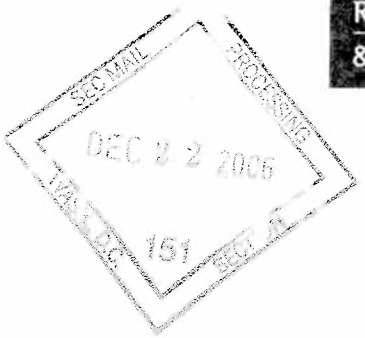
MAYER BROWN ROWE & MAW

December 22, 2006



Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Attn: Nancy M. Morris, Secretary

RE: File Number: SR-CBOE-2006-106

Ladies and Gentlemen:

On behalf of CBOT Holdings, Inc. ("CBOT Holdings") and its wholly-owned subsidiary, the Board of Trade of the City of Chicago, Inc. (collectively referred to herein as "CBOT"), we are submitting this request with respect to the filing on December 12, 2006 by the Chicago Board Options Exchange, Incorporated ("CBOE") with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the "Exchange Act")[1] and Rule 19b-4 thereunder, of a proposed rule change (SR-CBOE-2006-106) (the "Proposed Rule Change").[2]

The subject matter of the Proposed Rule Change is a dispute between CBOT and CBOE. This dispute currently is the subject of a case pending in the Delaware Court of Chancery, *CBOT Holdings, Inc., et al. v. Chicago Board of Options Exchange, Inc., et al.*, C.A. No. 2369-N. This court case involves questions of shareholder rights, contract rights, and the fiduciary duties that CBOE and its directors owe to its members. These are State law claims governed by Delaware and Illinois law. For these reasons, CBOT respectfully requests that the Commission and its staff defer consideration of the Proposed Rule Change until the Delaware court has an opportunity properly to rule upon the State law issues before it.

Background

In 1972, CBOT and its members established CBOE as a new and separate exchange, with its own membership, dedicated to the trading of listed securities options. In connection with CBOE's creation, CBOT made a number of contributions to CBOE, including providing seed capital and providing loan guarantees, and sharing valuable intellectual property. Since its creation, in recognition of the contribution to CBOE made by CBOT's members, Article Fifth(b) of CBOE's Certificate of Incorporation ("the CBOE Charter") has provided that CBOT members are entitled to become members of CBOE without having to purchase a separate CBOE membership. This right is called the "Exercise Right."

Since the CBOE was founded and the Exercise Right created, the CBOE and CBOT have entered into a number of agreements regarding the scope of the Exercise Right. Most

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1 15 U.S.C. § 78s(b)(2).

2 17 C.F.R. § 19b-4.

significantly, CBOT and CBOE executed an agreement in 1992 ("the 1992 Agreement"). The 1992 Agreement further expressed the parties' understanding as to the scope of the Exercise Right as set forth in Article Fifth(b). Importantly, CBOE confirmed its agreement that CBOT members who had exercised their Exercise Right to become CBOE members ("Exerciser Members of CBOE" or "Exercise Members") "have the same rights and privileges of CBOE regular membership as other CBOE Regular Members, including the rights and privileges with respect to the trading of all CBOE products." The 1992 Agreement specifically provides that the "same rights and privileges of CBOE regular memberships" include rights to any distribution made by the CBOE.

Furthermore, the CBOE agreed to give the Board of Trade at least 90 days notice prior to making any cash or property distribution, in order to give those holding Exercise Rights the opportunity to become Exerciser Members and participate in the distribution. The 1992 Agreement also includes a provision that, generally speaking and subject to certain conditions, if the CBOT merged with another exchange, the Exercise Right would survive such a merger. Finally, the 1992 Agreement further provides that "either party . . . may bring suit (on its own behalf or on behalf of its members, or both) to enforce the terms of this Agreement and to recover damages for any breach of this Agreement." The 1992 Agreement provides that it is governed by Illinois law.

A dispute between CBOT and CBOE has now arisen with respect to the scope of the Exercise Right in connection with both the proposed demutualization of CBOE and the proposed merger between CBOT Holdings, Inc. and Chicago Mercantile Exchange Holdings, Inc. ("CME Holdings"). On August 23, 2006, relying in part on the provision of the 1992 Agreement that allows either exchange to bring suit to enforce the terms of the Agreement, CBOT filed suit in Delaware[3] seeking a declaratory judgment that CBOE would be in breach of the 1992 Agreement if it does not permit Exerciser Members to participate equally with regular CBOE members in any cash or property distribution resulting from the CBOE's proposed demutualization. The complaint also seeks a declaration that CBOE and its directors would breach their fiduciary duties to the Exerciser Members and Exercise Right holders if it did not permit them to participate equally with other CBOE members in the demutualization. CBOE moved to dismiss CBOT's Complaint on November 2, 2006, arguing that there is no actual controversy ripe for adjudication because the CBOE has not yet decided precisely how the Exerciser Members will be treated in its demutualization. The CBOE pointed to the fact that its Board appointed a Special Committee to consider the issue and argued that any litigation should await the outcome of that Committee's deliberations.

