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CBOE
CHICAGO BOARD OPTIONS EXCHANGE

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May 6, 2005

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: File No. SR-CBOE-2005-19

Dear Mr. Katz:

On behalf of the Chicago Board Options Exchange ("CBOE"), I am writing in response to the two comment letters sent to you in response to the referenced proposed rule change filing (the "Filing"). One letter dated April 27, 2005, was signed by Thomas Bond and four other members of CBOE (the "Bond Letter"), and the other dated April 28, 2005, was signed by Marshall Spiegel, also a member of CBOE, and one other CBOE member (the "Spiegel Letter"). The Filing consists of an interpretation by CBOE of paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation (sometimes referred to as "Article Fifth(b)"), which describes the right of members of the Chicago Board of Trade ("CBOT") to become members of CBOE without having to acquire a separate CBOE membership. This right is referred to as the "Exercise Right." The interpretation that is the subject of the Filing concerns how the Exercise Right is to apply following a corporate restructuring of the CBOT that was a pending proposal of CBOT at the time the Filing was made and has since been implemented effective April 22, 2005. Both comment letters object to CBOE's interpretation of Article Fifth(b) on the ground that it supposedly constitutes an amendment of that Article, which requires the separate approval of 80% of regular members and 80% of members pursuant to the Exercise Right. The comment letters also challenge the procedures followed by CBOE in responding to the CBOT's restructuring.

The objections to the Filing made in the comment letters are based on a complete mischaracterization of the restructuring of CBOT and CBOE's response to that restructuring. Many of the same kinds of objections were made by some of these same commenters in response to CBOE's prior interpretations of Article Fifth(b), and they have been repeatedly rejected by the Commission. For these reasons and the other reasons explained below, we believe both comment letters are without foundation and should be rejected by the Commission.

CBOT continues to exist as a Delaware membership corporation following the restructuring of the CBOT. Central to the arguments made in the Bond Letter is its

statement that, "Because the CBOT has demutualized, no persons still exist who come within the terms of the exercise right i.e. the former membership organization known as the CBOT no longer exists and no members of it continue to exist." [Bond Letter, p. 4.] Similarly, the Spiegel Letter states that the interpretation that is the subject of the Filing "substantively changes the meaning of the key terminology [of Article Fifth(b)] – 'member of the CBOT' – ... from its long accepted, applied and plain meaning identifying a person who is a member of a particular membership organization (a full member of the former, now extinguished CBOT) to an entirely different meaning describing a person who is a particular stockholder of particular classes of stock in entirely new and different organizations." [Spiegel Letter, p. 5]

These characterizations of the CBOT restructuring are simply not correct. Prior to its recent restructuring, the CBOT existed as a Delaware non-stock, membership corporation owned by its members, who had trading rights on the futures exchange operated by the CBOT in accordance with the type of membership they held. Although there was a time when the CBOT proposed a restructuring that would have resulted in the elimination of the corporate entity that was the CBOT and would in its place have established a new stock corporation, that does not describe the restructuring that went into effect last month. In that restructuring, as contemplated in the interpretation of the Exercise Right that is the subject of the Filing, the CBOT maintains its existence as a Delaware non-stock, membership corporation and continues to be owned by its members, who have the same trading rights on the futures exchange operated by CBOT as they had prior to the restructuring.[1] The only structural difference effectuated by the restructuring is that while the members of CBOT owned it directly prior to the restructuring, now they own CBOT indirectly through their ownership of the common stock of a new holding company, CBOT Holdings, Inc ("CBOT Holdings"). CBOT Holdings owns a new "Class A" membership in the CBOT that represents 100% of its equity ownership and gives CBOT Holdings certain rights in the governance of the CBOT. [*See* Proxy Statement and Prospectus dated February 14, 2005, of the Board of Trade of the City of Chicago included in CBOT Holdings, Inc. Registration Statement No. 333-72184, at pp. 56-61]

Thus, contrary to the assertions of the commenters, after its restructuring the CBOT continues to exist as a Delaware nonstock corporation that is owned by its members, although that ownership is now indirect. CBOT full memberships are designated as Class B, Series B-1 memberships, although they continue to be referred to as "full" members of the CBOT under its rules.[2] These memberships continue to represent the trading rights of full members of the CBOT as they existed prior to the restructuring.

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[1] The Bond Letter quotes from the Filing in an effort to show that following the restructuring, "CBOT would no longer have a membership corporation." [Bond Letter, p. 2] This reflects a misreading of the Filing, which made it clear that the language quoted in the Bond Letter described an earlier proposed restructuring of CBOT and not the one that was actually implemented.

