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February 27, 2007

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

Attn: Nancy M. Morris, Secretary

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

Ladies and Gentlemen:

On behalf of UBS Securities, LLC, a subsidiary of UBS AG ("UBS"), we welcome this opportunity to comment on a proposed rule change filed by the Chicago Board Options Exchange, Inc. ("CBOE") ("Proposed Rule Change") purporting to interpret Article Fifth(b) of the CBOE's Certificate of Incorporation ("Article Fifth(b)").[1] UBS, its predecessors and affiliates have been long standing members of the CBOE. They also have been long standing members of the Chicago Board of Trade of the City of Chicago, Inc., which is wholly owned by CBOT Holdings, Inc. (collectively referred to as the "CBOT"). UBS also owns more than 50 "exercise right privileges" that, when assembled with the other two components comprising CBOT membership, afford CBOE membership status to the owner pursuant to Article Fifth(b). UBS has a significant economic stake in its memberships at the CBOT and the CBOE. As importantly, UBS has a significant economic stake in the fair and efficient functioning of the United States capital markets.[2]

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[1] Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation, Exchange Act Release No. 34-55193, 72 Fed. Reg. 5472 (February 6, 2007) (hereafter the "Filing").

[2] UBS is one of the largest financial institutions in the world. Throughout the organization, UBS has 87 stock exchange memberships in 31 countries. In the United States, UBS is active in all equity, fixed income and options markets.

The CBOE's Proposed Rule Change is the latest move in a complex legal and regulatory conflict that has been underway ever since the CBOE was established in 1972. At its heart, the conflict is over the nature and extent of the rights in the CBOE that Article Fifth(b) grants to full members ("Members") of the CBOT. The background and history of this extended conflict are far too familiar to the Commission and the participants to be reviewed again here.[3] Suffice it to say that the present battle appears to have begun on August 23, 2006, when the CBOT filed suit in Delaware against the CBOE alleging that the CBOE intended to act in derogation of the CBOT Members' rights under Article Fifth(b). On December 12, 2006, the CBOE filed the Proposed Rule Change. And on December 22, 2006, the CBOT filed a second amended complaint that included among the CBOE's proscribed actions the filing of the Proposed Rule Change.

Filing the Proposed Rule Change was an audacious move on the CBOE's part. Relying on its status as a self regulatory organization ("SRO") subject to the Commission's jurisdiction, the CBOE is seeking nothing less than to end the entire long running controversy in one fell swoop, interpreting Article Fifth(b) so that, upon completion of the CBOT's proposed merger with Chicago Mercantile Exchange Holdings, Inc. (the "Merger"), the rights, privileges, opportunities and interests of CBOT Members in the CBOE will be eliminated totally and forever. If the CBOE's interpretation of Article Fifth(b) is approved by the Commission and upheld by the courts, several hundred million dollars in "seat value" now held by CBOT members will be wiped out,[4] the number of actual and potential members of the CBOE will be cut by more than half,[5] and the future willingness of third parties to enter into contracts subject to unilateral "interpretation" by an SRO will be substantially

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[3] See, for example, the Filing; the Second Amended Complaint CBOT Holdings, Inc. et al. v. Chicago Board Options Exchange, et al., C.A. No. 2369-N (Del. Ch.) (hereafter the "Delaware Action"); Plaintiffs' Motion for Partial Summary Judgment CBOT Holdings, C.A. No. 2369-N (Del. Ch.); and Defendants' Motion to Dismiss and Stay the Second Amended Complaint CBOT Holdings, C.A. No. 2369-N (Del. Ch.).

[4] That there is significant economic value in the right CBOT Members now have to become CBOE members is without question. In 2003, the CBOE agreed that so-called "exercise rights" could be uncoupled from the other components of a "full" CBOT membership. This created a market in the exercise rights that allowed CBOT Members to capture the immediate value of "exercising" without actually doing so. CBOT Members who sell this "exercise right" face the risk that they may not be able later to repurchase all of the components of a "full" membership needed to actually become a CBOE Member. Some CBOT Members, including UBS, have determined to increase their investment in the CBOE by purchasing multiple exercise rights. Based on recent sales, including sales to the CBOE, the economic value of all outstanding exercise rights (that is, those not already purchased by the CBOE and "retired") easily exceeds many hundred million dollars.

