together with its Related Persons, is entitled to vote or cause the voting of shares representing in the aggregate more than 10% (or, in the event that a public offering of common stock has been completed, 20%) of the total number of votes entitled to be cast on any matter (including if it and its Related Persons possess this voting power by virtue of agreements entered into with other persons not to vote shares of stock), then such person, either alone or together with its Related Persons, will not be entitled to vote or cause the voting of these shares of stock to the extent that such shares represent in the aggregate more than 10% (or, in the event that a public offering of common stock has been completed, 20%) of the total number of votes entitled to be cast on any matter, and any such votes purported to be cast in excess of this percentage will be disregarded.<sup>40</sup>

The CBOE Holdings Board of Directors may waive the provisions regarding ownership and voting limits by a resolution expressly permitting ownership or voting rights in excess of such limits (which resolution must be

filed with and approved by the SEC prior to being effective), subject to a determination of the Board that:<sup>41</sup>

- The acquisition of beneficial ownership in excess of the ownership limits or the exercise of voting rights in excess of the voting limits will not impair the ability of CBOE to discharge its responsibilities under the Exchange Act and the rules and regulations under the Exchange Act and is otherwise in the best interests of CBOE Holdings and its stockholders and CBOE;

- The acquisition of beneficial ownership in excess of the ownership limits or the exercise of voting rights in excess of the voting limits will not impair the SEC's ability to enforce the Exchange Act;

- Neither the person obtaining the waiver nor any of its Related Persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act) if such person is seeking to obtain a waiver above the applicable ownership or voting percentage level;<sup>42</sup> and

- For so long as CBOE Holdings directly or indirectly controls CBOE, neither the person obtaining the waiver nor any of its Related Persons is a Trading Permit Holder if such person is seeking to obtain a waiver above the applicable ownership or voting percentage level.

In making these determinations, the CBOE Holdings Board may impose conditions and restrictions on the relevant stockholder and its Related Persons that it deems necessary, appropriate or desirable in furtherance of the objectives of the Exchange Act and the governance of CBOE Holdings.<sup>43</sup>

The CBOE Holdings Certificate of Incorporation also provides that the CBOE Holdings Board has the right to require any person and its Related Persons that the Board reasonably believes (i) to be subject to the voting or ownership restrictions summarized above, (ii) to beneficially own shares of CBOE Holdings stock entitled to vote on any matter in excess of the ownership restrictions discussed above, or (iii) to beneficially own an aggregate of 5% or more of the then outstanding shares of CBOE Holdings stock entitled to vote on any matter, which ownership has not been reported to CBOE Holdings, to provide to CBOE Holdings complete information as to all shares of the stock that such stockholder beneficially owns,

<sup>36</sup> In 2004, the Commission proposed rules that were designed to address conflicts of interest relating to for-profit SROs. *See, e.g.*, Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004).

<sup>37</sup> *See* proposed Article Sixth(b) of the CBOE Holdings Certificate of Incorporation.

<sup>38</sup> *See* proposed Article Sixth(b) of the CBOE Holdings Certificate of Incorporation. If and to the extent that shares of CBOE Holdings stock beneficially owned by any person or its Related Persons are held of record by any other person, this provision will be enforced against such record owner by requiring the redemption of shares of CBOE Holdings stock held by such record owner in a manner that will accomplish the ownership limitation applicable to such person and its Related Persons.

<sup>39</sup> *See* proposed Article Sixth(a) of the CBOE Holdings Certificate of Incorporation. The voting limitation does not apply to a solicitation of a revocable proxy by any CBOE Holdings stockholder on behalf of CBOE Holdings or by directors or officers of CBOE Holdings on behalf of CBOE Holdings or to a solicitation of a revocable proxy by a stockholder in accordance with Regulation 14A under the Exchange Act, 17 CFR 240.14A. This exception, however, would not apply to a solicitation by a stockholder pursuant to Rule 14a-2(b)(2) under the Exchange Act, which permits a solicitation made otherwise than on behalf of CBOE Holdings where the total number of persons solicited is not more than 10.

<sup>40</sup> *See* proposed Article Sixth(a) of the CBOE Holdings Certificate of Incorporation. If and to the extent that shares of CBOE Holdings stock beneficially owned by any person or its Related Persons are held of record by any other person, this provision will be enforced against such record owner by limiting the votes entitled to be cast by such record owner in a manner that will accomplish the voting limitation applicable to such person and its Related Persons.

<sup>41</sup> *See* proposed Articles Sixth(a) and (b) of the CBOE Holdings Certificate of Incorporation.

<sup>42</sup> 15 U.S.C. 78c(a)(39).

<sup>43</sup> *See* proposed Articles Sixth(a) and (b) of the CBOE Holdings Certificate of Incorporation.

as well as any other information relating to the applicability to such stockholder of the voting and ownership requirements outlined above as may reasonably be requested.<sup>44</sup>

CBOE has received a legal opinion that the foregoing ownership and voting rights limitations, as well as the provisions providing for the redemption of shares held by a person (either alone or together with its Related Persons) in excess of the ownership limitation, are valid under Delaware law.

#### (v) Self-Regulatory Function and Oversight

The CBOE Holdings Certificate of Incorporation contains various provisions designed to protect the independence of the self-regulatory function of CBOE and to make clear the Commission's and CBOE's jurisdiction with respect to CBOE Holdings. For example, pursuant to the CBOE Holdings Certificate of Incorporation, for so long as CBOE Holdings controls CBOE, each officer, director and employee of CBOE Holdings must give due regard to the preservation of the independence of the self-regulatory function of CBOE and to its obligations under the Exchange Act.<sup>45</sup> In addition, these persons are specifically prohibited from taking any actions that they reasonably should have known would interfere with the effectuation of any decisions by the Board of Directors of CBOE ("CBOE Board") relating to CBOE's regulatory functions, including disciplinary matters, or would adversely affect CBOE's ability to carry out its responsibilities under the Exchange Act.<sup>46</sup>

The CBOE Holdings Certificate of Incorporation also contains a specific requirement that to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of CBOE (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of CBOE that comes into the possession of CBOE Holdings will: (1) Not be made available to any persons other than to those officers, directors, employees and agents of CBOE Holdings that have a reasonable need to know the contents thereof; (2) be retained in confidence by CBOE Holdings and the officers, directors, employees and agents of CBOE Holdings; and (3) not be used for

any commercial purposes.<sup>47</sup> The CBOE Holdings Certificate of Incorporation also provides that for so long as CBOE Holdings controls CBOE, the books, records, premises, officers, directors and employees of CBOE Holdings will be deemed to be the books, records, premises, officers, directors and employees of CBOE for purposes of and subject to oversight pursuant to the Act, but only to the extent that such books, records, premises, officers, directors and employees of CBOE Holdings relate to the exchange business of CBOE.<sup>48</sup>

Further, the CBOE Holdings Certificate of Incorporation provides that CBOE Holdings will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting such a position with CBOE Holdings, to consent in writing to the applicability to them of Article Fourteenth, Article Fifteenth and Sections (c) and (d) of Article Sixteenth of the CBOE Holdings Certificate of Incorporation, as applicable, with respect to their activities related to CBOE.<sup>49</sup> In addition, CBOE Holdings will take reasonable steps necessary to cause its agents, prior to accepting such a position with CBOE Holdings, to be subject to the provisions of Article Fourteenth, Article Fifteenth and Sections (c) and (d) of Article Sixteenth of the CBOE Holdings Certificate of Incorporation, as applicable, with respect to their activities related to CBOE.

The CBOE Holdings Certificate of Incorporation also provides that CBOE Holdings, its directors, officers, agents and employees, irrevocably submit to the jurisdiction of the U.S. federal courts, the SEC, and CBOE, 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 SEC arising out of, or relating to, CBOE's activities.<sup>50</sup> Further,

<sup>47</sup> Notwithstanding this restriction, nothing in the CBOE Holdings Certificate of Incorporation will be interpreted so as to limit or impede the rights of the SEC or CBOE to access and examine such 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 CBOE Holdings to disclose such confidential information to the SEC or CBOE. See proposed Article Fifteenth of the CBOE Holdings Certificate of Incorporation.

<sup>48</sup> The books and records related to the exchange business of CBOE will be subject at all times to inspection and copying by the SEC and CBOE. *Id.* In addition, the CBOE Holdings Bylaws provide that the books of CBOE Holdings must be kept within the United States. See proposed Section 1.3 of the CBOE Holdings Bylaws.

<sup>49</sup> See proposed Article Sixteenth(b) of the CBOE Holdings Certificate of Incorporation.

<sup>50</sup> See proposed Article Fourteenth of the CBOE Holdings Certificate of Incorporation.

the Certificate of Incorporation provides that CBOE Holdings, its directors, officers, agents and employees, waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that they are not personally subject to the jurisdiction of the SEC, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.<sup>51</sup>

In addition, the CBOE Holdings Certificate of Incorporation and Bylaws provide that, before any amendment or repeal of any provision of the Certificate of Incorporation and Bylaws of CBOE Holdings becomes effective, such amendment or repeal will be submitted to the Board of Directors of CBOE, and if such amendment or repeal must be filed with or filed with and approved by the Commission, then such amendment or repeal will not become effective until filed with or filed with and approved by the Commission, as the case may be.<sup>52</sup> The CBOE Holdings Certificate of Incorporation also contains a provision that requires each director of the Board of CBOE Holdings to take into consideration the effect that CBOE Holdings' actions would have on CBOE's ability to carry out its responsibilities under the Exchange Act.<sup>53</sup>

#### (B) CBOE

Following the demutualization, CBOE will become a Delaware for-profit stock corporation that will be wholly-owned by CBOE Holdings. CBOE will issue a total of 1,000 shares of common stock, all of which will be owned by CBOE Holdings immediately following the demutualization transaction.<sup>54</sup> CBOE, not CBOE Holdings, will continue to be the entity registered as a national securities exchange under Section 6 of the Exchange Act and, accordingly, CBOE will continue to be an SRO.<sup>55</sup> The proposed CBOE Certificate of Incorporation, Bylaws and Rules will govern the activities of CBOE. CBOE's

<sup>51</sup> *Id.*

<sup>52</sup> See proposed Article Eleventh of the CBOE Holdings Certificate of Incorporation and proposed Article 10.2 of the CBOE Holdings Bylaws.