[2] See CBOT Rule 211.00 as amended and restated in the restructuring.

Given that little has actually changed in respect of the status of the members of the CBOT as a result of its restructuring, it is arguable that a formal interpretation of Article Fifth(b) was not needed to support the conclusion that, following the restructuring, the Exercise Right remained available to persons who continued to hold all of the interests into which their CBOT full memberships were divided in the restructuring.[3] Nevertheless, CBOE filed the interpretation embodied in its 2001 Agreement with the CBOT as a rule change under Section 19(b) of the Exchange Act in order to foreclose any argument that the approach to the Exercise Right embodied in its 2001 Agreement with the CBOT was not a proper interpretation of Article Fifth(b), and because Section 19(b) of the Exchange Act and Rule 19b-4 thereunder treat interpretations of an exchange's organizational documents as rule changes subject to being filed with and approved by the Commission. As part of the interpretation of Article Fifth(b), the Filing also addresses various administrative aspects of how the exercise right would apply following the restructuring of CBOT as well as how the Exercise Right should operate following the expansion of electronic trading on CBOT and CBOE.

CBOT full members are not required to own 100% of the equity of the CBOT in order to be entitled to the Exercise Right. The Bond Letter also argues that following the restructuring, CBOT full members will own less than 100% of the equity of CBOT Holdings and thus will indirectly own less than 100% of the equity of CBOT, and that this alone should preclude them from being entitled to the Exercise Right. Without dealing with the hypothetical situation envisioned in the Bond Letter whereby the equity ownership of CBOT full members in that exchange could be reduced to zero and without taking the position that a person could qualify as a full member of CBOT eligible to become a member of CBOE pursuant to the Exercise Right at a time when he holds no equity in the CBOT, suffice it to say that there is nothing in Article Fifth(b) or in prior interpretations of that Article that require CBOT full members to own 100% of the equity of CBOT in order to qualify for the Exercise Right. Instead, it is clear under the interpretations embodied in the 1992 Agreement and in the 2001 Agreement that whatever amount of equity in CBOT (or in a holding company that owns CBOT) is issued to each CBOT full member in a restructuring of CBOT, that same amount of equity must continue to be held by an individual, together with all of the other interests distributed to CBOT full members in the restructuring in respect of their memberships, in order for that individual to be eligible to be a member of CBOE pursuant to the Exercise Right.[4]

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[3] One thing that did change in the restructuring is that, while formerly all of the rights of CBOT full members were bound up in the single interest that constituted a CBOT full membership, the restructuring divided these rights into Class B, Series B-1 memberships in CBOT, which represent the trading rights of full members, and shares of common stock of CBOT Holdings, Inc., which represent the ownership rights of full members. Both of these interests were issued to CBOT full members in the restructuring. This triggered a requirement under a prior interpretation of Article Fifth(b) that was embodied in CBOE's 1992 Agreement with CBOT and was previously approved by the Commission, to the effect that if the CBOT ever split or subdivided the rights represented by a full membership into two or more parts, all such parts had to be held by a person in order for that person to be deemed to be a full member of the CBOT entitled to become a member of CBOE pursuant to the Exercise Right. This requirement is reflected in the interpretation embodied in the 2001 Agreement.

[4] See note 3 above.

The Filing represents an interpretation of Article Fifth(b) of CBOE's Certificate of Incorporation and not an amendment of that Article. In addition to incorrectly describing the restructuring of CBOT, the comment letters err by characterizing CBOE's response to the restructuring as involving an amendment of Article Fifth(b) rather than an interpretation of that Article. That same mischaracterization of CBOE's interpretations of Article Fifth(b) has been made on several prior occasions by some of these same commenters. This distortion was employed most recently by those who commented on SR-CBOE-2004-16, which involved CBOE's proposed interpretation of Article Fifth(b) in response to the proposed issuance by CBOT of transferable "Exercise Right Privileges" representing the Exercise Right Component of CBOT Full Memberships.

