

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Petition of: )

MARSHALL SPIEGEL )  
\_\_\_\_\_) )

File No. SR-CBOE-2004-16

**MOTION OF PETITIONER MARSHALL SPIEGEL FOR RECONSIDERATION OF  
THE COMMISSION'S FEBRUARY 25, 2005 ORDER**

Pursuant to Commission Rules 154 and 401, Petitioner Marshall Spiegel respectfully moves for Reconsideration of the Commission's February 25, 2005 Order in this proceeding.

The reasons for the Motion are set forth in the attached supporting Brief.

Respectfully submitted,

  
\_\_\_\_\_

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Dated: March 7, 2005

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**BRIEF IN SUPPORT OF MOTION MARSHALL SPIEGEL FOR  
RECONSIDERATION OF THE COMMISSION'S FEBRUARY 25, 2005 ORDER**

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**BRIEF IN SUPPORT OF MOTION OF MARSHALL SPIEGEL FOR  
RECONSIDERATION OF THE COMMISSION'S FEBRUARY 25, 2005 ORDER**

Pursuant to Commission Rules of Practice 154 and 470, Petitioner Marshall Spiegel respectfully files this Brief in Support of his Motion for Reconsideration of the Commission's Order dated February 25, 2005 (Release No. 34-51252) ("Order") in this proceeding.

**I. SUMMARY**

Petitioner respectfully moves for reconsideration on grounds that the Order should be set aside based on manifest errors of law and fact. Petitioner understands that, pursuant to settled Commission precedent, upon the filing of this Motion, the Order is not deemed to be a final order of the Commission and its effectiveness is stayed, until, at a minimum, the Commission determines the merits of this Motion.<sup>1</sup>

1. This is a case of first impression and it does not present easy questions. The heart of the points that follow is that the Commission's lengthy Order does not even deign to address – and appears oblivious to – the material conflict of interest of the Board of Directors of the Chicago Board Options Exchange ("CBOE") in attempting to "interpret" the Certificate of Incorporation, when, as here, such interpretation has the effect of materially altering the

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<sup>1</sup> *In the Matter of the Application of Reuben D. Peters, et al.*, Admin. Proc. File No. 3-11277, 1934 Act Release No. 51237 at note 8 (February 22, 2005).

respective, relative and competing rights of the several classes of CBOE equity interest holders.<sup>2</sup> Under Delaware law and the CBOE's Certificate of Incorporation, such material changes to equity holder rights constitute amendments to the Certificate, that may be adopted only pursuant to a duly authorized equity holder vote. Delaware law does not empower boards of directors to act unilaterally to change equity holder rights. And, in any event, the CBOE Board, which owes fiduciary duties of honesty, loyalty and good faith to all equity holders, is conflicted with respect to the interpretation it has made and therefore should be precluded under both Delaware and the federal securities laws from attempting to so act unilaterally rather than through the amendment process.

The contention of the Commission ,Order (at pp. 8-9), the CBOE, and its outside counsel that a board of directors may "interpret" a certificate of incorporation is not dispositive of the issues here. Where an "interpretation" changes equity holder rights, it also is an amendment and is nugatory until the change in rights is approved by the equity holders themselves through a vote in compliance with the law and the Certificate of Incorporation.

Here, the Commission's Order accepts in substance Petitioner's position that the Chicago Board of Trade's ("CBOT") changes to the exercise rights alter the respective, relative rights of the CBOE equity holders in a fashion that requires a determination of how those changes will be treated under the CBOE Certificate of Incorporation: "The Commission agrees that it is

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<sup>2</sup> Consistent with the principles set forth in Commission orders in other cases that motions for reconsideration should address only manifest errors of law and fact or new evidence that might compel the Commission to grant reconsideration, this Brief will not restate all of Petitioner's arguments made before, but Petitioner preserves all of them in the event of later judicial review. Petitioner hereby expressly reserves all objections, challenges, points and bases on which the Order should be set aside pursuant to Section 25 of the Securities Exchange Act of 1934, as amended, and the Administrative Procedure Act, in the event he seeks judicial review of the Commission's final action.

circumstances external to this proposed rule change that present the question about what it means to be a 'member of the CBOT' under Article Fifth(b)." (Order at pp. 9-10.) The Order, however, manifestly errs in concluding that the CBOE Board has independent, unilateral, and final authority to determine the answer to that question. Delaware law regarding amendments to certificates of incorporation does not permit it, and, given the conflict extant here, the fiduciary obligations of the Board under Delaware and federal law preclude the Board from doing so as well.