[5] See the discussion in Section B.2. below.

diminished if not entirely eliminated. To state that the stakes in this proceeding are high would be a serious understatement.

Despite the CBOE's audacity in filing the Proposed Rule Change, the Filing itself is a seriously flawed effort to "end run" the legitimate and appropriate course of the Delaware Action. Contrary to the CBOE's assertions, the Proposed Rule Change will not resolve the issues raised in the Delaware Action, much less moot the underlying controversy between the CBOT and the CBOE over the proper interpretation of Article Fifth(b). In what follows, we make essentially two arguments in support of those assertions. First, the Delaware Action is more than a simple claim for breach of contract; it is a direct attack on the validity of the CBOE's corporate authority to file the Proposed Rule Change. If the CBOT's allegations in this respect are found by the Delaware court to be correct, the CBOE's Filing will be rendered invalid and the parties will be back where they were when the Delaware Action was first commenced. Second, the Proposed Rule Change, in any event, is not consistent with the requirements of the Securities Exchange Act of 1934 ("Act") and should be disapproved by the Commission.

A. The CBOT has Seriously Challenged the CBOE's Corporate Authority to File the Proposed Rule Change. That Challenge Should be Resolved Before the Commission Undertakes Consideration of the Proposal.

In the Delaware Action, the CBOT challenges the validity of and authority for the CBOE's proposed interpretation of Article Fifth(b). The CBOE seeks to short circuit the judicial resolution of this challenge. Basically, the CBOE's argument proceeds as follows:

(1) the CBOE, as an SRO, has the right to interpret its own rules;

(2) Article Fifth(b) is part of its rules;

(3) the filing of the Proposed Rule Change was made pursuant to its authority under the Act;

(4) a finding by the Commission that the Proposed Rule Change is "consistent" with the requirements of the Act would preempt any other interpretation of Article Fifth(b); and

(5) therefore, the Delaware Action must be dismissed and the contract dispute rendered moot upon the Commission's approval of the Proposed Rule Change.[6]

The CBOE's argument might have some plausibility in other circumstances, but not here. The Delaware Action certainly involves a contract dispute – indeed, one, as we have pointed out, with enormous economic consequences – and at the core of this dispute is the interpretation of Article Fifth(b), which certainly is part of the CBOE's rules. But the Delaware Action is about something more than a claimed breach of contract. In that action, the CBOT alleges that the Proposed Rule Change was filed by the CBOE in an effort to "extinguish the rights" of CBOT Members under Article Fifth(b) in breach of its fiduciary duties to these Members.[7] In other words, the CBOT alleges that the CBOE and its Directors did not act in good faith in filing the Proposed

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[6] Letter from Michael L. Meyer, counsel to CBOE, to Elizabeth K. King, Associate Director, Division of Market Regulation, Securities and Exchange Commission, (January 12, 2007) (hereafter, "Meyer Letter"). See also the CBOE's S-4 Registration Statement dated February 9, 2007 filed with the Commission:

> The CME/CBOT transaction is expected to close before the CBOE restructuring transaction. The CBOE restructuring is based on this assumption and on the assumption that the SEC will have approved the CBOE's determination regarding the effect of the CME/CBOT transaction on the exercise right. Under those circumstances, CBOE memberships held by CBOT members pursuant to the exercise right before the CME/CBOT transaction will not be converted into shares of CBOE Holdings common stock in the restructuring transaction, because there no longer will be any members of the CBOT who qualify to hold such a membership on the date of the restructuring transaction.
>
> The board of directors has determined that following the acquisition of the [CBOT] by [CME] there will no longer be members of the CBOT who qualify to become or remain members of the CBOE pursuant to the exercise right.
>
> On December 12, 2006, at a regularly scheduled meeting of the board of directors of the CBOE, lawyers from the CBOE's outside legal counsel, Schiff Hardin, presented a legal analysis of the impact of the CME/CBOT Transaction on the CBOE Exercise Right. Following a discussion from which members of the Special Committee were recused, the board determined that the CBOT would no longer have "members" as contemplated by Article Fifth(b) upon the completion of the CME/CBOT Transaction and authorized CBOE management to submit a rule filing to the SEC [which filing was submitted on that day].
>
> Following approval of this action, the directors on the Special Committee were invited to rejoin the meeting and were informed of the board's decision.