<sup>53</sup> See proposed Article Sixteenth(d) of the CBOE Holdings Certificate of Incorporation.

<sup>54</sup> Any sale, transfer or assignment by CBOE Holdings of any shares of CBOE common stock will require an amendment to the proposed CBOE Certificate of Incorporation and consequently will be subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act (15 U.S.C. 78s). See proposed Article Fourth of the CBOE Certificate of Incorporation.

<sup>55</sup> 15 U.S.C. 78f.

<sup>44</sup> See proposed Article Sixth(d) of the CBOE Holdings Certificate of Incorporation.

<sup>45</sup> See proposed Article Sixteenth(c) of the CBOE Holdings Certificate of Incorporation.

<sup>46</sup> *Id.*

current Certificate of Incorporation, Constitution (which will be replaced by the proposed Bylaws) and Rules are proposed to be amended to reflect, among other things, CBOE's status as wholly-owned subsidiary of CBOE Holdings, its management by the CBOE Board and its designated officers, and its self-regulatory responsibilities under Section 6 of the Exchange Act.<sup>56</sup>

(i) CBOE Board of Directors

After the Restructuring Transaction, the business and affairs of CBOE will be managed by or under the direction of the CBOE Board. The CBOE Board will consist of between 11 and 15 directors, and except with respect to the initial board of 13 directors as discussed below, will be fixed by the CBOE Board from time to time.<sup>57</sup> After the Restructuring Transaction, the CBOE Board will be reduced from 23 directors to 13 directors. This initial CBOE Board will have 13 directors who will consist of the CBOE's Chief Executive Officer, seven Non-Industry Directors and five Industry Directors.<sup>58</sup> The initial CBOE

Board will be selected by the Prior CBOE Board or a committee thereof, and the composition requirements for the CBOE Board will be satisfied in connection with the selection of directors for the initial CBOE Board. It is anticipated that the same individuals will be on the CBOE Holdings Board and the CBOE Board immediately following the Restructuring Transaction.

This initial CBOE Board will be smaller than the Prior CBOE Board and will have a majority of public directors (*i.e.*, Non-Industry Directors). In comparison, as indicated above, the Prior CBOE Board has 23 directors. Eleven of these directors are Public Directors,<sup>59</sup> two are At-Large Directors,<sup>60</sup> four are Floor Directors,<sup>61</sup> one is a Lessor Director,<sup>62</sup> four are Off-Floor Directors,<sup>63</sup> and one is the

provided that the broker-dealer is not a holder of a Trading Permit or otherwise subject to regulation by the Exchange. At all times, at least one Non-Industry Director will be a Non-Industry Director exclusive of the exceptions provided for in the immediately preceding sentence and will have no material business relationship with a broker or dealer or the Exchange or any of its affiliates. For purposes of proposed Section 3.1 of the CBOE Bylaws, an "outside director" is a director of an entity who is not an employee or officer (or any person occupying a similar status or performing similar functions) of such entity. The CBOE Board or the Nominating and Governance Committee will make all of the foregoing materiality determinations. In addition, in determining under (iii), (vi) and (B) above whether a broker-dealer's revenues account for a material portion of the consolidated revenues of the entities with which the broker-dealer is affiliated, the revenues of the broker-dealer will be compared with the consolidated revenues of all of the entities affiliated with the broker-dealer as well as the broker-dealer (*i.e.*, all of the entities in the broker-dealer's corporate family, inclusive of the broker-dealer). A director will qualify as a Non-Industry Director only so long as such director meets the requirements for that position.

<sup>59</sup> See Section 6.1 of the current Constitution of the Exchange. A "Public Director" is a non-member who is not a broker-dealer or person affiliated with a broker-dealer.

<sup>60</sup> *Id.* For purposes of Class II of the Prior CBOE Board, an "At-Large Director" is a person who functions as a member in any recognized capacity either individually or on behalf of a member organization, who is a CBSX Permit holder or an executive officer of a CBSX Permit holder, or who is an Interim Trading Permit holder or executive officer of an Interim Trading Permit holder. For purposes of Class III of the Prior CBOE Board, an "At-Large Director" is a member who functions as a member in any recognized capacity either individually or on behalf of a member organization.

<sup>61</sup> *Id.* A "Floor Director" is a member who directly or indirectly owns and controls a membership and is primarily engaged in business on the floor of the Exchange in the capacity of a member.

<sup>62</sup> *Id.* The "Lessor Director" is a person who directly or indirectly owns and controls a membership with respect to which s/he acts solely as lessor and who is not actively engaged in business as a broker-dealer or as a person associated with a broker-dealer as those terms are defined in the Exchange Act.

<sup>63</sup> *Id.* An "Off-Floor Director" is an executive officer of a member organization that primarily

conducts a non-member public customer business and who is not individually engaged in business on the Exchange floor.

Chairman of the Board (who is also the Chief Executive Officer of the Exchange).<sup>64</sup> Thus, the Prior CBOE Board consists of eleven public directors, eleven directors from the industry, and the Chairman of the Board.<sup>65</sup> After the Restructuring Transaction, the number of Non-Industry Directors and Industry Directors on the CBOE Board may be increased from time to time by resolution adopted by the CBOE Board, but in no event will the number of Industry Directors constitute less than 30% of the members of the CBOE Board and in no event will the number of Non-Industry Directors constitute less than a majority of the members of the CBOE Board.<sup>66</sup> In addition, at all times at least 20% of directors serving on the CBOE Board shall be Industry Directors nominated (or otherwise selected through the petition process) by the Industry-Director Subcommittee (directors selected through this process are referred to as "Representative Directors").<sup>67</sup> This nomination process is described below.

The CBOE Board will appoint one of the directors on the CBOE Board to serve as Chairman of the CBOE Board.<sup>68</sup> The CBOE Bylaws do not restrict the Chief Executive Officer of CBOE from serving in this role.<sup>69</sup> Each year following the annual election of the directors, the CBOE Board will select, from among the Industry Directors, a Vice Chairman of the CBOE Board to serve for a term of one year and until a successor is elected or appointed and qualified.<sup>70</sup> The CBOE Board also may appoint one of the Non-Industry Directors to serve as Lead Director, who will perform such duties and possess such powers as the CBOE Board may

conducts a non-member public customer business and who is not individually engaged in business on the Exchange floor.

<sup>64</sup> See Sections 6.1 and 8.2 of the current Constitution of the Exchange.

<sup>65</sup> Unlike the Prior CBOE Board, the Chairman of the CBOE Board after the Restructuring Transaction will be defined as an Industry Director.

<sup>66</sup> See proposed Section 3.1 of the CBOE Bylaws.

<sup>67</sup> *Id.*

<sup>68</sup> See proposed Section 3.6 of the CBOE Bylaws.

<sup>69</sup> See proposed Section 5.1(a) of the CBOE Bylaws.

<sup>70</sup> See proposed Section 3.7 of the CBOE Bylaws. The Vice Chairman will: (i) Preside over the meetings of the CBOE Board in the event the Chairman of the Board is absent or unable to do so, (ii) serve as chair the Trading Advisory Committee, (iii) except as otherwise provided in the Rules or resolution of the CBOE Board, appoint, subject to the approval of the CBOE Board, the individuals to serve on all Trading Permit Holder Committees established in the Rules or by resolution of the Board, and (iv) exercise such other powers and perform such other duties as are delegated to the Vice Chairman of the Board by the CBOE Board.

<sup>56</sup> *Id.*

<sup>57</sup> See proposed Article Fifth(b) of the CBOE Certificate of Incorporation and proposed Section 3.1 of the CBOE Bylaws.

<sup>58</sup> See proposed Section 3.1 of the CBOE Bylaws. A "Non-Industry Director" is defined as a person who is not an Industry Director. An "Industry Director" is defined as any director who (i) is a holder of a Trading Permit or otherwise subject to regulation by the Exchange; (ii) is a broker-dealer or an officer, director or employee of a broker-dealer or has been in any such capacity within the prior three years; (iii) is, or was within the prior three years, associated with an entity that is affiliated with a broker-dealer whose revenues account for a material portion of the consolidated revenues of the entities with which the broker-dealer is affiliated; (iv) has a material ownership interest in a broker-dealer and has investments in broker-dealers that account for a material portion of the director's net worth; (v) has a consulting or employment relationship with or has provided professional services to the Exchange or any of its affiliates or has had such a relationship or has provided such services within the prior three years; or (vi) provides, or has provided within the prior three years, professional or consulting services to a broker-dealer, or to an entity with a 50% or greater ownership interest in a broker-dealer whose revenues account for a material portion of the consolidated revenues of the entities with which the broker-dealer is affiliated, and the revenue from all such professional or consulting services accounts for a material portion of either the revenues received by the director or the revenues received by the director's firm or partnership. Notwithstanding the foregoing, a director will not be deemed to be an "Industry Director" solely because either (A) the person is or was within the prior three years an outside director of a broker-dealer or an outside director of an entity that is affiliated with a broker-dealer, provided that the broker-dealer is not a holder of a Trading Permit or otherwise subject to regulation by the Exchange, or (B) the person is or was within the prior three years associated with an entity that is affiliated with a broker-dealer whose revenues do not account for a material portion of the consolidated revenues of the entities with which the broker-dealer is affiliated,



from time to time prescribe.<sup>71</sup> The CBOE Board will continue to be a classified board with staggered terms of office, however, the CBOE Board will consist of two classes of directors, each of which serve for two years, as opposed to the current board that consists of three classes of directors, each of which serve for terms of three years.<sup>72</sup> There is no limit on the number of terms a director may serve on the CBOE Board.

