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June 3, 2005

Mr. Thomas A. Bond
1114 Wrightwood Avenue
Chicago, IL 60614-1315

Re: Proposed Rule Changes: File Nos. SR-CBOE-2005-19; SR-CBOE-2005-20

Dear Mr. Bond:

We have acted as special Delaware counsel to you solely for the purpose of delivering this letter, which is being delivered to you at your request. We submit this letter in connection with two proposed rule changes – File Nos. SR-CBOE-2005-19 and SR-CBOE-2005-20 – recently submitted to the Securities and Exchange Commission (the "Commission") by the Chicago Board Options Exchange, Incorporated (the "CBOE"), a Delaware membership corporation, each consisting of an interpretation of paragraph (b) of Article Fifth ("Article Fifth(b)") of the CBOE's Certificate of Incorporation (the "Certificate") pertaining to the right of certain members of the Board of Trade of the City of Chicago, Inc. (the "CBOT") to become members of the CBOE in accordance with the provisions of Article Fifth(b).[1]

You have asked us whether it is within the power and authority of the Board of Directors of the CBOE (the "Board") to interpret Article Fifth(b) when questions arise as to its application and whether the determinations of the Board in approving the interpretations of Article Fifth(b) contemplated by the proposed rule change constitute amendments to the Certificate necessitating the approval by a vote of the CBOE's membership. We note that the questions raised herein ordinarily would be determined only through a litigated proceeding. The outcome of any such court proceeding depends in large part upon the facts and circumstances as they would be developed in such proceeding.

[1]It is my understanding that, on May 24, 2005, the Commission granted approval to the proposed rule change, as amended, contained in File No. SR-CBOE-2005-19.

For purposes of this letter, it is my understanding that, on April 22, 2005, the CBOT and its direct, wholly-owned subsidiary, CBOT Holdings, Inc. ("CBOT Holdings"), and CBOT Holdings' direct, wholly-owned subsidiary, CBOT Merger Sub, Inc. ("Merger Sub") were restructured. Prior to the restructuring, the CBOT was a Delaware nonstock, not-for-profit corporation, and the CBOT's equity was held entirely by the CBOT's members. At the time of the restructuring, the CBOT and Merger Sub were merged, and, as a result of the merger, the CBOT, the surviving entity, was a Delaware nonstock, for-profit corporation and was a subsidiary of CBOT Holdings. Moreover, at the time of the restructuring, the CBOT's membership structure was altered and two classes of memberships were created – a Class A membership held entirely by CBOT Holdings and a series of five separate Class B memberships held by the former members of the CBOT. Specifically, at the time of the restructuring, the equity held by the CBOT's "full" members prior to the restructuring was converted into shares of stock of CBOT Holdings and Class B, Series B-1 memberships of the CBOT.

It also is my understanding that in an agreement entered into between the CBOE and the CBOT, dated September 1, 1992 (the "September 1992 Agreement"), filed as proposed rule change in SR-CBOE-1992-42, and approved by the Commission in Exchange Act Release No. 32430, dated June 8, 1993, the CBOE and the CBOT agreed upon a definition of the term "member of the [CBOT]" as applied in Article Fifth(b). Specifically, the term "member of the [CBOT]" is not defined in the Certificate. It is my understanding that the meaning of the term was understood by reference to the CBOT's certificate of incorporation as constituted in 1973 (at the time that the Certificate was adopted) and at the time that the CBOT only had one class of membership and 1402 members. It also is my understanding that, following the CBOT's creation of additional classes of members, a definition of "member of the [CBOT]" in Article Fifth(b) was agreed upon by the CBOE and the CBOT in the September 1992 Agreement, as reflected in CBOE Rule 3.16(b). CBOE Rule 3.16(b) provides that "for the purpose of entitlement to membership on the [CBOE] in accordance with [Article Fifth(b)] the term 'member of the [CBOT],' as used in Article Fifth(b), is interpreted to mean an individual who is either an 'Eligible CBOT Full Member' or an 'Eligible CBOT Full Member Delegate' as those terms are defined in the [September 1992 Agreement]." The September 1992 Agreement defines "Eligible CBOT Full Member" as an individual who at the time is the holder of one of 1,402 existing CBOT full memberships ("CBOT Full Memberships"), and who is in possession of all trading and privileges of such CBOT Full Memberships, and defines "Eligible CBOT Full Member Delegate" as an individual to whom a CBOT Full Membership is "delegated" (i.e., leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership.