[7] See Second Amended Complaint, supra.

Rule Change[8] and, hence, that this filing lacks necessary corporate authorization and is of no effect under the Act.

By credibly alleging that the CBOE and its Board of Directors breached their fiduciary duties in filing the Proposed Rule Change, the CBOT has significantly changed the regulatory environment within which the Commission is to review the rule filing. Disregarding for the moment whether the Proposed Rule Change is consistent with the Act,[9] the Commission is now forced to seriously consider the following argument:

> First, more than one interpretation of Article Fifth(b) is "consistent" with the requirements of the Act. Indeed, the interpretation being urged by the CBOT in the Delaware Action is also "consistent" with the requirements of the Act.[10]
>
> Second, if the CBOE chose the interpretation of Article Fifth(b) embodied in the Proposed Rule Change in bad faith and in breach of its fiduciary obligations then that interpretation is without proper corporate authorization.[11]
>
> Third, if the CBOE's interpretation lacks necessary corporate authorization under Delaware law, then the Proposed Rule Change was improperly filed and must be rejected outright by the Commission.

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[8] Second Amended Complaint, supra, provides credible allegations to support the CBOT's claim that the CBOE's Proposed Rule Change was filed in bad faith.

[9] As we argue in Section B, the Proposed Rule Change is clearly not consistent with the requirements of the Act.

[10] Further, the CBOT's interpretation does not suffer from the defects of the CBOE's interpretation pointed out in Section B.

[11] As the CBOE's Delaware counsel states: "It is within the general authority of the Board to interpret Article Fifth(b) so long as in doing so the Board acts in good faith, in a manner consistent with the terms of that Article and not for inequitable purposes." Letter from Wendell Fenton, Richards, Layton & Finger, counsel for CBOE to Joanne Moffic-Silver, General Counsel and Corporate Secretary for CBOE (January 16, 2007) (on file with the Commission). If, however, the Board did not interpret Article Fifth(b) in good faith but for inequitable purposes, its action lacks necessary corporate authority under Delaware Law and is consequently without legal effect. "Inequitable action does not become permissible simply because it is legally possible." Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1078 (Del. 2004); citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971). "Delaware's public policy interest in vindicating the legitimate expectations stockholders have of their corporate fiduciaries requires its courts to act when statutory flexibility is exploited for inequitable ends." Id. Thus, a "court can rescind or nullify an action where corporate directors exercise legal powers for an inequitable purpose." Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121 (Del. Ch. 1990).

In other words, if the CBOT's claim that the CBOE breached its fiduciary duty is correct, the CBOE's filing of the Proposed Rule Change was ultra vires and the Commission does not have before it a validly proposed rule change.

We want to be very clear that we are not now arguing that the CBOE did, in fact, file the Proposed Rule Change in bad faith and in breach of its fiduciary obligations. We do not know whether that is the case. Neither does the Commission. And that is the point. The process under the Act for reviewing a proposed rule change (even the process for disapproving a proposed rule change) does not provide for an evidentiary hearing. There simply is no mechanism under the Act for determining whether the filing of a proposed rule change by a self-regulatory organization was done in good faith. Making such a determination is precisely what courts are for, and precisely why the CBOT has amended its complaint in the Delaware Action to allege that the Proposed Rule Change was filed in breach of the CBOE's fiduciary duty. Because this allegation has been presented in an appropriate forum, is not frivolous, and can be adjudicated within a reasonable time frame,[12] the Commission should stay its consideration of the Proposed Rule Change until there has been a judicial determination as to whether this filing was made with requisite corporate authority under Delaware Law.[13]