(ii) Nomination and Election of Directors

The Nominating and Governance Committee of CBOE will consist of at least seven directors, including both Industry Directors and Non-Industry Directors, and will at all times have a majority of directors that are Non-Industry Directors.<sup>73</sup> All members of the committee will be recommended by the Nominating and Governance Committee for approval by the Board. The initial Nominating and Governance Committee after the Restructuring Transaction will be selected by the Prior CBOE Board or a committee thereof, and the composition requirements for the Nominating and Governance Committee will be satisfied in connection with the selection of members of the initial Nominating and Governance Committee. Subject to the discussion below, the Nominating and Governance Committee will have the authority to nominate individuals for election to the CBOE Board.<sup>74</sup>

<sup>71</sup> See proposed Section 3.8 of the CBOE Bylaws. The Prior CBOE Board currently has a Lead Director, and as provided in proposed Section 3.8 of the CBOE Bylaws, CBOE has the ability to continue the practice after the Restructuring Transaction.

<sup>72</sup> See proposed Section 3.1 of the CBOE Bylaws. With regard to the initial CBOE Board, the initial term of the Class I directors will end with the first annual stockholders meeting to be held by CBOE following the Restructuring Transaction, and the initial term of the Class II directors will end with the second annual stockholders meeting following the Restructuring Transaction. Class I directors will initially consist of the Chief Executive Officer, three Non-Industry Directors and two Industry Directors (one of whom is a Representative Director (as described below)). Class II directors will initially consist of four Non-Industry Directors and three Industry Directors (two of whom are Representative Directors). The CBOE Board is authorized to assign members of the Board already in office to such classes at the time the classification becomes effective.

<sup>73</sup> See proposed Section 4.5 of the CBOE Bylaws.

<sup>74</sup> *Id.* In performing this function, the Nominating and Governance Committee will determine, subject to review by the Board, whether a director candidate satisfies the applicable qualifications for election as a director, and the decision of that committee shall, subject to review, if any, by the Board, be final. See proposed Section 3.1 of the CBOE Bylaws. It is anticipated that the Nominating and Governance Committee will use director questionnaires in connection with determining the qualifications of director candidates.

The composition of the new Nominating and Governance Committee under the CBOE Bylaws is different than the composition of the current Nominating Committee under the Constitution of the Exchange.<sup>75</sup> In particular, the current Nominating Committee is composed of ten members. Eight of these members are from the industry and two of these members are from the public. Thus, unlike the new Nominating and Governance Committee, the current Nominating Committee consists of a majority of members from the industry.

In addition, the process for selecting the new Nominating and Governance Committee, which is described below, is different than the process for selecting the current Nominating Committee. In this regard, the current Nominating Committee is not a committee of the Prior CBOE Board, but rather a separate committee elected by the voting members of the Exchange.

After the Restructuring Transaction, the new Nominating and Governance Committee will be bound to accept and nominate the Representative Directors recommended by the Industry-Director Subcommittee (described below), provided that the Representative Directors so nominated by the Industry-Director bcommittee are not opposed by a petition candidate (described below).<sup>76</sup> If such Representative Directors are opposed by a petition candidate then the Nominating and Governance Committee will be bound to accept and nominate the Representative Directors who receive the most votes pursuant to a Run-Off Election (described below).<sup>77</sup> In addition, CBOE and CBOE Holdings will enter into a Voting Agreement pursuant to which CBOE Holdings will agree to vote in favor of the Representative Directors recommended by the Nominating and Governance Committee.<sup>78</sup>

The Industry-Director Subcommittee of the Nominating and Governance Committee will recommend a number of Industry Directors (*i.e.*, Representative Directors) that equals 20% of the total number of directors serving on the CBOE Board, provided that if 20% of the directors then serving on the CBOE Board is not a whole number, such

<sup>75</sup> See Section 4.1 of the current Constitution of the Exchange. The current Nominating Committee, as the name suggests, only has responsibility for nominations. This is different than the responsibilities of the new Nominating and Governance Committee, which will have authority with respect to nominations as well as governance issues.

<sup>76</sup> See proposed Section 3.1 of the CBOE Bylaws.

<sup>77</sup> *Id.*

<sup>78</sup> The proposed Voting Agreement is attached as Exhibit 5F to this proposed rule change.

number of Representative Directors will be rounded up to the next whole number.<sup>79</sup> Industry Directors not selected by the Industry-Director Subcommittee will be selected by the Nominating and Governance Committee.<sup>80</sup> The Industry-Director Subcommittee will consist of all of the Industry Directors then serving on the Nominating and Governance Committee.<sup>81</sup>

The Industry-Director Subcommittee will provide a mechanism for Trading Permits Holders to provide input to the Industry-Director Subcommittee with respect to nominees for the Representative Directors.<sup>82</sup> The Industry Director-Subcommittee will issue a circular to the Trading Permit Holders identifying the Representative Director nominees selected by the committee not later than January 15th, or the first business day thereafter if January 15th is not a business day.<sup>83</sup>

Holders of Trading Permits may nominate alternative candidates for election to the Representative Director positions to be elected in a given year by submitting a petition signed by individuals representing not less than 10% of the total outstanding Trading Permits at that time.<sup>84</sup> The names of all Representative Director nominees recommended by the Industry-Director Subcommittee and those selected pursuant to a valid and timely petition will, immediately following their selection, be given to the Secretary who will promptly issue a circular to all of the Trading Permit Holders identifying all such Representative Director candidates.<sup>85</sup>

If one or more valid petitions are received, the Secretary will issue a circular to all of the Trading Permit Holders identifying those individuals nominated for Representative Director by the Industry-Director Subcommittee and those individuals nominated for Representative Director through the petition process as well as of the time and date of a run-off election to determine which individuals will be nominated as Representative Director(s) by the Nominating and Governance Committee (the "Run-off Election").<sup>86</sup> In any Run-off Election, each holder of a Trading Permit will have one vote with

<sup>79</sup> See proposed Section 3.2 of the CBOE Bylaws. This section addresses the fair representation requirement for members in Section 6(b)(3) of the Exchange Act. 15 U.S.C. 78f(b)(3).

<sup>80</sup> See proposed Section 3.2 of the CBOE Bylaws.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



respect to each Trading Permit held by such Trading Permit Holder for each Representative Director position to be filled that year; provided, however, that no holder of Trading Permits, either alone or together with its affiliates, may account for more than 20% of the votes cast for a candidate, and any votes cast by a holder of Trading Permits, either alone or together with its affiliates, in excess of this 20% limitation shall be disregarded.<sup>87</sup> The Secretary will issue a circular to all of the Trading Permit Holders setting forth the results of the Run-off Election.<sup>88</sup> The number of individual Representative Director nominees equal to the number of Representative Director positions to be filled that year receiving the largest number of votes in the Run-off Election (after taking into account the voting limitation set forth above) will be the persons approved by the Trading Permit Holders to be nominated as the Representative Director(s) by the Nominating and Governance Committee for that year.

### (iii) Committees of CBOE

In addition to the Nominating and Governance Committee discussed above, CBOE will have the following CBOE Board committees: An Executive Committee, an Audit Committee, a Compensation Committee, a Regulatory Oversight Committee and such other standing and special committees as may be approved by the CBOE Board.<sup>89</sup> Except as may be otherwise provided in the CBOE Bylaws or as may be otherwise provided for from time to time by resolution of the CBOE Board, the Board may, at any time, with or without cause, remove any member of any such committees of the Board.<sup>90</sup>

With regard to the Prior CBOE Board, it also has an Executive Committee, an Audit Committee, a Compensation Committee, and a Regulatory Oversight Committee. The current Executive Committee consists of the Chairman of the Prior CBOE Board, the Vice Chairman of that Board, and four other persons who are directors (each of which is appointed by the Vice Chairman with the approval of the Prior CBOE Board).<sup>91</sup> At least 50% of the members of that committee (excluding

the Chairman) are Public Directors. The current Audit Committee consists of at least three directors appointed by the Chairman of the Prior CBOE Board with the approval of that Board, the exact number to be determined from time to time by that Board.<sup>92</sup> At least 50% of the members of that committee are Public Directors. The current Compensation Committee consists of the Vice Chairman of the Prior CBOE Board, the Lessor Director, the Chairman of the Financial Planning Committee (a committee of the Exchange), one or more Off-Floor Directors, and such number of Public Directors that will constitute at least 50% of the members of that committee.<sup>93</sup> The Off-Floor Director(s) and the Public Directors are appointed to that committee by the Chairman of the Prior CBOE Board with the approval of that Board. The current Regulatory Oversight Committee consists of at least four directors, all of whom are Public Directors.<sup>94</sup> The members of that committee are appointed by the Chairman of the Prior CBOE Board with the approval of that Board.

After the Restructuring Transaction, members on the new Executive, Audit, and Compensation Committees of CBOE will be recommended by the Nominating and Governance Committee for approval by the CBOE Board.<sup>95</sup> The new Executive Committee will consist of the Chairman of the CBOE Board, the Chief Executive Officer (if a director), the Vice Chairman of the CBOE Board, the Lead Director (if any), at least one Representative Director and such other number of directors that the Board deems appropriate, provided that at all times the majority of the directors serving on the Executive Committee are Non-Industry Directors.<sup>96</sup> CBOE notes that if the Vice Chairman is a Representative Director, the requirement to have at least one Representative Director on the new Executive Committee will be satisfied by the Vice Chairman's participation on that committee. The new Audit Committee will consist of at least three directors, all of whom will be Non-Industry Directors.<sup>97</sup> The new Compensation Committee will consist of at least three

directors, all of whom must be Non-Industry Directors.<sup>98</sup> The new Regulatory Oversight Committee will consist of at least four directors, all of whom shall be Non-Industry Directors and all of whom shall be recommended by the Non-Industry Directors on the Nominating and Governance Committee for approval by the Board.<sup>99</sup>

The new Executive Committee will have and may exercise all the powers and authority of the CBOE Board in the management of the business and affairs of CBOE, except it will not have the power and authority of the Board to (i) approve or adopt or recommend to the stockholders any action or matter (other than the election or removal of directors) expressly required by Delaware law to be submitted to stockholders for approval, including without limitation, amending the proposed CBOE Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of CBOE's property and assets, or approval of a dissolution of CBOE or revocation of a dissolution, or (ii) adopt, alter, amend or repeal any bylaw of CBOE.<sup>100</sup>

Although the current Executive Committee (as well as the new Executive Committee) generally can act in the place of the CBOE Board, the practice of the current Executive Committee has been that it generally does not make a decision unless there is a need for a CBOE Board-level decision between CBOE Board meetings due to the time sensitivity of the matter. In addition, in situations when the current Executive Committee does make a decision between CBOE Board meetings, the CBOE Board is generally aware ahead of time of the potential that the Executive Committee may need to make the decision. This is the case because oftentimes the decision relates to a time-sensitive issue that is discussed by the CBOE Board at a CBOE Board meeting, but that is not yet ripe for decision, and the CBOE Board is advised that the Executive Committee may need to make a decision on the issue prior to the next CBOE Board meeting. It is expected that the foregoing practices will continue with the new Executive Committee. However, with a smaller CBOE Board after the Restructuring Transaction (13 directors versus 23 directors), it likely will be easier to convene the CBOE Board on short notice and there may be less of a need than there is today for the new

<sup>87</sup> In any Run-off Election, Trading Permits representing one-third of the total outstanding Trading Permits entitled to vote, when present in person or represented by proxy, will constitute a quorum for purposes of the Run-off Election. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See proposed Section 4.1(a) of the CBOE Bylaws.

