

SECURITIES AND EXCHANGE COMMISSION
Securities Exchange Act of 1934
Release No. 34-52611

October 14, 2005

File Nos. SR-CBOE-2004-16 and SR-CBOE-2005-19

In the Matter of the Application of

Marshall Spiegel

**For Stays of Commission Orders Approving
Proposed Rule Changes by the Chicago
Board Options Exchange, Incorporated**

ORDER DENYING STAY

On June 17, 2005 and July 18, 2005, Petitioner Marshall Spiegel (“Petitioner”) filed, in the United States Court of Appeals for the District of Columbia Circuit, Petitions for Review of two Securities and Exchange Commission (“Commission”) Orders approving proposed rule changes of the Chicago Board Options Exchange, Incorporated (“CBOE”).¹ Pending such reviews, Petitioner filed with the Commission on July 18, 2005, two motions, pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 (“Exchange Act”),² requesting a stay of each of the Commission’s Orders.³ On July 20, the CBOE filed its response to Petitioner’s stay requests.⁴ On July 22, Petitioner filed a reply to the CBOE’s response.⁵ After reviewing the foregoing submissions, as well as the record underlying its issuance of the Orders approving each of the CBOE’s proposed rule changes, the Commission has determined, for the reasons discussed below, that the Motions to Stay should be denied.⁶

¹ See Securities Exchange Act Release Nos. 51252 (Feb. 25, 2005), 70 FR 10442 (Mar. 3, 2005) (Commission approval order for File No. SR-CBOE-2004-16) (“February 25th Order”); and 51773 (May 24, 2005), 70 FR 30981 (May 31, 2005) (Commission approval order for File No. SR-CBOE-2005-19) (“May 24th Order”). On July 26, 2005, Petitioner filed a motion to consolidate his two appeals.

² 15 U.S.C. 78y(c)(2).

³ Motion of Petitioner Marshall Spiegel For a Stay of the February 25, 2005 Order and Brief in Support Thereof, dated July 18, 2005 (“Petitioner’s First Brief”); and Motion of Petitioner Marshall Spiegel For a Stay of the May 24, 2005 Order and Brief in Support Thereof, dated July 18, 2005 (“Petitioner’s Second Brief”) (collectively, “Motions to Stay”).

⁴ Response of CBOE to Spiegel’s Motion for a Stay Pending Appellate Review, dated July 19, 2005 (“Response of CBOE”).

⁵ Reply of Marshall Spiegel to CBOE Opposition to Motion for a Stay Pending Appellate Review, dated July 22, 2005 (“Petitioner’s Reply to Response of CBOE”).

⁶ The Commission recently filed the certified list in the appeal of the February 25th Order.

I. Background

Since the inception of the CBOE in the early 1970s, the members of the Board of Trade of the City of Chicago, Inc. (“CBOT”) have been entitled to become members of the CBOE without having to acquire a separate CBOE membership (referred to as the “Exercise Right”). This entitlement was compensation for the time and money the CBOT and its members expended in the development of the CBOE, and is established by Article Fifth(b) of the CBOE’s Certificate of Incorporation (“Article Fifth(b)”), which provides, in relevant part, that:

[E]very 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] notwithstanding any limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the [CBOE]. . . .

Article Fifth(b) explicitly states that no amendment may be made to it 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.

The CBOT’s announcement that it intended to demutualize and issue separately transferable interests representing the Exercise Right component of a membership in the CBOT (this transferable right is referred to as the “Exercise Right Privilege”) raised the question of who would constitute a “member of [the CBOT]” under Article Fifth(b) because it would be possible for a CBOT member to sell the Exercise Right Privilege separately. The CBOE’s proposed rule changes, which the Petitioner is challenging, sought to clarify the application of Article Fifth(b) in light of the CBOT’s actions. Specifically, the proposed rule changes provide guidance regarding the eligibility of a CBOT member to utilize his or her Exercise Right to become a member of the CBOE.