Nevertheless and despite the strength of the arguments against it doing so, if the Commission chooses to proceed to approve the Proposed Rule Change, there should be no expectation that the Delaware Action would be dismissed as a result. Clearly, this is the CBOE's expectation, for it argues, "the Commission's jurisdiction over the interpretation of exchange rules, particularly rules like Article Fifth(b) that bear upon the qualifications for membership in an exchange, preempt[s] any state court claims related to such issues." Accordingly, if the Commission approves the

[12] Of course, a mere allegation that an SRO's proposed rule change was filed in bad faith would not be sufficient to foreclose Commission review and, indeed, approval of the rule change. For the Commission to stay its consideration of a proposed rule change, the challenge to the authorization of that rule change, at a minimum, would have to be made in a forum in which the issue of good faith action and adherence to fiduciary duty could be conclusively resolved in accordance with applicable state law.

[13] The CBOE appears to agree with our argument in this regard, for as it has commented to the Commission, "[c]orporate governance traditionally falls within the purview of state law, and the SEC does not appear to have been granted any specific authority to supplant state corporation law regarding the governance of SROs." Letter from William J. Brodsky, Chairman and Chief Executive Officer, CBOE to Jonathan G. Katz, Secretary, SEC Regarding File No. S7-39-04, Fair Administration and Governance of Self-Regulatory Organizations, at 2, fn. 6 (March 8, 2005).

Proposed Rule Change, "upon the consummation of the [Merger], CBOE will move to dismiss the amended Delaware Action on the ground of federal preemption.... We expect that the Delaware court will recognize that plaintiffs' state law claims are preempted...."[14]

While we strongly disagree with the CBOE's views as to whether and when Commission action preempts state court claims,[15] the CBOE's preemption argument in the current proceeding is wide of the mark. The Commission's approval of the Proposed Rule Change, whatever its effect on the interpretation of Article Fifth(b), would not under any theory of federal preemption preempt the CBOT's challenge to the CBOE's corporate authority. This challenge has nothing to do with the substance of a particular interpretation of Article Fifth(b), but rather goes to the legitimacy of the very act of the CBOE propounding the interpretation in the first place. This issue of legitimacy can only be resolved by a court in accordance with state law. Whatever cloak of unattackability Commission approval may give to the CBOE's interpretation of Article Fifth(b), that approval can do nothing to insulate the CBOE from an attack on its corporate authority to file the rule interpretation in bad faith. That is what the CBOT's allegation of CBOE's breach of fiduciary duty is about, and that is why Commission approval of the Proposed Rule change (on whatever basis) will not end the Delaware Action or the underlying controversy between the CBOT and the CBOE over the proper interpretation of Article Fifth(b).

B. The Proposed Rule Change is Not Consistent with the Requirements of the Act

As an alternative to suspending consideration of the Proposed Rule Change pending resolution of the CBOT's challenge to the CBOE's corporate authority, the Commission should act immediately to institute proceedings to disapprove the Proposed Rule Change. Under Section 19(b) of the Act, the Commission must disapprove a Proposed Rule Change if it does not find that the rule change is "consistent with the requirements of [the] Act...." We do not believe that the Commission can make that finding because (1) the CBOE has provided no rational basis for concluding that the Proposed Rule Change is consistent with the requirements of the Act, and (2) the Proposed Rule Change imposes burdens on competition not necessary or appropriate in furtherance of the purposes of the Act. We discuss these two points in turn.

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[14] Meyer Letter.

[15] CBOE counsel's interpretation of the reach and effect of cases such as Buckley v. Chicago Board Options Exchange, Inc., 440 N.E.2d 914 (Ill. App. Ct. 1982), and Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d. 1119, 1131-32 (9th Cir. 2005) is far too sweeping. But the proper forum for the resolution of our legal disagreements is a court of law with authority to render a binding decision.