<sup>90</sup> *Id.*

<sup>91</sup> See Section 7.2 of the current Constitution of the Exchange.

<sup>92</sup> See Section 7.3 of the current Constitution of the Exchange.

<sup>93</sup> See Section 7.4 of the current Constitution of the Exchange.

<sup>94</sup> The current Regulatory Oversight Committee was created by a charter.

<sup>95</sup> See proposed Sections 4.2, 4.3 and 4.4 of the CBOE Bylaws. The selection and composition of the Nominating and Governance Committee is discussed above.

<sup>96</sup> See proposed Section 4.2 of the CBOE Bylaws.

<sup>97</sup> See proposed Section 4.3 of the CBOE Bylaws.

<sup>98</sup> See proposed Section 4.4 of the CBOE Bylaws.

<sup>99</sup> See proposed Section 4.6 of the CBOE Bylaws.

<sup>100</sup> See proposed Section 4.2 of the CBOE Bylaws.

Executive Committee to make decisions. It may also be easier for the CBOE Board to act by unanimous written consent. In any event, the CBOE Board is, and after the Restructuring Transaction will be, fully informed of any decision made by the current (and new) Executive Committee at its next meeting and can always decide to review that decision and take different action.

The new Audit, Compensation, and Nominating and Governance Committees will have such duties and may exercise such authority as may be prescribed by the CBOE Board and their respective Charters as adopted by resolution of the Board.<sup>101</sup> Similarly, the new Regulatory Oversight Committee will have such duties and may exercise such authority as may be prescribed by resolution of the Board, the CBOE Bylaws or the Rules of the Exchange.<sup>102</sup> In general, the new Regulatory Oversight Committee will be charged with overseeing the independence and integrity of the regulatory functions of the Exchange.

In addition to these CBOE Board committees, CBOE will have as Exchange committees a Trading Advisory Committee and such other committees as may be provided in the CBOE Bylaws or the Rules or as may be from time to time created by the CBOE Board.<sup>103</sup> The Trading Advisory Committee will advise the Office of the Chairman regarding matters of interest to Trading Permit Holders.<sup>104</sup> It will consist of such number of members as set by the CBOE Board of Directors from time to time. The majority of the members of the Trading Advisory Committee will be individuals involved in trading either directly or through their firms. The Vice Chairman will be the Chairman of the Trading Advisory Committee and will appoint, with the approval of the CBOE Board, the other members of the committee.

The Trading Advisory Committee essentially will serve as a replacement

for the current Floor Directors Committee, which advises the Prior CBOE Board and the Office of the Chairman of that Board regarding trading and floor-related issues. The Floor Directors Committee consists of those directors of the Prior CBOE Board who are primarily engaged in business on the floor of the Exchange (whether serving as Floor Directors or At-Large Directors), the Lessor Director as a non-voting member of that committee, and such other persons as may be appointed as voting or nonvoting members of that committee by the Vice Chairman of the Prior CBOE Board with the approval of that Board.<sup>105</sup>

The Exchange also will continue to have as an Exchange committee after the Restructuring Transaction the Business Conduct Committee ("BCC"), the functions of which are described below.<sup>106</sup> With regard to the composition of the current BCC, the Prior CBOE Board determines the number of members of the committee. In selecting members of that committee, the intent is to pick individuals who represent a broad cross section of the membership of the Exchange as well as individuals who represent the public. It is anticipated that the make-up of the BCC will be the same after the Restructuring Transaction.

(iv) Filling of Vacancies and Removal for Cause

Any vacancy in the CBOE Board, however occurring, including a vacancy resulting from an increase in the number of directors, 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.<sup>107</sup> A director elected to fill a vacancy will 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 or removal.<sup>108</sup> In the event the CBOE Board fills a vacancy resulting from a Representative Director position becoming vacant prior to the expiration of such Representative Director's term, or resulting from the creation of an additional Representative Director position required by an increase in the size of the CBOE Board, the Industry-Director Subcommittee of the Nominating and Governance Committee will either (i) recommend an

individual to the CBOE Board to be elected to fill such vacancy or (ii) provide a list of recommended individuals to the CBOE Board from which the Board shall elect the individual to fill such vacancy.<sup>109</sup>

In addition, the CBOE Bylaws provide that no director may be removed from office by a vote of the stockholders at any time except for cause.<sup>110</sup> For purposes of this provision, "cause" means only (i) a breach of a director's duty of loyalty to CBOE (as a corporation) or its stockholders, (ii) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) transactions from which a director derived an improper personal benefit. Any director may be removed for cause by the holders of a majority of the shares of stock then entitled to be voted at an election of directors.

(v) Disciplinary Matters and Trading and Disciplinary Rule Changes

The current process for the hearing of disciplinary matters, and the rules governing that process, will remain substantively unchanged after the Restructuring Transaction. Under CBOE Rule 17.6(a), the hearing of a disciplinary matter currently is conducted by one or more members of the BCC. As indicated above, the BCC currently consists of industry and public representatives. It has been the BCC's general practice to use three-person BCC hearing panels that include both industry and public representation. CBOE is not proposing to change this process following demutualization. Consistent with CBOE Rule 17.9, any decision of a BCC hearing panel that is not composed of at least a majority of the BCC is reviewed by the full BCC.

In addition, the current process for the review of appeals of disciplinary actions, and the rules governing that process, will remain substantively unchanged after the Restructuring Transaction. Under CBOE Rule 17.10(b), the CBOE Board is the body vested with the authority to review appeals of disciplinary actions. The CBOE Board may appoint a committee of the Board composed of at least 3 directors to review the appeal, but the decision of that committee must be ratified by the CBOE Board. Thus, after the Restructuring Transaction, Trading Permit Holders will have a say in the

<sup>101</sup> See proposed Sections 4.3, 4.4 and 4.5 of the CBOE Bylaws.

<sup>102</sup> See proposed Section 4.6 of the CBOE Bylaws.

<sup>103</sup> See proposed Section 4.1(b) of the CBOE Bylaws. "Exchange committees" refers to committees that are not solely composed of directors from the CBOE Board. Except as may be otherwise provided in the CBOE Bylaws, the Rules or the resolution of the CBOE Board establishing any such other committee, the Vice Chairman of the Board, with the approval of the CBOE Board, will appoint the members of such Exchange committees (other than the committees of the CBOE Board) and may designate, with the approval of the Board, a Chairman and a Vice-Chairman thereof. Except as may be otherwise provided in the Bylaws or the Rules, the CBOE Board may, at any time, with or without cause, remove any member of any such Exchange committees.

<sup>104</sup> See proposed Section 4.7 of the CBOE Bylaws.

<sup>105</sup> See Section 7.5 of the current Constitution of the Exchange.

<sup>106</sup> See CBOE Rule 2.1(a).

<sup>107</sup> See proposed Section 3.5(a) of the CBOE Bylaws.

<sup>108</sup> *Id.*

<sup>109</sup> See proposed Section 3.5(b) of the CBOE Bylaws. Any individual recommended by the Industry-Director Subcommittee to fill the vacancy of a Representative Director position must qualify as an Industry Director.

<sup>110</sup> See proposed Section 3.4(c) of the CBOE Bylaws.

review of such appeals by virtue of their representation on the CBOE Board, as discussed above.<sup>111</sup>

The current process for the review of proposed trading and disciplinary rules also will remain substantively unchanged after the Restructuring Transaction. Under proposed Section 10.1 of the CBOE Bylaws, the CBOE Board will continue to be the body that is tasked with approving rule changes, including changes to trading and disciplinary rules. Thus, Trading Permit Holders will have a voice in the review of these rules by virtue of their representation on the CBOE Board. In addition, the current Floor Directors Committee reviews many of CBOE's rule changes in an advisory capacity, particularly trading rules, but the Floor Directors Committee has no decision-making authority with regard to rule changes. After the Restructuring Transaction, the Trading Advisory Committee, which is described above, will essentially take the place of the Floor Directors Committee.<sup>112</sup> It is expected that the Trading Advisory Committee will perform the same rule review function in an advisory capacity that has been performed by the Floor Directors Committee. Accordingly, the Trading Advisory Committee also will provide a mechanism for Trading Permit Holders to provide input on trading rules.

(vi) Officers of CBOE

The officers of CBOE will be a Chief Executive Officer, a Vice Chairman, a President, a Chief Financial Officer, one or more Vice-Presidents (the number thereof to be determined by the CBOE Board of Directors), a Secretary, a Treasurer, and such other officers as the Board may determine, including an Assistant Secretary and Assistant Treasurer.<sup>113</sup> The CBOE Board by an affirmative vote of the majority of the Board will appoint the Chief Executive Officer of CBOE, who will have general

<sup>111</sup> Prior to Restructuring Transaction, it has been the CBOE Board's general practice to appoint a cross-section of directors to the CBOE Board committees that review appeals of disciplinary actions. These committees usually consist of a floor or at-large director, an off-floor director, and a public director. CBOE is not proposing to change this general practice and would expect that CBOE Board committees that review disciplinary decision appeals after the Restructuring Transaction would generally consist of an Industry Director who or whose firm is engaged in trading on the Exchange, an Industry Director whose firm is significantly engaged in conducting a securities business with public customers, and a Non-Industry Director.