2. Petitioner also respectfully suggests that the CBOT's recent formal actions to demutualize have the capacity to render the proposed rule change moot.<sup>3</sup> The proposed rule change has relevance only if the CBOT is structured as a membership organization. Petitioner raises for the Commission's consideration whether in these circumstances the better course for both the CBOE and the Commission is to hold final determination of the validity of the proposed rule change in abeyance until it can be known whether the rule change is needed, following the CBOT members' vote on whether to demutualize.

## **II. ARGUMENT**

The novelty and complexity of the corporate governance issues here are the product of the dynamics of the uniquely symbiotic relationship between the CBOE and CBOT arising from the exercise right for CBOE memberships granted to CBOT members in CBOE's Certificate of Incorporation. The CBOT created that exercise right for its members as the incorporator of the CBOE in 1972.

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<sup>3</sup> It apparently is not in the record of this proceeding considered by the Commission that the CBOT has recently formally commenced a vote of its membership to authorize demutualization of the CBOT, such that it will no longer be a membership organization but, rather, a stock corporation. (See Order, p. 14 at note 46.)

Due to the exercise right, any action by the CBOT that purports to change its membership structure or the ownership or control of the CBOE exercise rights necessarily calls for a determination of whether and to what extent such changes will be recognized and honored under the CBOE Certificate of Incorporation. What process should be followed to make such determinations is the legal issue presented by this proceeding. The CBOE Board contends, and the Commission's Order finds, that the Board may make that determination unilaterally by purporting to "interpret" the Certificate. Petitioner contends the issue involves a change of equity interest holder rights and as such must be presented to the membership for a vote in accordance with the voting procedures set forth in Article Fifth(b) of the CBOE's Certificate of Incorporation ("Article Fifth(b)"), and, if such a vote does not resolve the issue, it may be presented to a court for declaratory relief.

Emblematic of the difficulty of the issues is the fact that the Commission's Order does not even attempt to state in its own words for the parties' and the public's understanding a rationale for its central holding that the Board's proposed rule change is an "interpretation" of the CBOE Certificate of Incorporation within the Board's power to make and not a substantive "amendment" of it, which is outside the Board's authority to make. Rather, in a fashion perhaps unprecedented for Commission orders, the Commission seeks to justify its fundamental holding by only incorporating by reference without exposition (1) arguments set forth at page 6 of the Statement of CBOE in Support of Approval of Rule Delegated Authority, October 26, 2004 ("CBOE's Statement in Support of Approval") and (2) a bare conclusion in the letter of the



CBOE's outside counsel that CBOE submitted to the Commission in support of its request for approval of the proposed rule.<sup>4</sup>

The self-serving arguments in those sources do not support the Commission's ruling. They fail to cite any relevant Delaware statute and case law that should control the disposition of the issues. They also fail to address the CBOE Board's conflict of interest in attempting through the guise of an "interpretation" to bless CBOT action, when that "interpretation" materially alters the relative and competing rights of the different classes of CBOE equity interest holders.

**A. The Order Contravenes Delaware Statutes**

The CBOE is a Delaware nonstock corporation governed by Delaware law. The Order correctly finds at page 8 that, if the proposed CBOE rule change does not comply with state law governing the Board's authority, it would be inconsistent with the Securities Exchange Act of 1934, as amended ("Exchange Act") and, thus, could not be approved under Section 19 of that Act. However, the Commission's ruling that the CBOE Board's "interpretation" of the term "member of the [CBOT]" in Article Fifth(b) of the CBOE Certificate of Incorporation was a valid exercise of the Board's power manifestly contravenes Delaware statutes that limit the authority of corporate boards of directors unilaterally to change fundamental terms of certificates of incorporation and equity holder rights.