CBOE has since announced that the Special Committee has been suspended and, on December 12, 2006, CBOE submitted the Proposed Rule Change, declaring that the Exercise

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[3] CBOT Holdings, Inc., The Board of Trade of the City of Chicago, Inc., and Chicago Board Options Exchange, Inc. all are Delaware corporations.

Right will be terminated, upon completion of the proposed merger between CBOT Holdings and CME Holdings. In a letter to the Delaware court on December 12 (copy attached), the CBOE therefore argued that the filing of the Proposed Rule Change mooted the Delaware Court lawsuit.

CBOT, however, strongly disagrees with the CBOE's assertion for two reasons. First, the Delaware lawsuit involves issues that arose prior to the CBOE's filing of Proposed Rule Change, and the Proposed Rule Change serves only to further strengthen CBOT and CBOT members' claims and allegations involving the CBOE's intentions. In addition, CBOE's December 12 conduct seeks unilaterally and without notice to extinguish the Exercise Right without the contractually-required vote or a court determination. The issues in controversy are ripe and properly before the Delaware court. In any event, those issues are uniquely State law issues that should be resolved by the Delaware court.

Discussion

We respectfully submit that the Commission should abstain from considering the Proposed Rule Change at this time. The Proposed Rule Change relates to an issue – the scope of the Exercise Right – that has given rise to an ongoing lawsuit between a class of members of the CBOE on the one hand, and CBOE and its directors on the other. The dispute is governed not only by Article Fifth(b) of the CBOE Charter, but also by the 1992 Agreement and other agreements. Fundamental State law issues of corporate and contract law are the very core of the pending Delaware case. These include the effect, if any, of the CBOT Holdings–CME Holdings merger on the CBOE's obligations under the 1992 Agreement and the CBOE Charter.

The parties' agreements reflect the CBOE and CBOT's mutually agreed understanding of the scope of the Exercise Right and the Agreements are governed by, and must be interpreted under, Illinois contract law and Delaware corporate law. As a result, the CBOE does not have the same flexibility to interpret its Charter and their agreements as it might have with respect to its rules or governing documents that are not subject to, or modified by, separate third-party agreements that define the parties' rights under State law.

The Commission has routinely exercised jurisdiction over approving a self regulatory organization's interpretation of its charter, including interpretations of Article Fifth(b) by the CBOE, as a "rule change" under Section 19(b) of the Exchange Act and Rule 19b-4 to ensure the rule change is consistent with the Exchange Act.[4] However, in reviewing rule changes under the Exchange Act, the Commission has indicated that it does not interpret state law to determine that a rule change is also consistent with State laws.[5] Consequently, although an interpretation of the

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[4] *See e.g.*, Exchange Act Release No. 34-32430 (June 8, 1993), 58 Fed.Reg. 32969 (June 14, 1993); Exchange Act Release No. 34-51733 (May 24, 2005), 70 Fed.Reg. 30981 (May 31, 2005); Exchange Act Release No. 34-345125 (Feb. 25, 2005); 70 Fed.Reg. 10442 (Mar. 3, 2005).

[5] *See e.g.*, Exchange Act Release No. 34-345125 (Feb. 25, 2005); 70 Fed.Reg. 10442, 10444 (Mar. 3, 2005).

Exercise Right in Article Fifth(b) must be consistent with the Exchange Act, that requirement does not eliminate the need for that interpretation to be consistent with State law; simply put, any such interpretation must be consistent with *both* the Exchange Act and applicable state law. As indicated above, this interpretation of the Exercise Right in Article Fifth(b) is currently subject to dispute in the Delaware courts.[6] Depending upon the outcome in the courts, that interpretation may change. For this reason, CBOT requests that the Commission defer consideration of the Proposed Rule Change until the Delaware court has decided the state law questions in the pending cases.

If the Commission does ultimately approve the Proposed Rule Change before resolution in the courts, the interpretation of Article Fifth(b) in the Proposed Rule Change may become moot, and the CBOE would have to propose a new rule change to reflect the actual resolution of the Delaware court dispute. As a matter of regulatory efficiency, the CBOE and its all members would be better served if this matter is considered only once by the SEC under Exchange Act Section 19(b). In this regard, we note that the Commission has generally waited to approve a proposed rule change relating to Article Fifth(b) until after the CBOE and CBOT have resolved any disputes concerning the interpretation of that provision.[7]

The SEC also should abstain from consideration of the Proposed Rule Change because CBOE's filing thereof is a clear attempt by one group of CBOE members to manipulate the Commission's regulatory processes under Rule 19b-4 to disadvantage those CBOT members who are eligible for the Exercise Right. The CBOE is attempting to supplant the Delaware courts with the SEC to act as arbiter between the CBOE, the CBOT, and CBOT members in this contract dispute. If the SEC ultimately approves the Proposed Rule Change as being consistent with the Act before resolution in the Delaware courts with respect to the State law issues, we expect that CBOE will seek to use that narrow approval to argue that the SEC supports the CBOE's position on the State law issues before the Delaware court, or that the SEC's action moots the issues before the Delaware court; indeed, CBOE's willingness to proceed in this manner is amply demonstrated by its December 12 letter to the Delaware court, referenced above, on the CBOT Holdings – CME Holdings merger.