<sup>112</sup> A majority of the Trading Advisory Committee will be composed of individuals involved in trading either directly or through their firms.

<sup>113</sup> See proposed Section 5.1(a) of the CBOE Bylaws.

charge and supervision of the business of CBOE.<sup>114</sup> In general, the other officers of CBOE will have the duties or powers or both set out in the CBOE Bylaws, as well as such other duties or powers or both as the CBOE Board or the Chief Executive Officer may from time to time prescribe.<sup>115</sup>

These officers essentially will be the same as the current officers of the Exchange. For instance, the Exchange currently has a Chief Executive Officer, who also serves as Chairman of the Prior CBOE Board. After the Restructuring Transaction, the Chief Executive Officer may, but does not have to, be a director or the Chairman of the CBOE Board. The Exchange also currently has a Vice Chairman, although the current Vice Chairman is elected by the membership.<sup>116</sup> After the Restructuring Transaction, the CBOE Board will select the Vice Chairman from among the Industry Directors serving on the CBOE Board.<sup>117</sup> In addition, the Exchange currently has a Chief Financial Officer. This position, however, is not specified in the Constitution of the Exchange. After the Restructuring Transaction, this position will be formally incorporated into the CBOE Bylaws.<sup>118</sup>

The CBOE Bylaws would not restrict an officer from being a Trading Permit Holder or a person associated with a Trading Permit Holder, or a broker or a dealer in securities or commodities or an associated person of such broker or dealer. This is a change from the current Constitution of the Exchange, which restricts an officer from being a member or affiliated with a member or a broker or a dealer in securities or commodities.<sup>119</sup> The Exchange is proposing this change because there are other protections in place that limit the potential conflicts between the Exchange as a self-regulator and Trading Permit Holders, including, among other things, the existence of a Regulatory Oversight Committee as a committee of the Board that consists solely of Non-Industry Directors.

(vii) Self-Regulatory Function and Oversight

As noted above, following the demutualization CBOE will continue to be registered as a national securities exchange under Section 6 of the

<sup>114</sup> See proposed Sections 5.1(a) and 5.2 of the CBOE Bylaws.

<sup>115</sup> See proposed Sections 5.3, 5.4, 5.5, 5.6, 5.7 and 5.8 of the CBOE Bylaws.

<sup>116</sup> See Section 8.1(a) of the current Constitution of the Exchange.

<sup>117</sup> See proposed Section 3.7 of the CBOE Bylaws.

<sup>118</sup> See proposed Section 5.5 of the CBOE Bylaws.

<sup>119</sup> See Section 8.1(b) of the current Constitution of the Exchange.

Exchange Act and thus will continue to be an SRO.<sup>120</sup> As an SRO, CBOE will be obligated to carry out its statutory responsibilities, including enforcing compliance by Trading Permit Holders with the provisions of the federal securities laws and the rules of CBOE. Further, CBOE will retain the responsibility to administer and enforce the rules that govern the activities of CBOE and its Trading Permit Holders. In addition, CBOE will continue to be required to file with the Commission, pursuant to Section 19(b) of the Exchange Act<sup>121</sup> and Rule 19b-4 thereunder,<sup>122</sup> any changes to its rules and governing documents.

The proposed CBOE Certificate of Incorporation contains various provisions designed to protect the self-regulatory functions of CBOE in light of the new structure of the Exchange. For instance, the proposed CBOE Certificate of Incorporation contains a provision that requires each director of the CBOE Board to take into consideration the effect that his or her action would have on CBOE's ability to carry out its responsibilities under the Exchange Act.<sup>123</sup> The proposed CBOE Certificate of Incorporation also contains provisions designed to protect confidential information pertaining to the self-regulatory function of the Exchange.<sup>124</sup>

In addition, CBOE will interpret its Rules to require that any revenue it receives from regulatory fees or penalties will be applied to fund the legal, regulatory, and surveillance operations of the Exchange and will not be used to pay dividends to CBOE Holdings, except in the event of liquidation of CBOE, in which case CBOE Holdings will be entitled to the distribution of CBOE's remaining assets.

(viii) National Market System Plans

CBOE currently is a participant in the following national market system ("NMS") plans: the Options Price Reporting Authority Plan ("OPRA Plan"), the Consolidated Tape Association ("CTA"), the Consolidated Quotation Plan ("CQ Plan"), the Nasdaq Unlisted Trading Privileges Plan ("Nasdaq UTP Plan"), the Options Intermarket Linkage Plan, the Options Regulatory Surveillance Authority Plan ("ORSA Plan"), and the Options Listing Procedures Plan ("OLPP"). These plans are joint industry plans entered into by

<sup>120</sup> 15 U.S.C. 78f.

<sup>121</sup> 15 U.S.C. 78s(b).

<sup>122</sup> 17 CFR 240.19b-4.

<sup>123</sup> See proposed Article Fifth(d) of the CBOE Certificate of Incorporation.

<sup>124</sup> See proposed Article Eleventh of the CBOE Certificate of Incorporation.

SROs for the purpose of providing for (i) last sale and quotation reporting in options and equities, (ii) intermarket options trading, (iii) the joint surveillance, investigation and detection of insider trading on the options exchanges, and (iv) the listing of standardized options. Following the completion of the demutualization, CBOE, in its continuing role as the SRO, will continue to serve as the voting member of these NMS plans, and a representative of CBOE will continue to serve as CBOE's representative with respect to dealing with these plans.

### (C) Trading Permits

As part of the Restructuring Transaction, the rules of the Exchange will be amended to reflect the way in which trading access will be granted to the Exchange. Prior to the Restructuring Transaction, Exchange memberships provided trading access to the Exchange. After the Restructuring Transaction, Trading Permits will provide trading access to the Exchange.

"Trading Permits" are defined as licenses issued by the Exchange that grant the holders or the holders' nominee the right to access the Exchange or one or more of its facilities for the purpose of effecting transactions in securities traded on the Exchange without the services of another person acting as broker, and otherwise to access the Exchange or its facilities for purposes of trading or reporting transactions or transmitting orders or quotations in securities traded on the Exchange, or to engage in other activities that, under the Rules, may only be engaged in by holders of Trading Permits, provided that the holder or the holder's nominee, as applicable, satisfies any applicable qualification requirements to exercise those rights.<sup>125</sup> A Trading Permit will not convey any ownership interest in the Exchange, will only be available through the Exchange, and will be subject to the terms and conditions set forth in proposed Rule 3.1.

As a result of the new structure of the Exchange after the Restructuring Transaction in which ownership will be separated from trading access, the Exchange is proposing to replace the term "member" throughout the rules with the term "Trading Permit Holder."<sup>126</sup> As indicated above, the

term "Trading Permit Holder" will be defined as any individual, corporation, partnership, limited liability company or other entity authorized by the Rules that holds a Trading Permit.<sup>127</sup> Holders of Trading Permits will meet the definition of "member" in Section 3(a)(3)(A) of the Exchange Act.<sup>128</sup> One's status as a Trading Permit Holder, however, does not confer on that person any ownership interest in the Exchange.<sup>129</sup> As members under the Exchange Act, Trading Permit Holders and their nominees will be subject to the regulatory jurisdiction of the Exchange, including without limitation the Exchange's disciplinary jurisdiction under Chapter XVII of the Rules.<sup>130</sup>

### (i) General Features of Trading Permits

The Exchange will have the authority to issue different types of Trading Permits that allow holders to trade one or more products authorized for trading on the Exchange, and to act in one or more trading functions authorized by the Rules.<sup>131</sup> Trading Permits will be for terms as shall be determined by the Exchange from time to time.<sup>132</sup> It is currently anticipated that the Exchange will offer Trading Permits for terms of one month, three months and a year, although these terms may be changed in the future. Prior to the Restructuring Transaction, the Exchange will announce in a circular the types and terms of Trading Permits that the Exchange has determined to issue.

Trading Permits will be subject to such fees and charges as are established by the Exchange from time to time pursuant to Rule 2.20 and the Exchange Fee Schedule.<sup>133</sup> The Exchange will file proposed rule changes under Section 19(b) of the Exchange Act,<sup>134</sup> including, as applicable, Section 19(b)(3)(A)(ii),<sup>135</sup> to establish and change the fees for the

Exchange's rules regarding trading access are covered by this filing, the Exchange is proposing to submit a companion filing to change the term "member" to "Trading Permit Holder" in the remainder of the Exchange's rules, as well as to make certain conforming changes. Subject to Commission approval of this filing, the Exchange expects that this companion filing will be filed upon that approval.

<sup>127</sup> See proposed Section 1.1(f) of the CBOE Bylaws and proposed CBOE Rule 1.1(gg).

<sup>128</sup> 15 U.S.C. 78c(a)(3)(A). As described in Section 4(B)(ii) above (Nomination and Election of Directors), the selection process for Representative Directors for the CBOE Board addresses the fair representation requirement for members in Section 6(b)(3) of the Exchange Act. 15 U.S.C. 78f(b)(3).

<sup>129</sup> See proposed Section 1.1(f) of the CBOE Bylaws and proposed CBOE Rule 1.1(gg).

<sup>130</sup> See proposed CBOE Rule 3.1(a)(iii).

<sup>131</sup> See proposed CBOE Rule 3.1(a)(iv).

<sup>132</sup> *Id.*

<sup>133</sup> See proposed CBOE Rule 3.1(a)(v).

<sup>134</sup> 15 U.S.C. 78s(b).

<sup>135</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

types of Trading Permits it has determined to issue. The entire fee for a Trading Permit will be due and payable in accordance with the Exchange Fee Schedule. A TPH organization holding a Trading Permit will be responsible for paying all fees and charges for that Trading Permit.<sup>136</sup> In addition, an individual holding a Trading Permit will be responsible for paying all fees and charges for that Trading Permit.

The Exchange will have the authority to limit or reduce the number of any type of Trading Permit it has determined to issue.<sup>137</sup> Notwithstanding this general authority, in the event the Exchange imposes such a limitation or reduction, the Exchange will be prohibited from eliminating or reducing the ability to trade one or more product(s) of a person currently trading such product(s), and will be prohibited from eliminating or reducing the ability to act in one or more trading function(s) of a person currently acting in such trading function(s), unless the Exchange is permitted to do so pursuant to a rule filing submitted to Commission under Section 19(b) of the Exchange Act.<sup>138</sup> The Exchange will announce in a circular any limitation or reduction in the number of Trading Permits it determines to impose.