1. The Proposed Rule Change Is Not a "Reasonable" Interpretation of Article Fifth(b)

Rule 19b-4 under the Act provides that an SRO's interpretation of an existing rule is not deemed to be a "proposed rule change" if the "change" is "reasonably and fairly implied by that rule." The CBOE has filed its proposed interpretation of Article Fifth(b) as a proposed rule change. Accordingly, it must be assumed that this interpretation is not reasonably and fairly implied by Article Fifth(b). But if the CBOE's interpretation is not reasonably and fairly implied by the provision it seeks to interpret, what basis is there for finding that it is "consistent with the requirements of the Act"? Despite a lengthy discussion of the history of the controversy over Article Fifth(b) and the impending merger between the CBOT and the CME, the CBOE makes only one argument in support of the Proposed Rule Change. [16] This argument proceeds as follows:

(a) Upon the Merger, the so-called 2001 Agreement between the CBOT and the CBOE no longer will be effective, [17]

(b) upon the ineffectiveness of the 2001 Agreement, a condition in the so-called 1992 Agreement will not be satisfied, [18] and,

(c) therefore, another provision in the 1992 Agreement would be triggered, providing that "the exercise right under [Article Fifth(b)] will no longer be available as a means of acquiring membership in CBOE." [19]

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[16] Filing at 5474-5475.

[17] Section 3(a) of the 2001 Agreement provided that "full" CBOT members, as specifically defined, would continue to have all rights under Article Fifth(b). Agreement between CBOT and CBOE (Aug. 7, 2001) (on file with CBOT and CBOE).

[18] Section 3(d) of the 1992 Agreement sets forth three conditions applicable upon the CBOT's merger or consolidation with another entity, including that the survivor is an exchange which provides or maintains a market in other financial instruments, CBOT Members are granted membership in the survivor, and the survivor allows former CBOT Members to have full trading rights in all products then traded on the CBOT. Agreement between CBOT and CBOE (Sept. 1, 1992((on file with CBOT and CBOE)) (hereafter "1992 Agreement").

[19] Section 3(d) of the 1992 Agreement purports to provide what is to occur following a merger or consolidation that does not meet the three conditions in the 1992 Agreement. Id.

This argument, given that it is the CBOE's sole argument in support of the Proposed Rule Change, is peculiar in a number of respects. First, the key provision in the 1992 Agreement on which the CBOE places such weight – namely that "Article Fifth(b) shall not apply to any other merger" – is not part of the CBOE's rules, has never been filed with the Commission, and has never been found by the Commission to be consistent with the requirements of the Act.[20] In other words, the CBOE is seeking "to interpret" Article Fifth(b) based on its unilateral interpretation of a provision of a bilateral contract with the CBOT in the face of the CBOT's disagreement with the CBOE's interpretation of that bilateral contract. It would not be unfair to characterize the CBOE's argument in this respect as bootstrapping from a bootstrapping.

Second, Article Fifth(b) is clearly subject to differing interpretations. This is hardly surprising. Article Fifth(b) is best thought of as a "constitutional" provision – a broad, general statement of fundamental policy – that requires and is expected to receive new interpretations as new circumstances and conditions arise. Indeed, over the 25 years that Article Fifth(b) has been part of the CBOE's Certificate of Incorporation, that is what has happened. But no interpretation of Article Fifth(b) has ever been approved by the Commission that had not been previously agreed to by the CBOT – as the other party to the contract embodied in Article Fifth(b). With the filing of the Proposed Rule Change, the CBOE is arguing now that it can interpret Article Fifth(b) unilaterally and in a manner contrary to the views of the other party to the Article Fifth(b) contract. This assertion of a unilateral prerogative to interpret Article Fifth(b) in contravention of the CBOT's views is highly suspect. The assertion (1) breaks with past practice in the interpretation of Article Fifth(b), (2) ignores the fact that Article Fifth(b) as a contract needs to be interpreted in accordance with state contract law, [21] and (3) flouts the status of Article Fifth(b) as a broad general policy intended to be interpreted based on the original objectives of the CBOT and the CBOE in the light of changed circumstances. For the CBOE now to assert that it can disregard the CBOT's reasonable alternative interpretation, reject the opportunity to resolve its disagreement with the CBOT in a neutral judicial forum, and proceed

[20] The Commission specifically "did not approve the 1992 Agreement itself." Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and amendment No. 1 Thereto Relating to an Interpretation of Paragraph (B) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3.16(B) File No. SR-CBOE-2004-16, Exchange Act Release No. 34-51252, 84 S.E.C. Docket 3235 (February 25, 2005).