The Commission has consistently rejected this argument. For example, in 1992 and again in 2003, when CBOE found it necessary to interpret Article Fifth(b) to address circumstances that were not contemplated in the terms of that Article (the introduction of seat leasing on CBOT in 1992, and the adoption of rules by CBOT authorizing the issuance of transferable Exercise Right Privileges in 2003), both of these prior interpretations were approved by the Commission as interpretations of Article Fifth(b) under Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. [5]

In Item 5 of the Filing, CBOE addressed the argument that the interpretation of Article Fifth(b) that is the subject of the Filing should be treated as an amendment of that Article as follows:

> "CBOE believes any allegation that the 2001 Agreement or the interpretation of Article Fifth(b) embodied therein reflects an amendment of Article Fifth(b), and not an interpretation of that Article, is entirely without merit.
>
> .... CBOE believes the proposed restructuring of CBOT ... raises unanticipated issues concerning who if anyone should be viewed as a Full Member of CBOT entitled to the Exercise Right following the restructuring. CBOE believes these issues can be resolved only by CBOE's interpreting how Article Fifth(b) will apply under these changed circumstance.... Neither this interpretation of Article Fifth(b) nor the

[5] The 1992 interpretation was approved in Exchange Act Release No. 32430 dated June 8, 1993, and the 2003 interpretation was approved in Exchange Act Release No. 51252 dated February 25, 2005. In approving the latter interpretation the Commission stated, "The Commission finds persuasive CBOE's analysis of the difference between "interpretations' and 'amendments', and the letter of [CBOE's Delaware] counsel that concludes that it is within the general authority of the CBOE's Board to interpret Article Fifth(b) and that the 'Board's interpretation of Article Fifth(b) contemplated by the [2003 Agreement] does not constitute an amendment to the Certificate and need not satisfy the voting requirements of Article Fifth(b) that would apply if the Article were being amended.' " Exchange Act Release No 51252 at p. 8. Also see Exchange Act Release No 51568 dated April 18, 2005, in which the Commission denied a motion to reconsider its Order approving that interpretation, at p. 6

proposed change to Rule 3.16 makes any changes to the text of Article Fifth(b) nor are they in any way inconsistent with that Article....

> If CBOE were not able to interpret Article Fifth(b) under unanticipated changed circumstances without satisfying the 80% class vote requirements that apply in the case of an amendment to that Article, CBOE would be placed on the horns of a dilemma. If an interpretation did not achieve the 80% approval of each class of voting members, the interpretation could not be enforced. However, CBOE would still need to know how the Exercise Right should apply under the changed circumstances. But under the view that any interpretation CBOE might adopt in such circumstances must be treated as an amendment to Article Fifth(b), CBOE could be paralyzed because conceivably no interpretation would receive the necessary vote. In other words, where CBOE has no choice but to interpret Article Fifth(b) in response to unanticipated changed circumstances and where its interpretation is entirely consistent with that Article, CBOE must be able to make such an interpretation without having to satisfy the requirements that would apply if Article Fifth(b) were being amended."

We find nothing in either comment letter that refutes this analysis.

The Bond Letter makes the additional argument that the provision of the 2001 Agreement that provides for arbitration of certain issues that may arise under that Agreement constitutes an amendment of Article Fifth(b). This argument cannot be sustained. CBOE's interpretation of Article Fifth(b) embodied in the 2001 Agreement is conditioned on CBOT's agreeing to maintain meaningful fee preferences and other incentives to promote the value of CBOT membership in respect of the trading of futures products on CBOT. This aspect of the interpretation is critical because otherwise most if not all CBOT full memberships would be used to acquire membership on CBOE via the Exercise Right (referred to in the 2001 Agreement as "mass migration"), and a CBOT full membership would become little more than a transferable Exercise Right. Since this would be inconsistent with the intent of Article Fifth(b), CBOE's interpretation of that Article was conditioned on CBOT's taking steps to assure that this result does not occur. The only question authorized for submission to arbitration under the 2001 Agreement is the factual question whether these fee preferences and incentives maintained by CBOT continue to be meaningful. The arbitrators have no authority to interpret Article Fifth(b) in any way, let alone to amend that Article, but only to make factual determinations in order to implement the interpretation of Article Fifth(b) that is the subject of the Filing.

The Bond Letter also claims that CBOT's restructuring itself somehow amounts to an amendment to Article Fifth(b).[6] The Commission rejected this same argument in its February 25, 2005 order that approved SR-CBOE-2004-16:

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[6] "... [T]he CBOE and the SEC recognize that the CBOT is changing its corporate structure. One can only conclude that this change is an amendment in wording and meaning to Article 5(b)." [Bond Letter, p. 2]

> "The Commission does not believe that changes CBOT makes to its memberships, such as CBOT's pending restructuring, could be considered an amendment to CBOE's Certificate of Incorporation. The CBOT and CBOE are separate corporate entities. The Commission does not believe that any changes that the CBOT makes to its corporate structure should, by themselves, be considered a change to the CBOE's Certificate of Incorporation." (Exchange Act Release No. 34-51252 at p. 14.)

