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August 20, 2007

Erik R. Sirri
Elizabeth K. King
Division of Market Regulation
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Proposed Rule Change: File No. SR-CBOE-2006-106

Dear Mr. Sirri and Ms. King:

I deliver this letter in connection with the proposed rule change submitted to the Securities and Exchange Commission (the "Commission") by the Chicago Board Options Exchange, Inc., a Delaware membership corporation ("CBOE"), on December 12, 2006, and amended on January 16, 2007, and June 28, 2007. The proposed rule change involves an interpretation of paragraph (b) of Article Fifth ("Article Fifth(b)") of CBOE's Certificate of Incorporation (the "Certificate") regarding the continued right of Full Members of the Board of Trade of the City of Chicago, Inc., a Delaware corporation ("CBOT"), to become members of CBOE in light of the recent merger (the "Merger") between Chicago Mercantile Exchange Holdings Inc. and CBOT Holdings, Inc., CBOT's parent corporation.

I understand that Article Fifth(b) has been previously interpreted in accordance with agreements of CBOE and CBOT dated September 1, 1992, August 7, 2001 (as amended by letter agreements dated October 7, 2004, and February 14, 2005), and December 17, 2003 (collectively, the "Agreements"). The interpretations of Article Fifth(b) set forth in the Agreements were approved by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934, as amended, in Release Nos. 34-32430, 34-517333, and 34-51252. Additionally, I understand that CBOE has previously interpreted Article Fifth(b) and that the Commission approved such interpretation in Release No. 34-46719. In each of these instances, at the time of the final approval of the proposed rule submissions, there were no disputed state law issues between the CBOE and the CBOT. Here, of course, such disputed issues still exist and are pending in the Delaware Court of Chancery. See *CBOT Holdings, Inc. v. Chicago Board Options Exchange, Inc.*, C.A. No. 2369-VCN (Del. Ch. August 3, 2007).

Erik R. Sirri
Elizabeth K. King
August 20, 2007
Page 2

With respect to the proposed rule change (SR-CBOE-2006-106), I understand that the interpretation of Article Fifth(b) was approved by CBOE's board of directors (the "CBOE Board"). I submit this letter because the CBOE Board's interpretation of Article Fifth(b) in connection with the proposed rule change implicated a number of principles of Delaware law that should be brought to the Commission's attention. These principles were not discussed in the letters submitted on behalf of CBOE to the Commission in support of the proposed rule change. More specifically, the letter submitted to the Commission on behalf of CBOE by Richards, Layton & Finger on January 16, 2007 (the "Richards Letter")¹ stated that "when questions arise as to the application of Article Fifth(b) in circumstances not directly addressed by that Article, 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." The CBOE Board's action does not meet any of these three prongs, and the Richards Letter does not address them or opine on whether the Board acted properly in light of the standard. Furthermore, the Richards Letter failed to explain the fiduciary duties that the CBOE Board owed to its members or potential members in connection with any such interpretation or the level of review that applies to such an interpretation.

This letter briefly explains certain important concepts of Delaware law and their application to the proposed rule change. First, the CBOE Board owes fiduciary duties to *all* members of CBOE, including the Full Members of CBOT who have exercised their right to become members of CBOE (the "Exerciser Members"), and may owe fiduciary duties to the Full Members of CBOT who hold the right ("Exercise Rights") to become Exerciser Members. These fiduciary duties include the duty to act in good faith, consistent with the terms of Article Fifth(b), and not for any inequitable purpose. Second, when examining whether directors have met their fiduciary duties under Delaware law, directors will not be entitled to the protection of the business judgment rule if a majority of directors have a personal financial interest in the decision. In such circumstances, the directors bear the burden of demonstrating the entire fairness of their decision.

Here, because a majority of the CBOE Board has a material, financial interest in the decision to interpret Article Fifth(b), the CBOE Board bears the burden, under Delaware law, of demonstrating the fairness of its decision.

¹ Richards, Layton & Finger submitted a second letter to the Commission on June 28, 2007, in response to the Commission's request for an opinion that the change to Article Fifth(b) was not an amendment but an interpretation. This letter, like the January 16 Richards Letter, acknowledged that the CBOE Board's interpretation of Article Fifth(b) must be made "in good faith, consistent with the terms of Article Fifth(b) and not for inequitable purposes." Furthermore, the June 28 letter conceded that in "the event of a legal challenge to an interpretation, the reviewing authority would interpret Article Fifth(b) and would not be bound by the interpretation of the [CBOE] Board."

Fiduciary Duties to Exerciser Members and Holders of Exercise Rights. As noted above, the CBOE Board owes fiduciary duties to the Exerciser Members, and arguably owes fiduciary duties to the holders of Exercise Rights. The Delaware Court of Chancery, in a recent decision in the litigation between CBOT and CBOE, addressed the fiduciary issues raised by the proposed rule change:

In addition, if the CBOE Board owed fiduciary duties to the Exerciser Members (and arguably others), those duties may well protect the interests of these CBOT members because those decisions which caused the claimed harm to them were made by the CBOE Board while, under any interpretation of the various documents, at least many of the CBOT members were Exerciser Members of the CBOE. In sum, it is not immediately and conclusively obvious why a regulatory act voluntarily (and not necessarily) taken by the CBOE Board can be isolated from the reach of fiduciary duty law, especially when the consequences (great benefits to the Seat Members and great detriment to the CBOT Full Members) were so apparent at the time when the CBOE Board decided to act.²

The fiduciary duties owed by the CBOE Board to the holders of Exercise Rights and the Exerciser Members include, by CBOE's own admission, the duty to act in good faith and in a manner that is consistent with the terms of Article Fifth(b), and not to act for any inequitable purpose. The CBOE Board failed to satisfy these fiduciary duties in determining to extinguish the rights of the Exerciser Members and all of the holders of Exercise Rights.