[21] As the Commission has stated, "if the CBOE has failed to comply with its own Certificate of Incorporation, which is a rule of the exchange, the Commission believes that this may not only violate state corporation law, but it would also be inconsistent with the Exchange Act, and thus, the Commission could not approve the proposed rule change under Section 19." Id.

unilaterally to seek the Commission's imprimatur of "federal preemption" in an effort to foreclose an appropriate resolution of this matter, does not constitute what we understand to be the promotion of "just and equitable principles of trade."

Third, as we pointed out above, the economic harm to CBOT Members from the CBOE's proposed interpretation of Article Fifth(b) would be stunning. While there may be differing views as to the precise size of this harm, even using the most conservative estimate, the value of the loss to CBOT Members (including both those who have already elected to become CBOE members and those who may yet elect to become CBOE members) is well into the hundreds of millions of dollars. Of course, contracts are often interpreted in ways that cause significant harm to one party or another and, in itself, such harm does not necessarily mean that the interpretation is flawed. But in presenting its argument in support of the Proposed Rule Change, the CBOE never once mentions economic harm. This is peculiar, not just because a principal motivation of the CBOT in agreeing to Article Fifth(b) was to retain for its members their valuable interests in the CBOE,[22] but also because the 1992 Agreement explicitly permitted the CBOT Members to exercise their rights, without otherwise becoming CBOE members, for the special purpose of participating in CBOE offers, distributions or redemptions.[23] In other words, given that economic gain or opportunity for CBOT Members was a principal motivation in the drafting of Article Fifth(b), it would appear only reasonable for the CBOE to explain how its interpretation, which eliminates all economic opportunity for CBOT Members, is consistent with the intention of the parties underlying this provision and hence the requirements of the Act.[24]

Fourth, in arguing in support of the Proposed Rule Change, the CBOE does not discuss, except in the most perfunctory way, the key provisions of the Act with which this rule change must be found to be "consistent." For example, there is no discussion of the Proposed Rule Change's adverse impact on "the mechanism of a free and open market," its "unfair discrimination" between CBOE Members who have become such through "exercise" and those who have become such through the purchase of a seat, and its failure to promote just and equitable principles of trade. For an SRO that is expected to demonstrate to the Commission why that Proposed Rule Change is

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[22] Article Fifth(b) explicitly recognizes the capital expended by the CBOT in the establishment of the CBOE, acknowledges the CBOT's desire to retain ownership in the enterprise it founded, and recognizes the parties' desire that CBOT Members would be on an equal membership footing with those persons who purchase seats on the CBOE.

[23] 1992 Agreement ¶3(e).

[24] See Footnote 22.

consistent with the provisions of the Act, the CBOE appears to have done a very poor job.

The CBOE's argument in support of the Proposed Rule Change comes down to this: bootstrapping on a unilateral interpretation of a bilateral agreement without the agreement of the other party, ignoring past practices, disregarding economic realities, and failing to explain how the adverse consequences of this interpretation are consistent with key provisions of the Act. The CBOE's justification of the Proposed Rule Change, quite simply, is not reasonable. Based on the materials now before it, the Commission should institute a proceeding to disapprove the Proposed Rule Change.

2. The Proposed Rule Change Imposes a Burden on Competition Not Necessary or Appropriate in Furtherance of the Purposes of the Act.