The Exchange also will have the authority to increase the number of any type of Trading Permit it has determined to issue by issuing additional Trading Permits of that type, and will announce in a circular any such increase.<sup>139</sup> In addition, the Exchange will have the authority, pursuant to a rule filing submitted to the

<sup>136</sup> A "TPH organization" refers to an organization that holds a Trading Permit, and is the replacement term for "member organizations." See proposed Section 1.1(f) of the CBOE Bylaws and proposed CBOE Rule 1.1(gg).

<sup>137</sup> See proposed CBOE Rule 3.1(a)(vi).

<sup>138</sup> 15 U.S.C. 78s(b). In addition, in no event will the Exchange act in a manner under this provision that does not comply with the provisions of Section 6(c)(4) of the Act (15 U.S.C. 78c(4)). See proposed CBOE Rule 3.1(a)(vi). As noted in a letter submitted by the Exchange to the SEC in connection with SR-CBOE-2006-106, CBOE has been unable to locate records that reflect with certainty the number of CBOE memberships on May 1, 1975. See Letter dated November 2, 2007 from Joanne Moffic-Silver, Executive Vice President, General Counsel and Corporate Secretary, CBOE, to Richard Holley III, Senior Special Counsel, Division of Market Regulation, SEC (<http://www.sec.gov/comments/sr-cboe-2006-106/cboe2006106-161.pdf>). The closest date to May 1, 1975 for which CBOE has been able to locate records that CBOE believes can be relied upon to establish this information is June 30, 1975. Specifically, CBOE has financial statements as of June 30, 1975, the end of its then fiscal year, which set forth this information as of that date. The number of CBOE memberships on June 30, 1975 was 1,025.

<sup>139</sup> See proposed CBOE Rule 3.1(a)(vii).

<sup>125</sup> See proposed CBOE Rule 1.1(ggg).

<sup>126</sup> This change will cause a significant number of the Exchange's rules to be amended. In connection with this rule filing, this change will be made in the rules in Chapters I-III, as well as CBOE Rule 8.3. The Exchange also will make this change in its forms. Because of the length of this rule filing and the fact that the substantive changes to the

Commission under Section 19(b) of the Act,<sup>140</sup> to establish objective standards that must be met to be issued, or to have renewed, a Trading Permit.<sup>141</sup>

Trading Permits will only be issued by the Exchange and cannot be leased or transferred to any person under any circumstances, except in the following situations.<sup>142</sup> In this regard, a TPH organization may change the designation of the nominee in respect of each Trading Permit it holds in a form and manner prescribed by the Exchange.<sup>143</sup> In addition, a Trading Permit Holder may, with the prior written consent of the Exchange, transfer a Trading Permit to a TPH organization or to an organization approved to be a TPH organization: (A) Which is an affiliate; or (B) which continues substantially the same business without regard to the form of the transaction used to achieve such continuation, e.g., merger, sale of substantially all assets, reincorporation, reorganization or the like.<sup>144</sup> For example, this provision would allow the Exchange to approve a transfer of a Trading Permit from an individual or TPH organization to an affiliated TPH organization of that individual or TPH organization.

#### (ii) Issuance of Trading Permits

In connection with the Restructuring Transaction, Trading Permits will be issued automatically to each current member of the Exchange that has the ability to trade. In this regard, prior to the date of the Restructuring Transaction, a person who is, or is treated the same as, a "member" of the Exchange under Sections 1.1 and 2.1 of the Constitution of the Exchange may submit a post-Restructuring Transaction trading application to the Exchange in accordance with such procedures as shall be established by the Exchange.<sup>145</sup> Provided the applicant is in good standing as of the date of the Restructuring Transaction, complies with the application procedures

established by the Exchange and pays any applicable fees, the Exchange in connection with the Restructuring Transaction will issue to the applicant, as applicable, a Trading Permit in respect of: (A) Each membership not subject to an effective lease as of the date of the Restructuring Transaction that is owned by the applicant; (B) each membership that is leased as a lessee by the applicant as of the date of the Restructuring Transaction; (C) each trading permit issued by the Exchange prior to the Restructuring Transaction that is held by the applicant, provided that in the case of a CBSX trading permit, the Exchange shall issue a Trading Permit in respect of the CBSX trading permit that only provides the right to effect transactions on the CBSX;<sup>146</sup> and (D) each Temporary Membership that is held by such applicant.<sup>147</sup> As the foregoing indicates, persons who are Temporary Members under Interpretation and Policy .02 of CBOE Rule 3.19 will be guaranteed Trading Permits in connection with the Restructuring Transaction, provided they comply with the requirements noted above. In addition, persons who are issued Trading Permits as set forth above will have the ability pursuant to those Trading Permits to continue after the Restructuring Transaction trading any product, and acting in any trading function, that those persons traded, or acted in, at the time of the Restructuring Transaction.<sup>148</sup>

<sup>146</sup> Holders of CBSX trading permits and holders of Interim Trading Permits will be issued Trading Permits pursuant to this provision. CBOE Rule 3.26, which currently provides for the issuance of CBSX trading permits, will be deleted as part of this rule filing because all Trading Permits after the Restructuring Transaction will be issued under proposed CBOE Rule 3.1. For the same reason, CBOE Rule 3.27, which currently provides for the issuance of Interim Trading Permits, also will be deleted as part of this rule filing.

<sup>147</sup> A person who was eligible to receive a Trading Permit(s) pursuant to this provision but who failed to comply with the application or other requirements, must submit an application for a Trading Permit as described below and must go through the approval process to hold a Trading Permit to be eligible to receive a Trading Permit. See proposed CBOE Rule 3.1A(c).

<sup>148</sup> This guarantee is subject to the provision noted above that provides that notwithstanding Rule 3.1, as well as Rule 3.1A, nothing in those rules will eliminate or restrict the Exchange's authority to delist any product or to take any action (remedial or otherwise) under the Exchange Act, the Bylaws and the Rules, including without limitation the Exchange's authority to take disciplinary or market performance actions against a person with respect to which the Exchange has jurisdiction under the Exchange Act, the Bylaws and the Rules. See proposed CBOE Rule 3.1(a)(ix). In addition, this guarantee is subject to the continuing satisfaction of any applicable qualification requirements, as well as to the Exchange's ability discussed above to limit or reduce the number of any type of Trading Permit pursuant to a rule filing with the Commission. See proposed CBOE Rules 3.1A(a) and 3.1(a)(vi).

At the time of Restructuring Transaction and afterwards, Trading Permits also will be issued after an application process. Persons who are seeking trading access to the Exchange for the first time, as well as current Trading Permit Holders seeking to hold additional Trading Permits, would need to go through this application process. Only a person approved to hold a Trading Permit (a "Qualified Person") is eligible to submit an application for a Trading Permit.<sup>149</sup>

We expect that this application process will be a simple process that generally will involve notifying the Exchange of the type, term and number of Trading Permits that a Qualified Person would like to receive.<sup>150</sup> To be eligible to be issued a type of Trading Permit, a Qualified Person must have satisfied the application requirements for that type of Trading Permit. In addition, to be eligible to use a type of Trading Permit, a Qualified Person must satisfy all requirements related to that type of Trading Permit.

From time to time, the Exchange in its discretion may determine to make available one or more of a type of Trading Permit through (i) a process in which Trading Permits will be issued to Qualified Persons by a random lottery ("Random Lottery Process"), or (ii) a process in which Trading Permits will be issued to Qualified Persons based on the order in time that such Qualified Persons applied for such Trading Permits ("Order in Time Process").<sup>151</sup> The number of Trading Permits that the Exchange determines to make available is referred to as the "issuance number." In connection with an issuance of such Trading Permits, and notwithstanding an application for a greater number of such Trading Permits, a Qualified Person and any affiliated Qualified Person will be eligible to receive no more than the greater of 10 such Trading Permits or 20% of the issuance number of such Trading Permits.

This limit, however, will not apply in the event the issuance number of such Trading Permits exceeds the demand for such Trading Permits.<sup>152</sup> In such a situation, Trading Permits will be made

<sup>149</sup> See proposed CBOE Rule 3.1(b)(i). The Exchange is not proposing to substantively change the current process to become a "member" of the Exchange, which after the Restructuring Transaction will be the process to become a "Trading Permit Holder." See, e.g., CBOE Rule 3.9.

<sup>150</sup> *Id.*

<sup>151</sup> See proposed CBOE Rule 3.1(b)(iii). The Exchange also will have the authority to modify these processes or to establish any other objective process to issue Trading Permits pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act. 15 U.S.C. 78s(b).

<sup>152</sup> *Id.*

<sup>140</sup> 15 U.S.C. 78s(b).

<sup>141</sup> See proposed CBOE Rule 3.1(a)(viii). The Exchange also has included a savings clause in Rule 3.1 that provides that notwithstanding Rule 3.1, as well as Rule 3.1A (which addresses the issuance of Trading Permits to current members), nothing in those rules will eliminate or restrict the Exchange's authority to delist any product or to take any action (remedial or otherwise) under the Exchange Act, the Bylaws and the Rules, including without limitation the Exchange's authority to take disciplinary or market performance actions against a person with respect to which the Exchange has jurisdiction under the Exchange Act, the Bylaws and the Rules. See proposed CBOE Rule 3.1(a)(ix).

<sup>142</sup> See proposed CBOE Rule 3.1(d)(i).

<sup>143</sup> See proposed CBOE Rule 3.1(d)(ii).

<sup>144</sup> *Id.*

<sup>145</sup> See proposed CBOE Rule 3.1A(a).

available through the Order in Time Process. Qualified Persons applying for Trading Permits in this situation will be automatically issued such permits until the number of permits issued equals the issuance number.