Finally, it is my understanding that, prior to the restructuring, Article Fifth(b) provided that a "member of the [CBOT]" had the right to become a member of the CBOE. This right, however, was subject to certain limitations. Specifically, in an agreement entered into between the CBOE and

the CBOT, dated September 1, 1992 (the "September 1992 Agreement"), filed as proposed rule change in SR-CBOE-1992-42, and approved by the Commission in Exchange Act Release No. 32430, dated June 8, 1993, the CBOE and the CBOT agreed that the CBOE membership that is available to the CBOT's members pursuant to Article Fifth(b) should not be transferable separate and apart from the transfer of the CBOT membership, and, thus, that the CBOT's members would be prohibited from separately transferring the CBOE membership, or any of the trading rights and privileges appurtenant thereto, by sale, lease, gift, bequest or other transfer. Notwithstanding the September 1992 Agreement, as a result of the restructuring, the former CBOT "full" members (whose membership in the CBOT was converted into shares of stock of CBOT Holdings and Class B, Series B-1 memberships of the CBOT) were conferred with the new right to transfer to third parties the rights to the CBOE membership under Article Fifth(b), without transferring the shares of stock of CBOT Holdings or the Class B, Series B-1 memberships of the CBOT.

For purposes of this letter, our review of documents has been limited (except as otherwise stated herein) to the review of originals or copies furnished to us of the following documents:

a. The Certificate;

b. An agreement, dated August 7, 2001, between the CBOE and the CBOT, as modified by two letter agreements among the CBOE, the CBOT and CBOT Holdings, Inc., dated October 7, 2004, and February 14, 2005, respectively;

c. An agreement, dated October 7, 2004, between the CBOE and the CBOT;

d. The September 1992 Agreement;

e. An agreement, dated December 17, 2003, filed as a proposed rule change in SR-CBOE-2004-16, and approved by the Commission in Exchange Act Release No. 51252, dated February 25, 2005;

f. Exchange Act Release No. 34-49620 of the Commission, dated April 26, 2004, in connection with File No. SR-CBOE-2004-16, entitled "Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to an Interpretation of Paragraph (b) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3.16(b)";

g. Exchange Act Release No. 34-50028 of the Commission, dated July 15, 2004, in connection with File No. SR-CBOE-2004-16, entitled "Order 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)";

h. Exchange Act Release No. 34-51252 of the Commission, dated February 25, 2005, in connection with File No. SR-CBOE-2004-16, entitled "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)";

i. Exchange Act Release No. 34-51462 of the Commission, dated March 31, 2005, in connection with File No. SR-CBOE-2005-20, entitled "Notice of 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)";

j. Exchange Act Release No. 34-51463 of the Commission, dated March 31, 2005, in connection with File No. SR-CBOE-2005-19, entitled "Notice of 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)";

k. Exchange Act Release No. 34-51568 of the Commission, dated April 18, 2005, in connection with File No. SR-CBOE-2004-16, entitled "Order Denying Motion for Reconsideration of 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)";

l. Exchange Act Release No. 34-51733 of the Commission, dated May 24, 2005, in connection with File No. SR-CBOE-2005-19, entitled "Order Granting Approval to proposed Rule Change As Amended By Amendment Nos. 1, 2, and 3 Thereto Relating to an Interpretation of paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)" ("Release No. 34-51733");

m. Letter of Michael D. Allen of Richard, Layton & Finger, dated June 29, 2004, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, the CBOE;

n. Letter of Wendell Fenton of Richard, Layton & Finger, dated March 28, 2005, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, the CBOE (the "March 2005 Letter");

o. Letter of Thomas A. Bond, Norman Friedland, Gary P. Lahey, Anthony Arciero and Marshall Spiegel, dated April 27, 2005, to Jonathan G. Katz, Secretary, the Commission;

p. Letter of Marshall Spiegel and Donald Cleven, dated April 28, 2005, to Jonathan G. Katz, Secretary, the Commission;

q. Letter of Joanne Moffic-Silver, dated May 6, 2005, to Jonathan G. Katz, Secretary, the Commission;

r. Letter of Marshall Spiegel and Donald Cleven, dated May 20, 2005, to Jonathan G. Katz, Secretary, the Commission.