A. SR-CBOE-2004-16

Before its demutualization, the CBOT stated its intent to issue separately transferable Exercise Right Privileges to its members. In response, the CBOE submitted a proposed rule change to the Commission to interpret Article Fifth(b) to clarify which individuals will be entitled to the Exercise Right upon distribution by the CBOT of the Exercise Right Privileges. Specifically, the CBOE proposed to interpret the term “member of [the CBOT]” as used in Article Fifth(b) to mean an individual who holds an Exercise Right Privilege, holds a CBOT Full Membership which gives him all other rights and privileges appurtenant to a CBOT full

Section 25(c)(2) of the Exchange Act provides that, “[u]ntil the court’s jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires.” 15 U.S.C. 78y(c)(2). This provision does not preclude the Commission from denying a motion for a stay. *Cf. Piper v. DOJ*, 374 F. Supp. 2d 74 (D.D.C. 2005) (stating that where the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal, the district court may outright deny, but cannot outright grant, a Rule 60(b) motion.”).

membership, and who meets the CBOT's membership eligibility requirements.⁷ The CBOE's proposal revised its Rule 3.16(b) to incorporate this new interpretation.

On July 15, 2004, the Commission, by authority delegated to the Division of Market Regulation, approved the CBOE's proposed rule change.⁸ On August 23, 2004, Petitioner submitted to the Commission a notice of intention to file a petition for review of the July 15, 2004 Order, and Petitioner filed a petition for review on September 13, 2004.⁹ On September 17, 2004, the Commission acknowledged receipt of these documents and confirmed that the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice was in effect. On February 25, 2005, the Commission set aside the July 15, 2004 Order, approved the proposed rule change, and lifted the automatic stay.¹⁰ On March 7, 2005, Petitioner submitted a Motion for Reconsideration in which he asked the Commission to set aside the February 25th Order based on allegations of manifest errors of law and fact. On April 18, 2005, the Commission issued an Order denying Petitioner's Motion for Reconsideration.¹¹

B. SR-CBOE-2005-19

When the CBOT's proposed demutualization was nearing completion, the CBOE submitted a proposed rule change to further revise CBOE Rule 3.16(b) to interpret Article Fifth(b) to address the effect on the Exercise Right of the CBOT's restructuring and the expansion of electronic trading on the CBOE and the CBOT.¹² Specifically, to be considered a "member of [the CBOT]" for purposes of Article Fifth(b), and therefore entitled to the Exercise Right, a person would have to possess all parts distributed in respect of his or her membership in the CBOT's restructuring (*i.e.*, the Class A shares of common stock of CBOT Holdings, Inc. and the Series B-1 membership), and an Exercise Right Privilege. On May 24, 2005, the Commission approved the CBOE's proposed rule change.¹³

II. Discussion

Under Section 25(c)(2) of the Exchange Act, the Commission may grant a stay pending judicial review if it finds that "justice so requires."¹⁴ The Commission generally considers a

⁷ See February 25th Order, *supra* note 1. See also CBOE Rule 3.16(b).

⁸ See Securities Exchange Act Release No. 50028 (July 15, 2004), 69 FR 43644 (July 21, 2004) (approval order for File No. SR-CBOE-2004-16).

⁹ See Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, dated September 13, 2004.

¹⁰ See February 25th Order, *supra* note 1.

¹¹ See Securities Exchange Act Release No. 51568 (Apr. 18, 2005), 70 FR 20953 (Apr. 22, 2005) ("April 18th Order").

¹² See Securities Exchange Act Release No. 51463 (Mar. 31, 2005), 70 FR 17732 (Apr. 7, 2005) (notice for File No. SR-CBOE-2005-19).

¹³ See May 24th Order, *supra* note 1.

¹⁴ 15 U.S.C. 78y(c)(2).

request for a stay in light of four criteria: (A) whether the petitioner has shown a strong likelihood that he will prevail on the merits on appeal; (B) whether the petitioner has shown that, without a stay, he will suffer irreparable injury; (C) whether there would be substantial harm to other parties if a stay were granted; and (D) whether the issuance of a stay would likely serve the public interest.¹⁵

The Commission has considered carefully each of the Petitioner's submissions in light of these four criteria. Because the Motions to Stay raise substantially similar arguments, this Order responds to both motions. As discussed below, the Commission finds that the Petitioner has not demonstrated a substantial likelihood of success on the merits for either matter, nor has he demonstrated that the other three factors strongly favor interim relief.