In the event the demand for Trading Permits exceeds the issuance number, Trading Permits will be made available through the Random Lottery Process or the Order in Time Process.<sup>153</sup> In such a situation, the Exchange in its discretion may maintain a waiting list to be used to issue Trading Permits pursuant to the Order in Time Process.<sup>154</sup> If the Exchange maintains a waiting list, Qualified Persons will be placed on that waiting list based on the order in time that such persons submitted applications, and such persons may at any time voluntarily withdraw from that waiting list. A person on the waiting list also may submit a notification to the Exchange to adjust the number of Trading Permits that such person would like to receive at any time prior to an announcement of an issuance of such Trading Permits. Persons on the waiting list will be issued Trading Permits based on the order in time they were placed on the waiting list.

(iii) Termination, Change and Renewal of Trading Permits.

A Trading Permit Holder seeking to terminate that holder's Trading Permit must notify the Exchange, prior to the deadline announced by the Exchange in a circular and in a form and manner prescribed by the Exchange, that the holder is terminating that Trading Permit at the end of its term.<sup>155</sup> In addition, a Trading Permit Holder seeking to replace that holder's Trading Permit with a different Trading Permit must file with the Exchange, prior to the deadline announced by the Exchange in a circular, an application for that different Trading Permit pursuant to the application process described above.<sup>156</sup> In the event a Trading Permit Holder does not take either of the foregoing actions with respect to a Trading Permit, the Exchange will automatically renew that Trading Permit for the same term as the expiring term.<sup>157</sup> In renewing that Trading Permit, the Exchange will have the authority to issue one or more Trading Permits that represent the same

or more trading right(s) as the expiring permit.<sup>158</sup>

In addition, a Trading Permit Holder seeking to hold an additional Trading Permit must file with the Exchange an application for that Trading Permit pursuant to the application process described above.<sup>159</sup> To change the term of a Trading Permit at the end of its current term to a longer or shorter term currently offered by the Exchange, a Trading Permit Holder must notify the Exchange of that holder's desire to change the term prior to the deadline announced by the Exchange in a circular and in a form and manner prescribed by the Exchange.<sup>160</sup> Such a change will be effective only at the end of the current term of the Trading Permit.

(iv) Tier Appointments

The Exchange is proposing to amend CBOE Rule 8.3 to provide for a new type of appointment called a "tier appointment." A "tier appointment" is an appointment to trade one or more options classes that must be held by a Market-Maker to be eligible to trade the options class or options classes subject to that appointment.<sup>161</sup> A Market-Maker that seeks to trade an options class or options classes subject to a tier appointment must submit an application for that tier appointment in accordance with, and subject to the same terms and conditions as, the application process for Trading Permits as described above. Notwithstanding this application requirement, in the event a current member of the Exchange at the time of the Restructuring Transaction is trading an options class with respect to which the Exchange is establishing a tier appointment, the Exchange in connection with the Restructuring Transaction will issue to that member such a tier appointment provided that the Exchange is notified by that member of that member's desire to hold such a tier appointment.<sup>162</sup>

Tier appointments will be in addition to the current appointment cost process set forth in CBOE Rule 8.3, which will remain unchanged in connection with the Restructuring Transaction. In general, under that process, the number of memberships owned or leased by a Market-Maker serves as the basis for

determining the number/types of options classes that the Market-Maker can trade. In this regard, each membership held by a Market-Maker has an appointment credit of 1.0, and each option listed on the Exchange has an assigned appointment cost. Under that process, for example, a Market-Maker with one membership could trade options on the Nasdaq 100 Index, which has an appointment cost of .50, and options on the CBOE Volatility Index, which also has an appointment cost of .50.

Issuance of tier appointments will be in accordance with, and subject to the same terms and conditions as, the issuance processes for Trading Permits as described above (*i.e.*, the Random Lottery Process or the Order in Time Process).<sup>163</sup> A Market-Maker that is issued a tier appointment must designate to the Exchange the Trading Permit with which that tier appointment is associated, and may designate no more than one tier appointment per Trading Permit. A tier appointment will be for the same term as the Trading Permit with which the tier appointment is associated. Termination, change, renewal, and transfer of tier appointments will be in accordance with, and subject to the same terms and conditions as, the processes for Trading Permits as described above. In this regard, for example, if a holder of tier appointment does not notify the Exchange that the holder is terminating that tier appointment and does not file an application to replace that tier appointment, that tier appointment will be renewed along with its associated Trading Permit for the same term as the expiring term of that Trading Permit.

Tier appointments will be subject to such fees and charges as are established by the Exchange from time to time pursuant to Rule 2.20 and the Exchange Fee Schedule. The Exchange will file proposed rule changes under Section 19(b) of the Exchange Act,<sup>164</sup> including, as applicable, Section 19(b)(3)(A)(ii),<sup>165</sup> to establish and change the fees for tier appointments. In accordance with, and subject to same terms and conditions as, the processes for Trading Permits as described above, the Exchange will have the authority with respect to any type of tier appointment it has determined to establish to limit or reduce the number of that type of tier appointment, to increase the number of that type of tier appointment, and to establish objective standards to be issued, or to have

<sup>153</sup> *Id.*

<sup>154</sup> See proposed CBOE Rule 3.1(b)(ii).

<sup>155</sup> See proposed CBOE Rule 3.1(c)(i).

<sup>156</sup> See proposed CBOE Rule 3.1(c)(ii).

<sup>157</sup> See proposed CBOE Rule 3.1(c)(iii). This automatic renewal provision will not limit the Exchange's authority to limit or reduce the number of any type of Trading Permit.

<sup>158</sup> *Id.* To the extent the Exchange determines to issue one or more Trading Permits that represent the same or more trading right(s) as an expiring Trading Permit, the Exchange will provide all holders of that type of expiring Trading Permit with the new Trading Permit(s).

<sup>159</sup> See proposed CBOE Rule 3.1(c)(iv).

<sup>160</sup> See proposed CBOE Rule 3.1(c)(v).

<sup>161</sup> See proposed CBOE Rule 8.3(e).

<sup>162</sup> See proposed CBOE 3.1A(b).

<sup>163</sup> See proposed CBOE Rule 8.3(e).

<sup>164</sup> 15 U.S.C. 78s(b).

<sup>165</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

renewed, that type of tier appointment.<sup>166</sup>

(D) Other Changes to the Rules

(i) Chapter I of the Rules

As mentioned above, the Exchange is proposing to replace the term “member” with “Trading Permit Holder” throughout the Exchange’s rules. Thus, references to the terms member and membership in Chapters I will be replaced.<sup>167</sup> For instance, in Rule 1.1(f) and throughout the rules, the term “Clearing Member” will be replaced with “Clearing Trading Permit Holder.”<sup>168</sup>

In addition, the Exchange has amended the definitions in Chapter I to reflect the use of Trading Permits. In this regard, for instance, the terms “Lessor” and “Lessee” have been deleted because these concepts will not exist after the Restructuring Transaction. In their place, the Exchange has added the definitions of “person” and “Trading Permit Holder.”<sup>169</sup> A person is defined as an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof, and a Trading Permit Holder is defined by reference to the definition of that term in Section 1.1 of the CBOE Bylaws. The Exchange also has added a definition of “Restructuring Transaction” to reflect the point in time at which Trading Permits will be issued.<sup>170</sup>

Further, the Exchange has added a definition of “Trading Permit,” which is discussed above, and a definition of “TPH Department.”<sup>171</sup> The TPH Department is defined as the department or division of the Exchange (which may be referred to by the Exchange from time to time by a name

other than the TPH Department) that has the functions set forth in the rules for the TPH Department. The TPH Department will serve as the successor to the current Membership Department and will continue the functions of that department, such as processing applications for Trading Permits (instead of applications for membership). The definition is drafted in this manner to give the Exchange the flexibility to call the department something other than the TPH Department in the future without having to amend the rules.

The Exchange also has made technical changes to certain definitions in Chapter I that do not change the substance of these definitions. For example, the Exchange has amended the term “Executive Officer” to clarify that the term refers to an executive officer of a TPH organization.<sup>172</sup> In addition, the Exchange has amended the definition of “Good Standing” to provide that the term means “that a Trading Permit Holder or associated person is not delinquent respecting Exchange fees or other charges and is not suspended or barred from being a Trading Permit Holder or from being associated with a Trading Permit Holder.”<sup>173</sup>

(ii) Chapter II of the Rules

CBOE Rule 2.1(a) will be amended to limit its scope to Exchange committees (*i.e.*, committees that are not solely composed of CBOE Board directors) and to modify the manner of appointment to such committees. Prior to the Restructuring Transaction, the Rules generally provided that except as may be otherwise provided in the Constitution or the rules, the Vice Chairman of the Board, with the approval of the CBOE Board, would appoint the chairmen and members of committees (other than the Business Conduct Committee) to serve for terms expiring at the first regular meeting of the Board of Directors of the next calendar year. After the Restructuring Transaction, the Rules will be amended to provide that the Vice Chairman of the Board, with the approval of the CBOE Board, will appoint the chairmen and members of Exchange committees (other than the Business Conduct Committee), with the exception that if a different manner of appointment is specified for any specific committee under the CBOE Bylaws, the rules or a resolution of the CBOE Board establishing that committee, that different manner of appointment will be followed. After the Restructuring Transaction, the

President, with approval of the Board, will continue to have the authority to appoint members of the Business Conduct Committee.

CBOE Rule 2.1(a) also has been amended to streamline the process for filling vacancies. In this regard, the Vice Chairman of the Board, with the approval of the CBOE Board, would fill vacancies on Exchange committees (other than the Business Conduct Committee), unless a different process is specified for any specific committee under the CBOE Bylaws, the Rules or a resolution of the CBOE Board establishing that committee. Similarly, the President, with approval of the CBOE Board, would fill vacancies on the Business Conduct Committee.

CBOE Rule 2.1(b) has been amended to provide a definition of quorum for committee meetings. In this regard, absent a different provision in the CBOE Bylaws, the Rules, a committee charter or a CBOE Board resolution related to a specific committee, a majority of members of a committee shall constitute a quorum. This is consistent with current Exchange practice for determining a quorum for committee meetings. This rule also has been amended to delete the reference to “informally” in the last sentence so that it now provides that “[c]ommittees may act by written consent of all of the members of the committee.” This change was made because committees can take all types of actions pursuant to written consent, and not just “informal” actions.