For purposes of this letter, we have not reviewed any documents other than the documents referenced in paragraphs (a) through (r) above. In particular, we have not reviewed and express no comment as to any other document that is referred to in, incorporated by reference into or attached (as an exhibit, schedule or otherwise) to any of the documents reviewed by us. This letter relates only to the documents specified herein, and not to any exhibit, schedule or other attachment to, or any other document referred to in or incorporated by reference into, any of such documents. We have assumed that there exists no provision in any document that we have not reviewed that bears upon or is inconsistent with or contrary to the subject matter of this letter. We have conducted no factual investigation of our own, and have relied solely upon the documents reviewed by us, the statements and information set forth in such documents and the additional matters recited or assumed in this letter, all of which we assume to be true, complete and accurate, and none of which we independently have investigated or verified.

Based upon and subject to the foregoing, and upon our examination of such questions of law and statutes as we have considered necessary or appropriate, and subject to the assumptions, qualifications, limitations and exceptions set forth herein, for the reasons set forth below, (a) the power and authority of the Board to interpret a provision of the Certificate is limited, (b) the interpretation of Article Fifth(b) by the Board must be based upon the unambiguous language contained in the Certificate, (c) if the language contained in the Certificate is ambiguous (i.e., in order to determine the meaning to be ascribed to such language documents outside the Certificate must be reviewed), then the interpretation of Article Fifth(b) by the Board must be fair and reasonable, and must support the franchise rights of the CBOE membership, (d) the meaning of the

language contained in Article Fifth(b) may be determined only by reference to documents outside the Certificate, and the interpretation of such ambiguous language by the Board is unfair and unreasonable, and would result in the disenfranchisement of the CBOE membership, and (e) the interpretation of Article Fifth(b) by the Board constitutes an amendment of the Certificate and approval of the CBOE members is required. Our conclusions are based upon the assumption that in any case in which this question is considered, the question will be competently briefed and argued. Our conclusions are reasoned and also presumes that any decision rendered will be based on existing legal precedents, including those discussed below.

Discussion

I. The Power And Authority Of A Board Of Directors To Interpret The Provisions Of A Certificate Of Incorporation Is Not Unlimited

Although a board of directors generally has the power and authority to interpret provisions of a corporation's certificate of incorporation, see 8 Del. C. § 141(a); see also Stroud v. Grace, 606 A.2d 75, 93 (Del. 1992), such power and authority is not unlimited. The interpretation must be based upon the unambiguous language of the provisions, and, if the meaning of the language of the provisions cannot be determined solely from the document itself, then the interpretation must be fair and reasonable,[2] and must support the franchise rights of the members. See infra pp. 8-10. To the extent that the interpretation is not based upon unambiguous language, or is not fair and reasonable, and does not support the members' franchise rights, then the "interpretation" of the board of directors would be considered an amendment of the certificate of incorporation and the procedural requirements of Section 242 of Delaware's General Corporation Law (the "DGCL") must be satisfied, see 8 Del. C. § 242(b)(3), which would include any voting requirements of the members as set forth the in the certificate of incorporation.[3]

[2]See Stroud, 606 A.2d at 93 ("The trial court was troubled that the meaning of 'substantial' could vary depending on how the board defined the term. The Vice Chancellor nonetheless found that the board had the authority to define the term as long as they exercised their discretion fairly.")

[3]In the March 2005 Letter, Richards, Layton & Finger stated that "it is within the general authority of the Board to interpret Article Fifth(b) in good faith when questions arise as to its application," and that "the determinations of the Board in approving the interpretations of the Certificate contemplated by the Agreements do not constitute amendments to the Certificate and thus do not need to be approved by a vote of the CBOE's membership." March 2005 Letter at 2. The March 2005 Letter also states that such conclusions are based upon Section 141(a) of the DGCL,