In its justification of the Proposed Rule Change, the only statement the CBOE makes concerning the competitive impact of the proposal is that it "does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act." The CBOE is either oblivious to, or feigning ignorance of, the obvious adverse competitive implications of this rule interpretation. We have already discussed the enormous economic loss to the CBOT Members from the Proposed Rule Change, but it should be particularly noted here that the CBOT Members' loss will be matched by a windfall enrichment of the other CBOE members – hardly an insignificant anticompetitive effect. Yet the most obvious anticompetitive consequence of the Proposed Rule Change would be to radically reduce member access to the CBOE.

The Proposed Rule Change would cause an immediate reduction in the current size of the CBOE membership by approximately 25% and a reduction in the future potential size of the CBOE membership by approximately 60%.[25] Among the competitive issues subject to Commission oversight under Section 19(b) to the Act, it is hard to think of any that are more important than exchange access, in general, and member access, in particular. And it is hard to think of a more egregious limitation on member access than that being proposed by the CBOE. Under anyone's conception of an anticompetitive barrier to access, the CBOE's Proposed Rule Change is shocking in

[25] According to the CBOE's S-4 Registration Statement, supra, only 930 persons will be members of the CBOE upon the effectiveness of the Proposed Rule Change, the demutualization, and a potential future public offering. 1402 CBOT Members (including 288 persons who have already elected CBOE membership) will be terminated as CBOE members.

its breadth and consequences. On its face, this barrier appears to be an obvious burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has made clear that "barriers to access to any securities market place burdens on competition which can only be justified where there is an indication that there are countervailing policy considerations under the Act."[26] The CBOE has not presented any countervailing policy considerations to its proposed absolute barrier to CBOT Members continuing to enjoy member access to the CBOE. Unless the CBOE presents such countervailing considerations, and interested persons have an opportunity to comment, the Commission should institute proceedings to disapprove the Proposed Rule Change as imposing a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

But the CBOE has a much more difficult hurdle to overcome than merely justifying the burden on competition that will result from its expulsion of all CBOT Members. Section 6(c)(4) of the Act expressly provides that an exchange "shall not have the authority to decrease the number of memberships in such exchange. . . below such number in effect on May 1, 1975...." On May 1, 1975, the number of CBOE members included all CBOT Members who might subsequently choose to become CBOE members. Where did the CBOE obtain the authority to eliminate from its membership all of these CBOT Members and thereby, to reduce the number of its members below what it was on May 1, 1975? We submit that the CBOE has no such authority and that the Commission should disapprove the Proposed Rule Change on this ground alone.

C. Conclusion

As we have attempted to make clear, the CBOE's Proposed Rule Change is not a normal SRO filing. Its economic and regulatory consequences are enormous. Its challenge to the processes of state law contract resolution is brazen. And its lack of reasoned justification for its anticompetitive effects is startling. For the reasons provided above, we urge the Commission either to postpone consideration of the Proposed Rule Change until the Delaware Court has determined whether the filing has proper corporate authorization or promptly to institute proceedings to disapprove the Proposed Rule Change.

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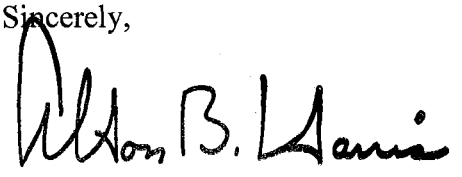
[26] Order and Statement of Reasons Disapproving Proposed Rule Changes by the NYSE, Inc., File No. SR-NYSE-76-7, File No. SR-NYSE-76-8, Exchange Act Release 24-12737, 10 S.E.C. Docket 272 (August 25, 1976).

[27] Section 6(b)(8).

We would be pleased to address any further questions the Commission may have as to the views of our client on this important topic.

Sincerely,



Alton B. Harris
ABH:jtj

cc: Honorable Christopher Cox, Chairman
Honorable Paul S. Atkins, Commissioner
Honorable Roel C. Campos, Commissioner
Honorable Annette L. Nazareth, Commissioner
Honorable Kathleen L. Casey, Commissioner
Erik R. Sirri, Director Division of Market Regulation
Elizabeth King
Katherine England
Richard Holley III
Johnna Dumler
David Kelly