A. Petitioner Has Not Demonstrated a Substantial Likelihood of Success on the Merits of His Appeal

To obtain a stay of a Commission order pending judicial review, Petitioner must demonstrate a strong likelihood of success on the merits of his appeal. The Commission notes that the imposition of a stay pending judicial review of an action by an administrative agency is an extraordinary remedy.¹⁶ The judicial standard for review of a Commission order is circumscribed in scope. A court generally will only overturn a Commission decision if the court finds the decision to have been arbitrary, capricious, or an abuse of discretion.¹⁷ This standard of review is deferential, presuming an agency's action to be valid and "requir[ing] affirmance if a rational basis exists for the agency's decision."¹⁸ The Commission does not believe that Petitioner has presented sufficient evidence to suggest that his appeal stands a substantial likelihood of success on the merits to justify the imposition of a stay of these matters.

¹⁵ See, e.g., William Timpinaro, Order Denying Stay, Securities Exchange Act Rel. No. 29927 (Nov. 12, 1991), 50 SEC Docket 283, 290; Christian Klein & Cogburn, Inc., Order Denying Stay, Securities Exchange Act Rel. No. 33377 (Jan. 5, 1994), 55 SEC Docket 2622, 2624; see also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Commonwealth-Lord Joint Venture v. Donovan et al., 724 F.2d 67, 68 (7th Cir. 1983) (holding that the standard to be used in deciding applications for stays of administrative actions pending review is the same as for stays of district court orders pending review).

¹⁶ See, e.g., Busboom Grain Co., Inc. et al. v. ICC et al., 830 F.2d 74, 75 (7th Cir. 1987) ("A strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process misfired.").

¹⁷ See, e.g., Natural Resources Defense Council, Inc., et al. v. SEC, et al., 606 F.2d 1031, 1049 (D.C. Cir. 1979); Bradford Nat'l Clearing Corp. et al. v. SEC, 590 F.2d 1085, 1093 (D.C. Cir. 1978). See also 5 U.S.C. 706(2)(A) (Administrative Procedure Act).

¹⁸ See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976).

1. Petitioner’s Claim That the Commission’s Orders Were Arbitrary and Capricious Is Baseless

In his Motions to Stay, Petitioner asserts that the Commission’s February 25th and May 24th Orders are “arbitrary and capricious agency action” in that they, among other things, failed to independently evaluate Delaware law and uncritically relied on the CBOE’s allegedly erroneous arguments regarding the application of Delaware law.¹⁹

When it considers a proposed rule change submitted by a self-regulatory organization (“SRO”), like the CBOE, Section 19(b)(2) of the Exchange Act provides that the Commission shall approve such proposed rule change “if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to such organization.”²⁰

Petitioner asserts that the Commission’s Orders constitute “arbitrary and capricious agency action” because the Commission did not independently evaluate CBOE’s compliance with Delaware law. However, the Exchange Act does not require the Commission to find that the CBOE’s proposed rule changes are consistent with Delaware law. The Exchange Act only requires the Commission to determine that a proposed rule change is consistent with the Exchange Act, including the requirement that an exchange comply with its own rules. In this regard, the Commission considered, as it is required to do for proposed rule changes submitted by SROs, the full record in each matter, including the submissions of the CBOE and the comment letters on each filing. Based on this record, the Commission determined that the CBOE provided a “sufficient basis on which the Commission can find that, as a federal matter under the Exchange Act, the CBOE complied with its own Certificate of Incorporation in determining that the proposed rule change” constituted an interpretation, rather than an amendment, of Article Fifth(b).²¹

The Commission found that the arguments raised in Petitioner’s comment letters did not refute the CBOE’s analysis.²² Petitioner argued that the new interpretation of the term “member of [the CBOT]” “denigrate[d] the definition of CBOT member ‘by permitting CBOT members to carve up membership rights and sell them separately to third parties without extinguishing their rights to exercise CBOE memberships under Article Fifth(b)...’”²³ According to Petitioner, this fundamental change and augmentation in the economic and legal rights of CBOT members and the structure of CBOT membership materially and profoundly affected the economic and legal

¹⁹ See Petitioner’s First Brief, supra note 3, at 8 and 10; Petitioner’s Second Brief, supra note 3, at 9-10.

