

MEMORANDUM

TO: CBOE-2007-77 Files

FROM: Richard Holley
Division of Market Regulation

DATE: July 25, 2007

SUBJECT: Meeting with CBOT counsels

On July 25, 2007, at 10:00am, Elizabeth King, Richard Holley, and Johnna Dumler attended an in-person meeting with counsel for CBOT including: Kathryn McGrath (Mayer Brown), Charles Horn (Mayer Brown), Peter Carey, and Jerrold Salzman (Skadden Arps). During the meeting, the counsels discussed the CBOE's (b)(3)(A) immediately effective proposed rule change (SR-CBOE-2007-77).

Mr. Salzman expressed concern with CBOE's filing and stated his belief that the filing was an improper use of the rule filing process by CBOE, and he noted that it has an effect on the matter pending before the Delaware court as well as CBOE-2006-106. Further, counsel argued that CBOE Rule 3.19 is not a proper rule under which to impose this new requirement, since it deals with temporary situations leading to the purchase of a full membership. Ms. McGrath and Mr. Horn argued that the filing is an abuse of the SEC process, assumes approval of 2006-106, and disrupts the status quo, and yet CBOE characterized 2007-77 as a "housekeeping" type rule proposal.

Mr. Salzman noted that CBOT had unsuccessfully tried to get CBOE to agree to a stipulation that the CBOE's lack of action (i.e., not filing 2007-77) would not constitute an admission regarding the effect of the CME/CBOT merger on the Exercise Right.

Mr. Carey noted that there are 221 exerciser members in addition to the 931 members of CBOE. Of those 221, 147 are lessees who lease their CBOE rights from a CBOT member who has exercised, and 74 are owners/operators who have exercised and use the seat themselves.

Mr. Salzman added that 2007-77 has serious consequences, as it effectively declared that all exercise rights are no longer valid. This, in turn, invalidates the CBOT exerciser member leases. As proposed, CBOE would get the "lease" money, though it would be held in escrow. Mr. Salzman questioned who would get the money back if the Commission disapproved 2006-106 (the lessee or the lease holder). Further, Mr. Salzman noted that all available CBOE seats would need to be leased first (current rate of \$9,000) before new permits are available. This may increase value of CBOE leases (there are approximately 14 unleased CBOE seats). So, 2007-77 has an effect on the CBOT lease market and the CBOT member market, and may affect the CBOE lease market.

Counsels noted that they filed a TRO with the Delaware court, and there is a 7/31 hearing on the TRO. CBOE is claiming to the court that it has to enforce its effective rule, and that the SEC has jurisdiction.

Mr. Carey added that 2007-77 creates a new class of membership that doesn't currently exist in CBOE rules.

Counsels expressed their preference that CBOE withdraw the filing and agree to hold things in "status quo" until the Delaware court or the Commission act on the pending matters. Counsels noted that damages will be difficult to assess in this instance. Counsels suggested the SEC write the court to say that CBOE is free to withdraw its filing.