For these reasons, the CBOT respectfully requests that the SEC defer consideration of the Proposed Rule Change until such time that the core contract, corporate, and fiduciary controversies that underlie the Proposed Rule Change, and the issues of State law governing these matters, have been properly resolved in the Delaware court proceeding.

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[6] This dispute alone distinguishes this rule request of CBOE from prior requests involving interpretation of Article Fifth (b). In the other instances there was no underlying State law dispute between the parties.

[7] *See* footnote 4 *supra.*

Thank you for your consideration of the foregoing. If you have any questions, please contact the undersigned at (202) 263-3219 or Kathryn McGrath at (202) 263-3374.

Sincerely,

Charles M. Horn

cc: Joanne Moffic-Silver, CBOE
Patrick Sexton, CBOE

Attachment

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December 12, 2006

BY ELECTRONIC FILING
The Honorable John W. Noble
Vice Chancellor
Court of Chancery
417 South State Street
Dover, DE 19901

Re: ***CBOT Holdings, Inc. v. Chicago Board Options Exchange, Incorporated*; Del. Ch. C.A. No. 2369-N**

Dear Vice Chancellor Noble:

I write on behalf of defendants to apprise the Court of recent developments that bear on defendants' pending motion to dismiss.

Plaintiffs purport to represent a class of individuals who are, or have the right to become, members of defendant Chicago Board Options Exchange, Incorporated ("CBOE") by virtue of an exercise right that CBOE's certificate of incorporation granted to members of plaintiff The Board of Trade of the City of Chicago (the "Board of Trade"). The suit arises out of CBOE's announced intention to "demutualize."

The terms of any demutualization transaction have not yet been fixed, but plaintiffs' complaint speculates that CBOE intends to treat persons who became CBOE members through the exercise right ("Exerciser Members") unfairly compared to CBOE's other members ("Seat Owners"). Since no decisions have yet been made by CBOE's Special Committee of independent directors concerning the relative consideration that Exercise Members and Seat Owners would receive in a demutualization, CBOE moved to dismiss this case as not ripe, and filed its opening brief on that issue on November 2. Plaintiffs have not filed an answering brief.

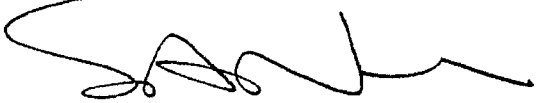
Plaintiff CBOT Holdings, Inc. ("CBOT Holdings"), the parent company of the Board of Trade, has announced entry into a definitive agreement providing for CBOT Holdings to merge with and into Chicago Mercantile Exchange Holdings, Inc. ("CME Holdings"). CME Holdings would be the surviving company and the Board of Trade would become a subsidiary of CME Holdings in that transaction (the "CME Holdings Acquisition"). In order to address the effect on the exercise right of this acquisition of the Board of Trade, CBOE today submitted a rule filing

with the U.S. Securities and Exchange Commission ("SEC"). Federal law gives the SEC exclusive jurisdiction to determine the meaning of the provisions of the certificate of incorporation and the rules of exchanges such as CBOE.[1]

Under this rule filing, once the acquisition of the Board of Trade is completed no one will qualify any longer as an Exerciser Member. Because no one will so qualify, it will not be necessary to determine the treatment of any such persons in the demutualization. Accordingly the Special Committee has suspended further work to value the consideration to which such a person otherwise would have been entitled in the demutualization.

For the same reason, upon approval of CBOE's rule interpretation and completion of the CME Holdings Acquisition plaintiffs' lawsuit will become moot.

Respectfully submitted,



Samuel A. Nolen

SAN/meh
Enclosure
cc: Register in Chancery (by e-file)
Kenneth J. Nachbar, Esquire (by e-file)
Andre G. Bouchard, Esquire (by e-file)

[1] *See* 15 U.S.C. §78s(b)(1); SEC Rule 19b-4, 17 C.F.R. § 240.19b-4; 15 U.S.C. §78c(a)(27) (defining "rules" to include an exchange's certificate of incorporation); *Buckley and Board of Trade of the City of Chicago v. Chicago Board Options Exchange, Inc.*, 440 N.E.2d 914 (Ill. App. Ct. 1982) (holding state action preempted because of SEC's exclusive jurisdiction over questions of exchange membership, referring particularly to the exercise right provision at issue in the present case).