Notwithstanding their position that an interpretation of Article Fifth(b) providing for the continuation of the Exercise Right after the restructuring of CBOT must be treated as an amendment of that Article, both comment letters seem to take the inconsistent position that an interpretation of Article Fifth(b) providing that the Exercise Right would be extinguished by the restructuring of CBOT would qualify as an interpretation and would not have to be treated as an amendment. In this respect, the Bond Letter points with approval to a proposed interpretation of Article Fifth(b) filed by CBOE as a rule change in 2000 and subsequently withdrawn (SR-CBOE-2000-44) that proposed the extinguishment of the Exercise Right in the event of the consummation of a restructuring of CBOT then being proposed which CBOE believed would have been inconsistent with Article Fifth(b). That interpretation was withdrawn and eventually replaced by the interpretation that is the subject of the Filing because, following negotiation between the CBOE and the CBOT, the CBOT substantially revised its proposed restructuring in ways that eliminated the perceived inconsistencies with Article Fifth(b).

The commenters cannot have it both ways. If it would be proper for CBOE to interpret Article Fifth(b) in a way that would result in the extinguishment of the Exercise Right upon the consummation of a proposed restructuring of CBOT under one set of circumstances, it is just as proper for CBOE to interpret Article Fifth(b) in a way that would permit the Exercise Right to remain in effect upon the consummation of a different restructuring of CBOT under a different set of circumstances, so long as in each case the interpretation is consistent with Article Fifth(b) and has been properly authorized by the Board of Directors in accordance with Delaware law. The point is that when CBOT restructures in a way not contemplated in the language of Article Fifth(b), CBOE cannot avoid interpreting that Article to determine how it will apply following the restructuring. The decision to treat this action as an interpretation rather than as an amendment cannot depend upon whether the result is the extinguishment or the continuation of the Exercise Right.

CBOE's Board of Directors acted in accordance with Delaware law and was not subject to any disqualifying conflicts of interest when it authorized the interpretation of Article Fifth(b) in response to the restructuring of the CBOT. Both comment letters allege that CBOE's management and its Board of Directors are conflicted in acting to interpret Article Fifth(b) in response to the restructuring of CBOT. Nothing is presented in support of this allegation, and nothing could be. There is no evidence that any member of management or of the CBOE Board had any self-interest in any particular interpretation of Article Fifth(b) in response to the restructuring of the

CBOT or was otherwise faced with any conflict of interest. The fact that the CBOE Board may be considering whether changes to CBOE's own corporate structure may be in the best interest of CBOE and its members does not in any way support the suggestion in the Bond Letter that CBOE management and its Board were conflicted when they considered how to interpret Article Fifth(b) in response to the restructuring of CBOT.

The Spiegel Letter makes the further allegation that the CBOE Board is conflicted because there may be conflicting interests among CBOE's members. This allegation is without foundation and specious. There may always be different and even conflicting interests among the members of CBOE in respect of the many issues that face the Exchange from time to time. This is hardly a reason to prevent CBOE's Board of Directors, which is made up of 50% independent directors with the rest representing a cross section of the membership of CBOE, from considering and attempting to resolve those issues that come within the scope of the Board's authority.

The Commission itself has already recognized that it is entirely consistent with the fiduciary duties of the CBOE Board for the Board to interpret Article Fifth(b) in the context of CBOT's restructuring. It made this point expressly in its order denying a motion made by one of the commenters to reconsider its previous order granting approval of an earlier interpretation of Article Fifth(b):

> "[W]e do not believe that fiduciary duties preclude the CBOE Board from interpreting its Certificate of Incorporation in an attempt to address potential interpretive ambiguities that the CBOE and CBOT have identified in advance of the CBOT's restructuring." [Exchange Act Release No. 51568 dated April 18, 2005 at p.7.]

The attempt of the Bond Letter to undermine the legal conclusions expressed in the opinion of CBOE's Delaware counsel is fatuous. The Bond Letter offers no support for its claim that the authority of the Board of Directors as the governing body of the Exchange has somehow been delegated as a general matter to the membership. Although the Board can delegate certain of its powers to committees of the Board within the limits permitted under Delaware law, no such delegation was made in the case of the Board's power to interpret the Certificate of Incorporation. In any event, notwithstanding the remarkable suggestion of the Bond Letter to the contrary, the membership of CBOE is not a committee of the Board.

