

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56016; File No. SR-CBOE-2007-77)

July 5, 2007

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt an Interpretation to CBOE Rule 3.19 Regarding Temporary Membership Status Pending Final Commission Action on a Pending Rule Interpretation Concerning Exercise Right Eligibility

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 2, 2007, the Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act<sup>3</sup> and Rule 19b-4(f)(1) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 proposes to adopt Interpretation and Policy .01 under CBOE Rule 3.19 as follows to address the nature and extent of temporary membership status to be granted to certain persons in the event that the proposed acquisition of The Board of Trade of the City of Chicago, Inc.

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(1).

("CBOT") by Chicago Mercantile Exchange Holdings Inc. ("CME Holdings")<sup>5</sup> is consummated before the Commission takes final action on CBOE's pending proposed rule change SR-CBOE-2006-106.<sup>6</sup> The text of the proposed Interpretation and Policy is provided below (the Interpretation and Policy is completely new, and is therefore underlined).

Chicago Board Options Exchange, Incorporated

Rules

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Rule 3.19. Termination from Membership

Rule 3.19. No change.

...Interpretations and Policies:

.01 If the proposed merger between Chicago Mercantile Exchange Holdings, Inc. and CBOT Holdings, Inc. ("CME/CBOT Transaction"), the parent company of the Board of Trade of the City of Chicago, Inc. ("CBOT"), is consummated and if such consummation occurs before the Securities and Exchange Commission ("Commission") takes final action on SR-CBOE-2006-106, a person who is a member of CBOE (an "exerciser member") pursuant to paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation ("Article Fifth(b)") as of July 1, 2007 will be granted temporary membership status at the Exchange, until the Commission takes final action on SR-CBOE-2006-106, if and only if such person (i) remains an exerciser member in

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<sup>5</sup> CME Holdings proposes to acquire CBOT by means of a CME Holdings merger with CBOT Holdings, Inc. ("CBOT Holdings"), of which CBOT is a wholly-owned subsidiary (the "CME/CBOT Transaction").

<sup>6</sup> See Securities Exchange Act Release No. 55190 (January 29, 2007), 72 FR 5472 (February 6, 2007). The Exchange filed this proposed rule change on December 12, 2006. On January 17, 2007, the Exchange filed Amendment No. 1 to the proposed rule change. Numerous comments were received, and the Exchange responded to those comments on June 15, 2007. On June 29, 2007, the Exchange filed Amendment No. 2 to the proposed rule change.

good standing as of the close of business on the trading day immediately before the consummation of the CME/CBOT Transaction, (ii) thereafter remains in good standing and continues to pay all applicable fees, dues, assessments and other like charges that are assessed against CBOE members, and (iii) pays to the Exchange, for each month starting in the month after the CME/CBOT Transaction is consummated, a monthly access fee based on the then current monthly lease fees being paid to lessors of the interest that CBOT denominates as a full CBOT membership, with such fee to be set by the Exchange on a monthly basis based on published lease fee information. Such access fee shall be due and payable in advance of each calendar month that the person decides to retain the temporary membership status granted pursuant to this paragraph. All such access fees shall be payable to and held in an interest-bearing escrow account maintained by the Exchange until the Commission takes final action on SR-CBOE-2006-106. The Exchange will retain such fees if the Commission approves SR-CBOE-2006-106, and such fees will be returned to the payor if the Commission disapproves SR-CBOE-2006-106. The temporary membership status granted pursuant to this paragraph shall be subject to the regulatory jurisdiction of CBOE under the Act, the Constitution and the Rules, including CBOE's disciplinary jurisdiction under Chapter XVII.

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

In its filing with the Commission, the 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. The 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to address whether or to what extent persons who claim the right to become and remain a member of CBOE (the right to be an “exerciser member”) pursuant to paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation (“Article Fifth(b)”) should continue temporarily to retain their CBOE membership status after the consummation of the CME/CBOT Transaction and before the Commission has taken final action on SR-CBOE-2006-106.

In SR-CBOE-2006-106, CBOE proposed an interpretation of Article Fifth(b) to address the impact of the CME/CBOT Transaction on the eligibility of persons to be exerciser members. Under this proposed interpretation, the consummation of the CME/CBOT Transaction would result in no persons any longer qualifying as members of the CBOT within the meaning of Article Fifth(b) and, therefore, would result in the elimination of the eligibility of any person thereafter to qualify to be an exerciser member. Although SR-CBOE-2006-106 is pending before the Commission and awaiting action, there is a risk that the proposed CME/CBOT Transaction may be consummated before the Commission is able to act on SR-CBOE-2006-106. In particular, the shareholders of CBOT Holdings and CME Holdings and the holders of certain CBOT memberships are presently scheduled to vote on the proposed transaction on July 9, 2007.

If the CME/CBOT Holdings Transaction is consummated, but the Commission has not yet taken action on CBOE's interpretation in SR-CBOE-2006-106 concerning the effect of that transaction on exercise right eligibility, CBOE will need to implement a procedure to determine whether persons who claim still to qualify as exerciser members should be permitted to retain their membership status, and consequently to trade on CBOE, while a decision on SR-CBOE-

2006-106 is pending. In this regard, upon the consummation of the CME/CBOT Transaction, the approval of SR-CBOE-2006-106 would mean that former exerciser members have lost that membership status. However, if the Commission has not taken final action on SR-CBOE-2006-106 when the CME/CBOT Transaction is consummated, those persons may maintain that they are still exerciser members.