Section 242 of the Delaware General Corporation Law expressly addresses requirements relating to the amendments of certificates of incorporation of nonstock corporations. Section 242(b)(3) sets forth the permissible procedures for amending the certificate of incorporation of a nonstock corporation. Those procedures require that the governing body of a nonstock

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<sup>4</sup> Order at pp. 8-9 and notes 27 and 28. The letter of CBOE's outside counsel is the letter from Michael D. Allen, Richard, Layton & Finger, to Joanne Moffic-Silver, Esq., CBOE General Counsel and Corporate Secretary, CBOE (June 29, 2004).

corporation “shall adopt a resolution setting forth the amendment proposed and declaring its advisability.” Thereafter, such proposed amendment “shall be submitted to the members or to any specified class of members of such corporation without capital stock in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation [Section 242(a)].” Further, Section 242(b)(3) provides that the determination of the members of a nonstock corporation must be in accordance with any “provision requiring any amendment thereto to be approved by a specified number or percentage of the members.” With respect to Article Fifth(b), the Commission’s Order correctly recognizes at page 3 that the CBOE’s Certificate of Incorporation requires that no amendment may be made without the approval of at least 80% of those CBOT members who have “exercised” their right to be CBOE members and 80% of all other CBOE members.

Section 242(b)(3) does not contain specific examples of corporate actions that constitute amendments, but clear guidance in that regard can be gleaned from Section 242(a), which identifies actions that constitute amendments to a stock corporation’s certificate of incorporation. Section 242(a)(1) expressly identifies such actions as including, among others, “reclassification, subdivision, combination or cancellation of stock or rights of stockholders.” Section 242(a)(3) similarly makes clear that amendments include any actions that change “preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights” of shareholders. These statutory examples set forth clear principles that corporate actions that reclassify, subdivide, limit, restrict, cancel or otherwise materially alter rights of equity holders of nonstock corporations are amendments to the certificates of incorporation and must comply with the procedures and standards set forth in Section 242(b)(3).

The CBOE Certificate of Incorporation recognizes two different classes of equity interest holders: (1) CBOT members who have exercised their right to be CBOE members (“hereinafter referred to as “CBOE exercise members”), and (2) all other CBOE members, *i.e.*, those who have purchased CBOE seats (hereinafter “CBOE treasury seat holders”). The Certificate of Incorporation also recognizes a third class of interested parties who, although not equity holders, have certain contractual exercise rights: CBOT members who own exercise rights but who have not in fact exercised them to become CBOE exercise members (hereinafter “CBOT exercise right holders”).

The Commission’s Order correctly recognizes that external events at the CBOT can potentially change the relative rights and interests of the CBOE equity interest holders (Order at pp. 9-10). In this connection, when the CBOT restructures the terms of its membership and the exercise right component of the membership, that can, as in this instance, change the respective and relative separate rights and interests of the classes of CBOE equity interest holders. Any restructuring of the rights and interests of any one of the classes of CBOE equity interest holders or of the CBOT exercise holders necessarily materially affects the interests of the other class or interested party and, importantly, the value of the rights and interests of each class. In important ways, those changes are in the nature of a “zero sum” game – for example, enhancing the rights of CBOT exercise right holders and CBOE exercise holders can correspondingly diminish the rights of CBOE treasury seat holders by, among other things, diluting their voting power and the economic value of their seats.

Previously, exercise rights were inalienable from full CBOT membership. Here, the CBOT unilaterally has sought to change the exercise rights into separate securities that may be transferred to and owned, rented or controlled by persons who are not full members of the

CBOT. Whether this action will affect the legal and economic rights that pertain to the CBOT exercise rights will depend on how the CBOT's changes will be treated under the CBOE's Article Fifth(b). Honoring the CBOT changes will, at a minimum, diminish the rights and interests of CBOE treasury seat holders, because it necessarily recognizes a new (and fourth) class of persons who may own and control exercise rights, and thereby repose in them a measure of economic influence over the CBOE at odds with CBOE treasury seat holders. However, a different result would obtain, if, for example, it were determined and declared under Article Fifth(b) that an exercise right would be extinguished if ever transferred apart from the sale or rental of a full CBOT membership.

Here, the Board's "interpretation" of the term "member of the [CBOT]" in Article Fifth(b) effectively alters the rights of the various and distinct classes of CBOE equity interest holders, by recognizing new rights that enhance the rights of CBOT exercise right holders and CBOE exercise members at the expense of CBOE treasury seat holders. As such, regardless of what label is applied to the Board's action, it functionally and substantively is an amendment to the Certificate of Incorporation within the meaning of Section 242.

Delaware Section 242 and the Certificate of Incorporation require that the CBOE Board permit the CBOE exercise members and all other CBOE members to vote on whether the alteration of exercise rights will be recognized under Article Fifth(b) and, if so, what the terms of the alteration will be. Those determinations cannot, consistent with Delaware law and the CBOE's Certificate of Incorporation, be determined by the CBOE Board alone.