It is not relevant to the question of whether the Filing is entitled to be approved that CBOE was compelled to provisionally interpret Article Fifth(b) when the CBOT consummated its restructuring before the Filing could be approved. The Spiegel Letter makes the additional comment that the interpretation of Article Fifth(b) proposed in the Filing should not be approved because CBOE implemented that interpretation on a provisional basis when the CBOT consummated its restructuring prior to the Commission's approval of the Filing. Of course, for the same reason CBOE cannot escape interpreting Article Fifth(b) whenever it is confronted by changed circumstances that were not anticipated in the language of that Article, CBOE had no

choice but to interpret Article Fifth(b) provisionally once the restructuring of CBOT became effective. CBOE could not control the timing of the restructuring of CBOT. And, in deference to the request of the staff of the Commission, CBOE held off filing this interpretation of Article Fifth(b) until after the full Commission had acted on a prior interpretation of that Article. This resulted in the CBOT restructuring becoming effective before CBOE's interpretation was approved. Yet once the restructuring of CBOT effective, CBOE could not escape having to determine the restructuring's effect on the Exercise Right. CBOE's response was to interpret Article Fifth(b) on an interim, provisional basis in a manner consistent with the interpretation it had filed with the Commission and consistent with the 2001 Agreement. Of course, if CBOE had interpreted Article Fifth(b) differently at that time, that interpretation also would not yet have been approved by the Commission. CBOE discussed its intended course of conduct with the staff of the Commission prior to the effectiveness of the CBOT restructuring and observed that any provisional interpretation would be completely reversible, so that if the interpretation of Article Fifth(b) reflected in the Filing were somehow not approved, CBOE would adopt and file a different interpretation and would treat the Exercise Right in accordance with that different interpretation.

In any event, the fact that CBOE had to interpret Article Fifth(b) provisionally prior to the approval of the Filing is irrelevant to whether the Filing should be approved. So long as the interpretation that is the subject of the Filing has been properly authorized by CBOE's Board of Directors under Delaware law, is consistent with the rules of CBOE, including Article Fifth(b) itself, and is consistent with the requirements of the Exchange Act, it is entitled to be approved by the Commission.

The CBOE's offering to purchase Exercise Right Privileges has no bearing on whether the Filing should be approved. Similarly, the matter of CBOE's offer to purchase from CBOT full members the Exercise Right Privileges issuable upon request under the rules of the CBOT is not relevant to whether the interpretation of Article Fifth(b) should be approved. CBOT's rules governing the issuance of Exercise Right Privileges were not materially affected by the restructuring and neither were the terms of CBOE's offer to purchase these privileges. The only exception is that, following the restructuring of CBOT under the interpretation that is the subject of the Filing, in order to be a member of CBOE pursuant to the Exercise Right the holder of an Exercise Right Privilege must also hold all of the other parts into which a full CBOT membership was converted in the restructuring (namely, a Class B, Series B-1 membership in CBOT and 27,338 shares of Class A common stock of CBOT Holdings). The purchase offer itself is based on an interpretation of Article Fifth(b) that was filed with the Commission under Section 19(b) of the Exchange Act as File No. SR-CBOE-2004-16, and was approved in Exchange Act Release No 51252 dated February 25, 2005, as confirmed in Exchange Act Release No 51568 dated April 18, 2005. The integration of that earlier interpretation of Article Fifth(b) with the pending interpretation that deals with the restructuring of CBOT (mostly involving changes in terminology after the restructuring) is the subject of the letter amendment to the 2001 Agreement dated October 7, 2004, that is part of the Filing. CBOE commenced its purchase offer shortly after SR-CBOE-2004-16 was approved, and

expects the Filing to be approved prior to the time it accepts and pays for Exercise Right Privileges that may be tendered in the offer.

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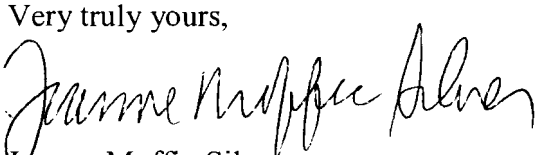
Finally, the Commission should deny the Bond Letter's request for additional time to enable the members who signed that letter to give further study to the Commission's April 18, 2005 order. That order rejected a motion to reconsider the Commission's approval of a different CBOE filing involving a different interpretation of Article Fifth(b). That order, which was largely procedural and focused on the unique facts of that filing, has little relevance to what these commenters may want to say in respect of the Filing. In any event, that order was publicly available for almost two weeks before the end of the comment period on this filing, and commenters had ample time to consider whether it might have any bearing on their comments on the Filing.

I believe the foregoing responds in full to the comments made in the two comment letters. If the Commission or its staff have any questions or would like any additional information, they should feel free to contact me.

Very truly yours,



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