²⁰ 15 U.S.C. 78s(b)(2).

²¹ February 25th Order, supra note 1, at 10444; May 24th Order, supra note 1, at 30984.

²² See February 25th Order, supra note 1, at 10444; and May 24th Order, supra note 1, at 30984.

²³ February 25th Order, supra note 1, at 10444 (citing Legal Memorandum of Points and Authorities in Support of the Statement of Petitioner Marshall Spiegel in Opposition to Staff Action, October 26, 2004, at 6).

rights of CBOE membership and governance, and as such constituted an amendment to the provisions of Article Fifth(b).

The Commission determined, however, that neither the new interpretation proposed by the CBOE nor the proposed rule change incorporating that new interpretation altered CBOT memberships in the manner alleged by Petitioner. The Commission found that, to the extent changes to CBOT memberships were being made, they were being made by the CBOT as part of its restructuring. The Commission noted that the CBOE believed it needed to interpret Article Fifth(b) to address the ambiguity with respect to the definition of “member of the CBOT” that was created by the CBOT’s actions. Accordingly, the proposed rule change merely set forth how the CBOE proposed to apply its rules once the CBOT restructured.

The Commission indicated that the changes the CBOT made to its memberships, such as the CBOT’s pending restructuring, themselves did not result in any amendment to CBOE’s Certificate of Incorporation. The CBOT and the CBOE were, the Commission noted, separate corporate entities.

Petitioner asserts that the Commission “erroneously opines that compliance by the [CBOE] Board with Section 242 of DGCL Law when materially changing the meaning of its Certificate of Incorporation is discretionary.”²⁴ The Commission never made such a finding, nor did the Commission ever find that the CBOE materially changed the meaning of its Certificate of Incorporation.

Further, Petitioner claims that the April 18th Order disavows that the Commission relied on the CBOE’s Statement in Support, which Petitioner uses to suggest that the Commission’s action was arbitrary and capricious.²⁵ In the April 18th Order, the Commission responded to Petitioner’s criticism of the CBOE’s statement that conducting a shareholder vote of the proposed rule change would “paralyze” the CBOE. In its Order, the Commission noted that it had not made, and did not make, any specific findings that failing to approve the CBOE’s proposed rule change would “paralyze” the CBOE.²⁶ Petitioner seeks to extend this statement to suggest that the Commission somehow disavowed the utility of the CBOE’s Statement in Support. Petitioner then uses this asserted disavowal to claim that the Commission’s “contradictory and confusing position leaves the February 25 Order without rational basis for its conclusions,” and thus indicates that the Commission’s Order is arbitrary and capricious action.²⁷ The Commission believes there is no support for this conclusion. In its February 25th and April 18th Orders, the Commission unambiguously stated that it “found persuasive CBOE’s analysis of the difference between ‘interpretations’ and ‘amendments,’ and the letter of [CBOE’s] counsel that concludes that it is within the general authority of the CBOE’s Board to interpret Article

²⁴ Petitioner’s Second Brief, supra note 3, at 11.

²⁵ See Petitioner’s First Brief, supra note 3, at 10.

²⁶ See April 18th Order, supra note 11, at 20955.

²⁷ Petitioner’s First Brief, supra note 3, at 10.

Fifth(b). . . .²⁸ Whether a vote would paralyze the CBOE is a separate issue with respect to the Commission's consideration of the CBOE's proposals, and did not affect the Commission's analysis of the difference between an interpretation and an amendment and the general authority of the CBOE Board under Delaware law.²⁹