**B. Fiduciary Principles of Delaware and Federal Law Preclude CBOE Board Interpretations that Materially Change the Relative and Competing Rights of the CBOT Exercise Right Holders and CBOE Exercise Members at the Expense of CBOE Treasury Seat Holders**

Where there are conflicting interests between or among the classes of CBOE equity interest holders with respect to an alteration of rights, the CBOE Board is conflicted from attempting to unilaterally referee and determine the competing and conflicting reclassification of rights and interests among the different classes of CBOE equity interest holders, because its determination will necessarily favor one class of equity interest holder over another.<sup>5</sup> Under Delaware law, the Board should step back and follow procedures governing amendments. Underscoring this point is the fact that the Certificate of Incorporation's requirement of an 80% vote is there in part to protect minority equity holders from reclassifications that would prejudice their equity rights.

Here, the CBOE Board's conflict is aggravated by the fact that its "interpretation" is designed to enhance the rights of CBOT exercise right holders, who have only contractual relations with the CBOT, at the expense of CBOE treasury seat holders to whom the CBOE Board owes fiduciary duties.

Moreover, the Order at page 8 manifestly errs in adopting the CBOE's factual contention at page 6 of its Statement in Support of Approval that the CBOE Board's "interpretation" does not amend Article Fifth(b) because that purported interpretation "makes no ... attempt to change the nature of CBOT 'member's rights, but rather seeks only to give sharper definition to what it means to be a CBOT 'member'" (emphasis in original). This contention is at best an illusory

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<sup>5</sup> See also, e.g., *Hartford Acc. & Ind. Co. v. Dickey Clay Mfg. Co.*, 21 A.2d 178 (Del. Ch. Ct. 1941), *Aff. 'd*, 24 A.2d 315 (1942) (right of controlling stockholders to amend certificate of incorporation must be exercised with fair and impartial regard for rights and interest of all stockholders of every class; any other action would be a breach of fiduciary duty of majority stockholders toward minority and would constitute fraud).

distinction of what the CBOE's purported interpretation is and has no basis in fact. When the CBOT changes the nature of a CBOT member's exercise rights in a way that changes the relative rights and interests among classes of CBOE equity interest holders, any CBOE Board action undertaken to validate those changes by redefining (or even, to use the CBOE's euphemism, "sharpening") what it means to "be" a CBOT member is itself a material alteration of CBOE equity holders' rights.<sup>6</sup>

The CBOE's argument at page 6 of its Statement in Support of Approval that the Board's interpretation is not an amendment because it does not change the rights of "CBOT 'members'" also misses the point – the issue is whether it effectively changes CBOE members' rights and interests.

**C. The Commission's Application of Principles of Contract Interpretation to Uphold the CBOE Board's Interpretation is Manifestly Erroneous**

The Commission's Order also manifestly errs in its conclusion incorporated from the CBOE's Statement in Support of Approval that principles of contract interpretation support the Commission's ruling. A certificate of incorporation is deemed to be a contract between the state and the corporation and among its shareholders and members, and certificates thus typically are interpreted using the rules for contract interpretation. *In re New York Trap Rock Corp.*, 141 B.R. 815, 822 (U.S. Bankr. S.D.N.Y. 1992) (and Delaware Authorities cited therein).

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<sup>6</sup> The 1992 interpretation is distinguishable from the 2003 interpretation. Unlike the 2003 interpretation, the 1992 interpretation did not place the CBOE Board in a conflicted role of reclassifying CBOE equity interest holder rights in a way that advantages any particular class of holder at the expense of another. The 1992 Agreement simply recognized that the Article Fifth(b) could not fairly be interpreted to permit expansion of the term "member of the [CBOT]" to include new and lesser forms of membership created by the CBOT, such interpretation did not disadvantage then current full CBOT members who held unexercised rights, CBOE exercise members, or all other CBOE members (CBOE treasury seat holders).