Specifically, a corporation's certificate of incorporation is regarded as a contract that operates on three different levels: (a) a contract between the state and the corporation, (b) a contract between the corporation and its stockholders, and (c) a contract between and among the stockholders. See Wylain, Inc. v. TRE Corp., 412 A.2d 338, 344 (Del. Ch. 1980). In light of the contractual nature of a certificate of incorporation, Delaware courts consistently have held that the rules used to interpret statutes, contracts and other written instruments generally are applicable when interpreting a certificate of incorporation. See Gentile v. Singlepoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001); Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 395 (Del. 1996); Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 342-43 (Del. 1983). Notwithstanding this general rule, Delaware courts have recognized that, when interpreting a certificate of incorporation, the language as written must be given respect – the same respect applicable to statutory construction – and extraneous aid to assist in the interpretation (generally permitted in contract construction) should be avoided:

> It is reasonable in interpreting the intent of an amendment to a corporate charter, to restrict the resort to evidence aliunde the document as an interpretative aid more in accordance with the principles of statutory construction than in accordance with principles applicable to the construction of ordinary contracts. In the interpretation of statutes the language as written is invested with more of sanctity and is subject to less of extraneous aid in its interpretation, than is the language of the typical and ordinary contract between individuals.

Holland v. National Auto. Fibres, Inc., 2 A.2d 124, 127 (Del. Ch. 1938); see also Fletcher Cyclopedia of the Law of Private Corporation ch. 43, § 3655 (2004) ("[i]n interpreting the intent of an amendment to a corporate charter, evidence outside the document is restricted to interpretative aid in accordance with the principles of statutory construction rather than in accordance with principles applicable to the construction of ordinary contracts"). Simply stated, an interpretation of a provision of a certificate of incorporation must be based upon the provision's unambiguous

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Article Eighth of the Certificate and the decision in Stroud, 606 A.2d at 92. Although the Board does have the power and authority to interpret provisions of the Certificate under Section 141(a), Article Eighth and the decision in Stroud, such power and authority is limited. The March 2005 Letter completely ignores these limitations and, because such limitations are relevant to the issues set forth in the March 2005 Letter and set forth herein, the conclusions set forth in the March 2005 Letter are fatally flawed. As set forth herein, based upon these limitations, the Board's interpretation of Article Fifth(b) should be deemed to be an amendment of the Certificate and a vote of the CBOE membership is required under Section 242(b)(3) of the DGCL and Article Fifth(b).

language. See In re Explorer Pipeline Co., 781 A.2d 705, 713 (Del. 2001) (quoting Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992)):

> [In certificate of incorporation construction] [t]he court first reviews the language of the contract to determine if the intent of the parties can be ascertained from the express words chosen by the parties or whether the terms of the contract are ambiguous. Unless the language is ambiguous, "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."

See also In re Gen. Motors (Hughes) S'holder Litig., 2005 WL 1089021, at *20 (Del. Ch.) ("[b]oth parties have urged the Court to look behind the contractual language for the meaning of this Article. This task is unnecessary as I conclude that Article Seventh, by its own unambiguous terms, is not in conflict with Delaware law"); Kirby v. Kirby, 1987 WL 14862, at *4 (Del. Ch.) ("[i]f the provisions in question are unambiguous, they must be applied as written, giving the language chosen its ordinary meaning"); Flerlage v. KDI Corp., 1986 WL 4278, at *4 (Del. Ch.) ("[t]he Certificate of Preferences is clear and unambiguous and parol evidence is therefore irrelevant").

Based upon the foregoing, the "starting point" of certificate of incorporation construction "is to determine whether a provision is ambiguous, i.e. whether it is reasonably subject to more than one interpretation." NBC Universal, Inc. v. Paxson Communications Corp., 2005 WL 1038997, at *5 (Del. Ch.). A provision of a certificate of incorporation "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning," City Investing Co. Liquidating Trust v. Cont'l Cas. Co., 624 A.2d 1191, 1198 (Del. 1993), "[n]or is it rendered ambiguous simply because the parties 'do not agree upon its proper construction.'" NBC Universal, 2005 WL 1038997, at * 5 (quoting Rhone-Poulenc, 616 A.2d at 1196). A provision of a certificate of incorporation is ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Rhone-Poulenc, 616 A.2d at 1196; see also Stroud, 606 A.2d at 93 (court determined that the word "substantial" was subject to different interpretations and had different meanings).