Interpretation and Policy .01 under CBOE Rule 3.19 deals with these extenuating circumstances by allowing certain categories of those persons temporarily to retain their membership status while SR-CBOE-2006-106 remains pending. In particular, under Interpretation and Policy .01, persons who were exerciser members in good standing as of July 1, 2007 and who remain exerciser members as of the close of business on the day before the consummation of the CME/CBOT Transaction temporarily would retain their membership status – including their trading access to CBOE – until the Commission acts on SR-CBOE-2006-106. Such persons would not be required to take any action to retain their membership status and would not be required to hold or maintain any securities, memberships or other interests in order to maintain that status. Rather, the Exchange would determine who was an exerciser member as of both of the specified dates and would take appropriate action to ensure that those persons retain their membership status after that date until the Commission takes final action SR-CBOE-2006-106. Such persons would be required to remain in good standing and would need to pay all applicable fees, dues, assessments and other like charges assessed against CBOE members. Of course, this temporary membership status would be subject to the regulatory jurisdiction of the Exchange under the Exchange Act and the Constitution and Rules of the Exchange, including the Exchange's disciplinary jurisdiction under Chapter XVII of the Exchange's rules.

Because such persons would be relieved of the obligation to hold or maintain any securities, memberships or other interests in order to maintain their membership status, they would be required to pay a monthly access fee based on the then current monthly lease fees being paid to lessors of the interest that CBOT denominates as a full CBOT membership. This monthly access fee would be set by the Exchange on a monthly basis, based on published lease fee information, and would be payable starting in the month after the month in which the CME/CBOT Transaction is consummated and lasting until the Commission takes final action on SR-CBOE-2006-106. The Exchange will submit a further proposed rule change, pursuant to Section 19(b)(3)(A)(ii), to specify the access fee to be charged or to specify the methodology by which this access fee will be determined. Any subsequent change in the amount of that access fee or in the methodology for determining that fee also will be submitted as a proposed rule change pursuant to Section 19(b)(3)(A)(ii). Because the Commission would not yet have determined whether to approve SR-CBOE-2006-106 during the period that these access fees were being collected, all access fees collected under this interpretation would be held in an interest-bearing escrow account maintained by the Exchange. The Exchange would retain such fees if the Commission approved SR-CBOE-2006-106, and such fees would be returned to the payor if the Commission disapproved SR-CBOE-2006-106. This access fee addresses the competitive advantage that the persons trading under the membership status granted in Interpretation and Policy .01 otherwise would have over lessees of transferable Exchange memberships, in light of the fact that the former exerciser members would be relieved of their financial obligation to obtain and hold any securities, memberships or other interests in order to maintain their membership status.

Under Interpretation and Policy .01, only persons who were exerciser members as of both of the specified dates, not persons who might thereafter claim the right to become an exerciser member, would have any membership status after the CME/CBOT Transaction, pending the Commission's final action on SR-CBOE-2006-106. CBOE Rule 3.19 provides CBOE with the authority only to allow persons who actually were members to retain their membership status on a temporary basis and does not authorize the granting of such status to persons who were not already CBOE members.

Upon the Commission's final action on SR-CBOE-2006-106, Interpretation and Policy .01 would cease to be in effect, and the rights of persons who claim to be exerciser members would be determined in accordance with the Commission's decision on SR-CBOE-2006-106. Pursuant to the terms of SR-CBOE-2006-106, there would be a different temporary access plan to address transitional issues that would arise from the approval of SR-CBOE-2006-106.

The Exchange believes that Interpretation and Policy .01 is reasonable under the circumstances. It avoids disturbing the trading access of persons who were exerciser members before the consummation of the CME/CBOT Transaction while the Commission is determining whether that transaction has extinguished their eligibility to be exerciser members. This interpretation also preserves fair and orderly markets at CBOE by avoiding the sudden loss of more than 200 persons who presently are contributing liquidity to CBOE's markets. So that persons who do not have a bona fide interest in trading on CBOE do not exercise in reaction to the adoption of Interpretation and Policy .01, a person must have been an exerciser not only as of the close of business on the day immediately before the consummation of the CME/CBOT Transaction, but also as of July 1, 2007, the day immediately before the filing of Interpretation and Policy .01. Under SR-CBOE-2006-106, persons would have had to be an exerciser member

as of December 11, 2006 in order to qualify for transitional trading access after the approval of SR-CBOE-2006-106. Interpretation and Policy .01 therefore effectively extends that cut-off date, as it applies to temporary trading access before final action on SR-CBOE-2006-106, more than six months to July 1, 2007.

## 2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act.<sup>8</sup> In particular, this interpretation is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>10</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(1).

appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>11</sup>

#### 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-2007-77 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-CBOE-2007-77. 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, on official

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<sup>11</sup> See 15 U.S.C. 78s(b)(3)(C).

business days between the hours of 10:00 am and 3:00 pm. Copies of the 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-2007-77 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Florence E. Harmon  
Deputy Secretary

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