Here, commonly applied principles of contract interpretation support the conclusions that “member of the [CBOT]” in Article Fifth(b) does not recognize a right to separate a CBOT exercise right from a CBOT full membership and that for a CBOT to do so would extinguish that member’s right to be within the term “member of the [CBOT]” as that term appears in Article Fifth(b). In this connection, a court interpreting Article Fifth(b) pursuant to principles of contract interpretation would perforce have to consider the meaning of the term as understood at the time the Article was created and any other well-settled understanding of the term thereafter. As stated in Section 223 of the Restatement of Contracts (Second):

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

It is undisputed that when exercise rights were created under the Certificate of Incorporation, they were integral rights appurtenant to a full membership of the CBOT, that could not be transferred separately from the sale or leasing of the full membership itself. That fact has remained in place at all times since adoption of the Certificate of Incorporation. Further, the parties reiterated that understanding of the exercise right in the CBOT and CBOE Agreement entered into in 1992. The Commission’s Order errs to the extent at pages 11-12 it suggests that prior to the 2003 Agreement, exercise rights could be transferred separately from a transfer or leasing of the full membership itself.

Based on that longstanding meaning of “member of the [CBOT],” a court would find the CBOE Board interpretation to be not only conflicted, but a material and unsupported departure from the settled meaning of that term in Article Fifth(b). The Commission’s legal and factual

finding that the CBOE Board may disregard the longstanding interpretation of “member of the [CBOT]” and may unilaterally adopt a new interpretation in opposition to it is thus manifestly erroneous.

**D. The Commission’s Reliance on the January 29, 2004 Letter of CBOE’s Outside Counsel is Manifestly Erroneous**

The January 29, 2004 letter of CBOE’s outside counsel did not cite any authority for the legal difference between an interpretation and an amendment and did not provide any rationale as to why the CBOE’s purported “interpretation” in the 2003 Agreement should be not be considered an amendment of the Certificate of Incorporation.<sup>7</sup> At most, the letter seems to rely on the spurious notion that, as long as the CBOE Board chose to label its determination as an “interpretation” rather than as an “amendment” and did not invoke the procedures for adopting amendments to the Certificate of Incorporation, the determination should be considered to be an interpretation and not an amendment. Such a contention unreasonably elevates form over substance by mechanically looking to labels rather than the substance of Board action. Nor did the letter address the circumstances when an “interpretation” must also be deemed in substance an amendment and what consequences flow from that. The January 29, 2004 letter also did not consider the issue of the CBOE Board’s conflict of interest in making and enforcing the interpretation at issue here.

We note that where, as here, a law firm is retained to provide an opinion as to the legal character of a particular act, but fails to provide any relevant statutory or case authority or

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<sup>7</sup> The letter cited but one relevant Delaware court decision that opined only that a board of directors had authority to interpret certain terms in a corporate charter (*Stroud v. Grace*, 606 A.2d 75 (Del. 1992)), but that case did not address an interpretation that had the effect of altering shareholder rights. Accordingly, it did not reach the issue before the Commission.



credible rationale for its conclusion, it might be reasonably inferred that no such authority exists and the opinion should not be entitled to any weight.

**E. The Order's Finding that Not Approving the CBOE Board's Interpretation Would Paralyze the Exchange is Without Basis in Fact**

The Commission's Order finding (incorporated from page 6 of the CBOE's Statement in Support of Approval) that failing to approve the CBOE Board's "interpretation" would "paralyze" the Exchange is without basis in fact. First, if the Board's resolution did not receive the 80% approval, the Board could act sensibly in the face of the information received through the voting process to propose a different resolution or amendment that might be more likely to receive the 80% approval. Further, if that alternative was not pursued or did not succeed, the CBOE could invoke rights under Section 111 of the Delaware General Corporation Law to place the issue before a Delaware Court of Chancery to interpret, apply, enforce or determine the Certificate of Incorporation. That remedy provides an appropriate means of resolution that avoids the Board acting unilaterally when there is a conflict between the interests of one class of equity interest holders over another with respect to alteration of rights.

The Certificate of Incorporation and the law thus provide effective remedies that avoid a conflicted CBOE Board arrogating to itself the power to alter the competing rights among classes of CBOE equity interest holders, to the advantage of some holders and to the detriment of others.

### III. CONCLUSION

For all the foregoing reasons, the Commission should reconsider its February 25, 2005 Order, set it aside, and either (1) commence proceedings to determine whether to disapprove the CBOE's proposed rule change, and/or (2) hold further proceedings in abeyance pending the CBOT's membership vote on demutualization, which could render further proceedings on this proposed rule change moot.

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Dated: March 7, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of March, 2005, I caused to be served a true and correct copy of the Motion of Petitioner Marshall Spiegel for reconsideration of the Commission's February 25, 2005 Order by telefax and U.S. Mail, postage prepaid, on the following:

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