To determine whether a provision of a certificate of incorporation is ambiguous, Delaware courts have recognized that "[t]he words employed by contract (or certificate of incorporation) drafters" must be examined to ascertain the "apparent purposes of the drafters." Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc., 2001 WL 1117505, at *6 (Del. Ch.); see also Pasternak v. Glazer, 1996 WL 549960, at *3 (Del. Ch.) ("[i]n determining whether a charter provision is ambiguous, the intent of the stockholders in enacting the provision is instructive"); TCG Sec., Inc. v. Southern Union Co., 1990 WL 7525, at *10 (Del. Ch.) (the language of the certificate of incorporation "is consistent with the underlying purpose of Southern Union's certificate, which was

obviously designed to safeguard preferred stockholders from certain mergers or consolidations that might affect adversely the preferred stockholders"). The "true test," however, "is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Rhone-Poulenc, 616 A.2d at 1196. quoted in Kaiser, 681 A.2d at 395. Indeed, in the context of corporate securities, "[w]here . . . the ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights, the reasonable expectations of the purchaser of the securities must be given effect." Kaiser, 681 A.2d at 395.

In contrast, if the language contained in a certificate of incorporation in ambiguous, "then 'all objective extrinsic evidence is considered: the overt statements and acts of the parties, the business context, prior dealings between the parties, and other business customs and usage in the industry.'" Explorer Pipeline, 781 A.2d at 714 (quoting Bell Atlantic Meridian Sys. v. Octel Communications Corp., 1995 WL 707916, at *6 (Del. Ch.)). In reviewing such factors, however, certain rules of construction must be observed "in order to determine the meaning to be ascribed to the language used." Standard Power & Light Corp. v. Investment Assocs., Inc., 51 A.2d 572, 600 (Del. Ch. 1947). In the context of interpreting ambiguous language contained in a corporation's certificate of incorporation, these rules of construction include the rule that the "corporate enterprise should adhere to well-established democratic theories, which embody principles of fairness and reasonableness as opposed to principles which are unfair and unreasonable." Id.; see also Emerald Partners v. Berlin, 1988 WL 25269, at *6 (Del. Ch.), rev'd on other grounds, 552 A.2d 482 (Del. 1988) ("an interpretation that makes an agreement fair and reasonable is preferred to one which leads to harsh and unreasonable results"); Maxwell v. Aristar, 1976 WL 2448, at *4 (Del. Ch.):

> [I]n reviewing the instrument creating stock preferences, that where the language is contradictory or ambiguous, or where its meaning is doubtful, or such that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it rational and probable must be preferred to that which makes it unusual or unfair.

In fact, based upon such "theories," interpretations that impact adversely the stockholder franchise should be viewed with disfavor. See Centaur Partners, IV v. National Intergroup, Inc., 582 A.2d 923, 927 (Del. 1990) ("there exists in Delaware 'a general policy against disenfranchisement.' This policy is based upon the belief that '[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of the directorial power rests") (quoting Blasius Indus. v. Atlas Corp., 564 A.2d 651, 669 (Del. 1988)). Accordingly, based upon the foregoing, where the language contained in a certificate of incorporation in ambiguous, such language should be interpreted in a fair and

reasonable manner and should not be interpreted in a manner that would result in the disenfranchisement of stockholders or members.

II. The Language Of Article Fifth(b) Is Ambiguous Because The Certificate Does Not Define The Term "Member of the [CBOT]"

Article Fifth(b) of the Certificate provides:

> In recognition of the special contribution made to the organization and development of the Corporation by the members of the Board of Trade of the City of Chicago, a corporation organized and existing by Special Legislative Charter of the General Assembly of the State of Illinois, and for the further purpose of promoting the growth and liquidity of the Corporation, developing a broad financial base of dues-paying members, and assuring participation on a continuing basis of persons experienced in the trading and clearing of contracts for future purchase or delivery on a central marketplace, every present and future member of said Board of Trade who applies for membership in the Corporation and who otherwise qualifies shall, so long as he remains a member of the Board of Trade, be entitled to be a member of the Corporation notwithstanding any such limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the Corporation, its members or elsewhere. Members of the Corporation admitted pursuant to this paragraph (b) shall as a condition of membership in the Corporation, be subject to fees, dues, assessments and other like charges, and shall otherwise be vested with all rights and privileges and subject to all obligations of membership, as provided in the by-laws. No amendment may be made with respect to this paragraph (b) of Article FIFTH without the prior approval of not less than 80% of (i) the members of the Corporation admitted pursuant to this paragraph (b) and (ii) the members of the Corporation admitted other than pursuant to this paragraph (b), each such category of members voting as a separate class . . . .