Further, CBOE Rules 2.1(d) and 2.2 have been amended to clarify certain aspects of the authority of the CBOE Board. With regard to CBOE Rule 2.1(d), the Exchange is proposing to clarify in the first sentence of that provision that each committee will have such other powers and duties as may be delegated to it by the CBOE Board in a committee charter or otherwise. The Exchange also is proposing to move the second sentence of that provision into a new paragraph (e) of CBOE Rule 2.1 and to modify that sentence so that it provides that each Exchange committee is subject to the control and supervision of the CBOE Board. The Exchange is limiting this provision to Exchange committees because the CBOE Board’s relationship to CBOE Board committees is governed by specific delegations of authority under the CBOE Bylaws, applicable committee charters and Delaware law.

With regard to CBOE Rule 2.2, the Exchange is clarifying that the CBOE Board has the authority to review, modify, suspend or overrule any and all actions (or inactions) of any committee, officer, representative or designee of the

<sup>166</sup> The Exchange also has included a savings clause in proposed Rule 8.3 that provides that notwithstanding the rule, nothing in it will eliminate or restrict the Exchange’s authority to delist any product or to take any action (remedial or otherwise) under the Exchange Act, the Bylaws and the Rules, including without limitation the Exchange’s authority to take disciplinary or market performance actions against a person with respect to which the Exchange has jurisdiction under the Exchange Act, the Bylaws and the Rules. *Id.*

<sup>167</sup> References to these terms also will be replaced in Chapters II and III and CBOE Rule 8.3 as part of this rule filing, and in the remaining rules as part of the companion filing noted above.

<sup>168</sup> In this regard, any change to a defined term in Chapter I will be reflected in Chapters II and III and CBOE Rule 8.3 as part of this rule filing, and in the remaining rules as part of the companion filing noted above.

<sup>169</sup> See proposed CBOE Rules 1.1(ff) and (gg).

<sup>170</sup> See *supra* note 3.

<sup>171</sup> See proposed CBOE Rule 1.1(iii) for the definition of TPH Department.

<sup>172</sup> See proposed CBOE Rule 1.1(h).

<sup>173</sup> See proposed CBOE Rule 1.1(jj).



Exchange taken (or not taken) pursuant to the rules; provided that the CBOE Board acts in accordance with any review procedures set forth in Chapters XVII, XVIII and XIX of the Rules, to the extent applicable to actions (or inactions) under those Chapters. The Exchange is making this change to CBOE Rule 2.2 to clarify that consistent with the general rule under Delaware law, the CBOE Board has the authority to review actions taken (or actions not taken) by committees, officers, representatives and designees of the Exchange pursuant to the rules. At the same time, the Exchange has included language that provides that the processes related to CBOE Board review (if any) set forth in Chapters XVII, XVIII and XIX of the rules will be followed. In other words, to the extent a particular process is not set forth in the rules (such as the ones in Chapters XVII, XVIII and XIX), the CBOE Board will have the authority to review actions taken (or actions not taken) pursuant to the rules by committees, officers, representative and designees of the Exchange.

Finally, conforming changes have been made to the rules in Chapter II to reflect the use of Trading Permits. For instance, CBOE Rule 2.23 has been amended to clarify that the Exchange will have the authority to suspend or revoke a Trading Permit in the event the holder of that permit does not pay any amounts due to the Exchange. In addition, references to the term "dues" have been deleted in CBOE Rules 2.20, 2.22 and 2.23 because this term generally refers to payments made by members in a membership organization.<sup>174</sup>

### (iii) Chapter III of the Rules

Conforming changes throughout Chapter III will be made to reflect the operation of Trading Permits. For example, the Rules relating to the sale, transfer and lease of memberships, and to the member death benefit will be deleted based on the operation of Trading Permits.<sup>175</sup> In addition, CBOE Rule 3.1 will be deleted and replaced

<sup>174</sup> This change also has been made to other rules in Chapters I–III. *See, e.g.*, CBOE Rule 1.1(jj).

<sup>175</sup> In this regard, CBOE Rules 3.12, 3.13, 3.14, 3.15, 3.24 and 3.25 will be deleted. One of the rules to be deleted, Rule 3.14(d), describes the rights of membership owners and grantees in Authorization to Sell arrangements. Persons in these arrangements should be aware that the Authorization to Sell process will terminate in connection with the Restructuring Transaction and that the Exchange will no longer have any involvement in these arrangements. In addition, persons in these arrangements should consider the impact, if any, the Restructuring Transaction (*i.e.*, the conversion of memberships into Class A common stock in CBOE Holdings) might have on the collateral in these arrangements.

with a new Rule 3.1 (discussed above) that addresses Trading Permits. The prior version of Rule 3.1 was designed to, among other things, ensure that memberships were used for trading on the Exchange. This requirement will no longer be necessary in connection with the use of Trading Permits.

The qualifications to be a member or member organization, and the application process to become a member, will be the same after the Restructuring Transaction with modifications to reflect the use of Trading Permits.<sup>176</sup> For example, the Exchange is proposing to amend CBOE Rule 3.3 to condense the description of the requirements that an organization must meet to become a TPH organization, but is not substantively changing these requirements.

The Exchange also is making technical changes to certain rules in Chapter III that do not change the substance of these rules. For instance, the Exchange is proposing to amend Rule 3.5 to clarify that the Exchange will have the authority to deny or condition persons from becoming or being associated with Trading Permit Holders under the circumstances that are already set forth in that rule. In addition, the Exchange is making similar changes to CBOE Rule 3.18 to clarify the Exchange's authority when a Trading Permit Holder or a person associated with a Trading Permit Holder becomes subject to a statutory disqualification. Further, the Exchange is amending CBOE Rule 3.10 to clarify when Trading Permit Holder status will become effective, and is amending CBOE Rule 3.11 to clarify that the Exchange will announce such effectiveness in the Exchange Bulletin.

In addition, because an individual will be able to hold a Trading Permit in his or her name, the process for designating nominees for Trading Permits in CBOE Rule 3.8 will be amended to require a TPH organization that has an associated person who is an individual holder of a Trading Permit to designate that individual as the nominee for that Trading Permit.<sup>177</sup> Moreover, references to the concept of registering a membership for a member organization will be deleted in Rule 3.8 because that concept will have no application once Trading Permits are used to provide trading access to the Exchange.<sup>178</sup> Further, the Exchange is streamlining the process of designating

<sup>176</sup> *See, e.g.*, CBOE Rules 3.2 and 3.3.

<sup>177</sup> *See* CBOE Rule 3.8(a).

<sup>178</sup> The Exchange also is making this change to other rules in Chapters I–III and to CBOE Rule 8.3 as part of this rule filing, and in the remaining rules as part of the companion filing noted above.

nominees for TPH organizations that have multiple Trading Permits in their name. Currently, a member organization that has multiple memberships in its name can designate the same individual to be the nominee for those memberships, except that for each membership used for trading in open outcry on the trading floor, the member organization must designate a different individual to be the nominee for each of those memberships. As modified, CBOE Rule 3.8(a)(ii) will allow TPH organizations to designate the same individual to be the nominee for Trading Permits held in its name, including Trading Permits used for trading in open outcry on the trading floor.

The Exchange also is deleting the requirement in CBOE Rule 3.7(g) that a member keep and maintain a current copy of the Constitution and rules in a readily accessible place, and that a member organization that is approved to do business with the public make the Constitution and rules available for examination by customers. Because the Exchange is required to maintain a copy of its governing documents and rules online, the Exchange believes that this requirement is no longer necessary.

Finally, the Exchange is amending CBOE Rule 3.9 to, among other things, delete the requirement that the Exchange post notices of applications on the Exchange Bulletin Board.<sup>179</sup> As trading on the Exchange becomes more electronic and remote from the Exchange, the use of a physical bulletin board at the Exchange to notify persons is outdated.<sup>180</sup> Despite this change, persons will still receive notice of applications because the Exchange will continue to be required to post them in the Exchange Bulletin.

### Statutory Basis

For the reasons set forth above, the Exchange believes that this filing is consistent with Section 6(b) of the Exchange Act,<sup>181</sup> in general, and furthers the objectives of Section 6(b)(1) of the Exchange Act,<sup>182</sup> in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its Exchange members and persons associated with its Exchange members, with the

<sup>179</sup> *See* CBOE Rule 3.9(e).

<sup>180</sup> The Exchange also is making this change to other rules in Chapters I–III as part of this rule filing, and in the remaining rules as part of the companion filing noted above. CBOE Rule 8.3 is not affected by this change.

<sup>181</sup> 15 U.S.C. 78f(b).

<sup>182</sup> 15 U.S.C. 78f(b)(1).

provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act because the rules summarized herein would create a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.<sup>183</sup> Among other things, the Certificate of Incorporation and Bylaws of CBOE Holdings and CBOE are designed to protect and maintain the integrity of the SRO functions of CBOE, and to allow it to carry out its regulatory responsibilities under the Exchange Act.

In addition, the Exchange believes that this filing is consistent with the requirements of Section 6(b)(3) of the Exchange Act that the rules of the exchange assure a 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.<sup>184</sup> As described above, the CBOE Bylaws provide a process for Trading Permit Holders to select members of the CBOE Board (*i.e.*, Representative Directors). The CBOE Bylaws also require that a majority of directors on the CBOE Board be Non-Industry Directors.

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

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

### **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,<sup>185</sup> the Commission will:

- (A) By order approve such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2008-88 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2008-88. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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-CBOE-2008-88 and should be submitted on or before September 25, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>186</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-20464 Filed 9-3-08; 8:45 am]

**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58428; File No. SR-CBOE-2008-86]

### **Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Voluntary Professional Transaction Fees**

August 27, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 19, 2008, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

CBOE is proposing to amend its fees schedule for certain non-broker-dealer orders. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

#### **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 CBOE included statements concerning the purpose of, and basis for, the

<sup>185</sup> The Commission notes that the Exchange has consented to an extension of time for Commission consideration of the proposed rule change. See Item 6 of CBOE's Form 19b-4 submission.

<sup>186</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>183</sup> 15 U.S.C. 78f(b)(5).

<sup>184</sup> 15 U.S.C. 78f(b)(3).