Entire Fairness Standard Applies Where A Majority Of The Directors Have An Interest In The Decision. In determining whether a board of directors has satisfied its fiduciary duties under Delaware law, a board is typically entitled to the presumption of the business judgment rule. If, however, a majority of the directors are not independent or have an interest in the transaction, the directors bear the burden of proving the entire fairness of the transaction or decision. *See, e.g., Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). Under Delaware law, a director is interested in a decision if the director will experience some benefit that is not shared by *all* of the stockholders or members. *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002).

A Majority Of The CBOE Directors Have A Material Interest In The Interpretation Of Article Fifth(b). A majority of the directors serving on the CBOE Board and interpreting Article Fifth(b) are either regular members of CBOE (who stand to benefit

² *CBOT Holdings, Inc. v. Chicago Board Options Exchange, Inc.*, C.A. No. 2369-VCN, slip op. at 30 n.48 (Del. Ch. August 3, 2007).

financially from the proposed rule change) or are affiliated with, or beholden to, such regular members. More specifically, 11 of the 23 members of the CBOE Board are CBOE regular members or are affiliated with or employed by regular members, such that they have a significant financial interest in eliminating the rights of the Exerciser Members and those holding Exercise Rights. In addition, CBOE's chairman and CEO is beholden to the regular members because his continued employment with CBOE rests in such members' hands. Thus, 12 of CBOE's 23 Board members are not independent with respect to the decision on how to treat Exerciser Members and holders of Exercise Rights in connection with the Merger.

The CBOE Board recognized that these conflicting personal interests prevented it from making a disinterested decision regarding the treatment of the holders of Exercise Rights in the CBOE demutualization. Because of that recognition and in an effort to satisfy its fiduciary duties, the CBOE appointed a special committee of independent directors to act in place of the CBOE Board in connection with the demutualization of CBOE. The same fiduciary duties that required the formation of the special committee of disinterested directors in the demutualization context should have compelled the formation of such a committee in these circumstances, where the CBOE Board has determined to extinguish the rights of the Exerciser Members and the Exercise Rights through regulatory action. Simply put, a majority of the CBOE directors stood to gain financially from a decision to extinguish those rights (or were beholden to such persons), and, thus, were not in a position to exercise business judgment on the treatment of all Exerciser Members and the holders of Exercise Rights.

The CBOE Board did not appoint a special committee to interpret Article Fifth(b), nor did it seek independent financial and legal advice for purposes of making its decision. Accordingly, in determining whether the CBOE Board met its fiduciary duties with respect to its proposed interpretation of Article Fifth(b), the CBOE Board must demonstrate that its decision with respect to Article Fifth(b) is entirely fair to all of the members of CBOE, including the Exerciser Members, under Delaware law.

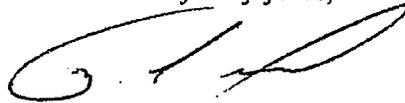
As noted above, Delaware law is clear that the board bears the burden of demonstrating the fairness of its decision in circumstances where the board makes a determination based on its own self-interest. Delaware law is also clear that this fairness requirement applies in circumstances where the Board's decision favors certain groups of stockholders or members with whom the particular directors' interests are aligned. *See, e.g., Oliver v. Boston University*, 2006 Del. Ch. LEXIS 75, at *119 (Del. Ch. Apr. 14, 2006) (holding that allocation of merger proceeds between various stakeholders was unfair and finding that "[m]ore disturbing is that, although representatives of all of the priority stakeholders were involved to some degree in the negotiations, no representative negotiated on behalf of the minority common stockholders"); *In re Tele-Communications, Inc. S'holders Litig.*, 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005) (stating that "because a clear and significant benefit of nearly \$300 million accrued" to board members because of their holdings of Series B common stock "at the expense of another class of shareholders to whom was owed a fiduciary duty," the entire fairness test applies); *In re FLS Holdings, Inc. S'holders Litig.*, C.A. No. 12623, 1993 Del.

Erik R. Sirri
Elizabeth K. King
August 20, 2007
Page 5

Ch. LEXIS 57 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or directors who were affiliates of the company's controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock). Accordingly, the CBOE Board must demonstrate to the Delaware court the fairness of its interpretation of Article Fifth(b) in connection with the proposed rule change in light of the direct financial interest of a majority of the directors serving on the CBOE Board.

This letter is solely for the benefit of CBOT in connection with the matters addressed herein and may not be relied upon for any purpose or by any other person or entity, other than the Commission, without my prior written consent. In the event that you have any questions with respect to this letter, please do not hesitate to contact me at (302) 351-9228.

Very truly yours,

A handwritten signature in black ink, appearing to read 'F. H. Alexander', with a large, stylized flourish on the left side.

Frederick H. Alexander