The language of Article Fifth(b) reflects that "every present and future member of the [CBOT] who applies for membership in the" CBOE "and who otherwise qualifies shall, so long as he remains a member" of the CBOT, "be entitled to be a member of the" CBOE. The Certificate, however, does not provide a definition of the term "member of the [CBOT]," and the meaning of such term is not defined in the Certificate. This ambiguity is highlighted by the fact that the CBOE and the CBOT agreed upon a definition of the term "member of the [CBOT]" in the September 1992 Agreement. Accordingly, because the meaning of the language contained in Article Fifth(b) is determined only by reference to documents outside the Certificate, (a) the language is ambiguous,

(b) documents outside the Certificate may be examined to determine the meaning of such language, and (c) the interpretation of the language contained in Article Fifth(b) must be fair and reasonable, and must support the franchise rights of the members of the CBOE.

The September 1992 Agreement expressly provides that a "member of the [CBOT]," as such term is contained in Article Fifth(b), is an individual who is a holder of a CBOT Full Membership, or is an individual to whom a CBOT Full Membership has been delegated. Based upon the September 1992 Agreement, therefore, the meaning to be ascribed to the term "member of the [CBOT]" as contained in Article Fifth(b) is clear, and only "Eligible CBOT Full Members" and "Eligible CBOT Full Member Delegates" have the right to become members of the CBOE pursuant to Article Fifth(b). As a result of the reorganization, however, all CBOT Full Memberships were converted into different equity securities (which provided the former "Eligible CBOT Full Members" and the former "Eligible CBOT Full Member Delegates" with different legal status, different legal rights and different interests in the CBOT), and CBOT Full Memberships no longer existed.[4] Accordingly, the "interpretation" of Article Fifth(b) proposed by the CBOE and approved by the Commission, alters the meaning of "member of the [CBOT]" in Article Fifth(b) and the status and rights of the individuals who have the right to become members of the CBOE pursuant to Article Fifth(b).

In addition to altering the status of the individuals who have the right to become members of the CBOE pursuant to Article Fifth(b), the "interpretation" of Article Fifth(b) proposed by the CBOE and approved by the Commission also alters the transfer restrictions imposed upon such individuals. As set forth above, the September 1992 Agreement was entered into to clarify – and preserve – the restriction on the transfer rights of "Eligible CBOT Full Members" and "Eligible CBOT Full Member Delegates" pursuant to Article Fifth(b). Specifically, the September 1992 Agreement provides that "Eligible CBOT Full Members" and "Eligible CBOT Full Member Delegates" "shall not have the right to transfer (whether by sale, gift, bequest or otherwise) their CBOE regular memberships or any of the trading rights and privileges appurtenant thereto" separate and apart from the transfer of the CBOT "full" membership. September 1992 Agreement at § 3(a). The rule change proposed by the CBOE and approved by the Commission permits the CBOE memberships (and all of the trading rights and privileges appurtenant thereto) received by the CBOT "members" pursuant to Article Fifth(b) to be transferred to third parties separate from the transfer of the shares of stock of CBOT Holdings and the Class B, Series B-1 membership of the CBOT in

[4]The CBOE recognizes that the former "Eligible CBOT Full Members" and the former "Eligible CBOT Full Member Delegates" would have no rights pursuant to Article Fifth(b) after the restructuring by stating that it "believes" that a rule change – the definition of "member of the [CBOT] – is "necessary." See Release No. 34-51733 at 4.

direct violation of the September 1992 Agreement. Accordingly, the "interpretation" of Article Fifth(b) proposed by the CBOE and approved by the Commission, alters the rights and privileges of the CBOE members by eliminating a prohibition on transfer that existed in connection with the CBOE memberships that were available to the CBOT's members in accordance with Article Fifth(b).

III. Conclusion

The "interpretation" of Article Fifth(b) by the CBOE and the Commission is unfair and unreasonable, and does not support the franchise rights of the members of the CBOE, because such "interpretation" (a) alters the status of persons who may become members of the CBOE, (b) alters the rights and privileges of the CBOE membership, and (c) denies the CBOE membership the right to vote in connection with amendments to the Certificate in violation of Section 242(b)(3) of the DGCL and Article Fifth(b). In contrast, to determine that the CBOE's and the Commission's "interpretation" of Article Fifth(b) is an amendment of Article Fifth(b), and to determine that such amendment of Article Fifth(b) requires a vote of the CBOE members pursuant to Section 242(b)(3) of the DGCL and Article Fifth(b), would be fair and reasonable, and would support the franchise rights of the members of the CBOE, because such determinations (a) would recognize that the proposed rule change alters the status of persons who may become members of the CBOE, (b) would recognize that the proposed rule change alters the rights and privileges of the CBOE membership, and (c) would recognize and enforce the franchise rights of the members of the CBOE as provided by Section 242(b)(3) and Article Fifth(b). In conclusion, a determination that the CBOE's and the Commission's "interpretation" of Article Fifth(b) is an amendment of Article Fifth(b) would be consistent with the rules of construction adopted by Delaware courts.[5]

[5]The Commission, in Release No. 34-51733, states that "[t]he actions identified in Section 242(a) are changes that a corporation may make to its certificate of incorporation by amendment." The Commission also states that "[t]here is nothing in Section 242 that requires a corporation to amend its certificate of incorporation if it makes such changes." Release No. 34-51733 at 11. These statements of the Commission appear to suggest that compliance with Section 242 of the DGCL is optional – the board of directors has the authority to "interpret" unilaterally the certificate of incorporation in a manner that would adversely impact the rights of the CBOE membership. Such suggestion by the Commission is in conflict with Delaware law. Specifically, Section 242(a) of the DGCL provides that an amendment to a certificate of incorporation includes "a change" to the certificate that alters the "rights of stockholders." 8 Del. C. § 242(a). Although Section 242(a) contains the word "stockholder," Section 242(b) of the DGCL provides that "[e]very amendment authorized by [Section 242(a)]" involving a nonstock corporation's certificate of incorporation "shall be made and effected" in accordance with Section 242(b)(3) of the DGCL. See id. at §§

The foregoing is subject to the following assumptions, exceptions, qualifications, and limitations, in addition to those above:

A. The subject matter of this letter are limited to Delaware law, and we have not considered the effect of any other laws of any jurisdiction (including, without limitation, federal laws of the United States of America), or rules, regulations, orders, or decisions relating thereto.

B. We have assumed: (i) the due incorporation or due formation, as the case may be, due organization, and valid existence in good standing pursuant to the laws of all relevant jurisdictions of each of the parties and (other than natural persons) each of the signatories to the documents reviewed by us, and that none of such parties or signatories has dissolved; (ii) the due authorization, execution, and delivery (and, as applicable, filing) of such documents by each of the parties thereto and each of the signatories thereto; (iii) the legal capacity of all relevant natural persons.

C. We have assumed that (i) all signatures on all documents reviewed by us are genuine, (ii) all documents furnished to us as originals are authentic, (iii) all documents furnished to us as copies or specimens conform to the originals thereof, (iv) all documents furnished to us in final draft or final or execution form have not been and will not be terminated, rescinded, altered, or amended, are in full force and effect, and conform to the final, executed originals of such documents, and (v) each document reviewed by us constitutes the entire agreement among the parties thereto with respect to the subject matter thereof.

The foregoing also is subject to limitations imposed by general principles of equity, including applicable law relating to fiduciary duties, regardless of whether enforcement is considered in proceedings at law or in equity.

This letter is rendered solely for your benefit in connection with the matters addressed herein. It is my understanding that you may furnish a copy of this letter to the Commission in connection with the matters addressed herein and I consent to your doing so. Except as stated in this paragraph, this letter may not be furnished to or quoted to, nor may this letter be relied upon by, any other person or entity for any purpose without my prior consent. This letter speaks only as the date

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242(b), 242(b)(3). Accordingly, contrary to the ruling of the Commission, the procedural requirements of Section 242 are not optional, and if the "rights" of members of a nonstock corporation are "changed," then the procedural requirements of Section 242(b)(3) must be satisfied.

hereof, and we assume no obligation to advise you of any changes in the foregoing subsequent to the delivery of this letter. In the event that you or the Commission has any questions with respect to this letter, do not hesitate to contact me as (302) 652-0367.

Sincerely,

Michael J. Maimone

MJM:db