Petitioner also criticizes the Commission's "refusal" to consider the legal opinion of Michael J. Maimone that Petitioner, along with three other CBOE members, submitted in connection with a Motion for Reconsideration of the Commission's Order approving SR-CBOE-2005-19 due to, in Petitioner's words, "an ambiguous technicality."³⁰ The Commission did not "refuse" to consider anything in the record before it. The legal opinion of Mr. Maimone was only sent to the Commission with Petitioner's attempted Motion for Reconsideration after the Commission had already approved the CBOE's proposed rule change in SR-CBOE-2005-19. Accordingly, the Commission did not consider Petitioner's legal opinion because it was not part of the record before the Commission when the Commission initially considered the CBOE's proposed rule change. Petitioner failed to provide the legal opinion to the Commission during the comment period on the CBOE's proposed rule change, and he fails to explain why he was unable to do so.³¹ As part of his present motion, Petitioner has again submitted the legal opinion of Mr. Maimone. However, as is the case with a motion for reconsideration, the Commission generally does not accept new evidence challenging the merits of the underlying order in a motion for stay when such evidence could have been provided to the Commission during the applicable comment period and there is an unexplained failure to have done so.

²⁸ February 25th Order, supra note 1, at 10444; April 18th Order, supra note 11, at 20954. See also May 24th Order, supra note 1, at 30984.

²⁹ The CBOE's representation on that point is irrelevant to the issue of whether the CBOE's rule changes are consistent with the Exchange Act.

³⁰ Petitioner's Reply to Response of CBOE, supra note 5, at 2. On June 6, 2005, Thomas Bond, Donald Cleven, Marshall Spiegel, and Norman Friedland filed a Motion for Reconsideration of the Commission's Order approving SR-CBOE-2005-19. Pursuant to Rule 470(a) of the Commission's Rules of Practice, 17 CFR 201.470(a), a party may file a motion for reconsideration of a final order issued by the Commission if such person was aggrieved by a determination in a "proceeding," as that term is defined in Rule 101(a)(9)(i) - (viii), 17 CFR 201.101(a)(9)(i) - (viii). The Commission's Order approving SR-CBOE-2005-19 does not fall into any of the enumerated eight categories in Rule 101(a)(9). By contrast, the Commission's Order approving SR-CBOE-2004-16 was issued in response to a petition for review of an action by delegated authority as specified in Rule 101(a)(9)(iv). Accordingly, the Deputy Secretary of the Commission properly rejected Petitioner's Motion for Reconsideration of the order approving SR-CBOE-2005-19 on the grounds that the motion was improperly filed. See Letter from Margaret H. McFarland, Deputy Secretary, Commission, to Thomas A. Bond, Donald Cleven, Marshall Spiegel, and Norman Friedland, dated June 9, 2005.

³¹ Further, the Commission notes that even if Petitioner had submitted the legal opinion as part of a validly-filed motion for reconsideration, the Commission would still not have been in a position to consider it. The Commission, on a motion for reconsideration, accepts only that evidence the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration. See Fundamental Portfolio Advisors, Inc., Order Denying Motion for Reconsideration, Securities Exchange Act Rel. No. 51725 (May 23, 2005), at note 5, available at <http://www.sec.gov/litigation/admin/33-8574.pdf>.

2. Petitioner Mischaracterizes the CBOE’s Proposals to Erroneously Conclude That Article Fifth(b) Was Amended

To support his claim that the proposed rule changes constitute amendments to Article Fifth(b), Petitioner asserts that the CBOE and the CBOT “endeavored to change the Exercise Right to sanction transferability through the new ‘interpretation’ in the 2003 Agreement.”³² Petitioner further argues that “the new interpretation sanctions the transfer of the Exercise Right to third parties who are not members of the CBOT.”³³ Petitioner asserts that “[t]he 2003 Agreement seeks to permit the CBOT to proceed with separating the Exercise Right from the CBOT membership[,]” and that the “effect of this interpretation is to implicitly recognize that persons may now hold an Exercise Right separate and apart from holding a full CBOT membership.”³⁴ Petitioner opines that “the interpretation’s undisputed purpose and effect is to permit the Exercise Right to be separated from CBOT membership and be held separately from a CBOT Full Membership, without jeopardizing its validity under Article Fifth(b).”³⁵

Contrary to the Petitioner’s contentions, however, the CBOE’s rule filings do not “sanction the transfer of the Exercise Right” nor do they “permit the CBOT to proceed with separating the Exercise Right.” The CBOE and the CBOT are legally separate entities. Accordingly, the CBOE has no ability or authority to tell the CBOT what it can or cannot do with respect to the Exercise Right. The Exercise Right belongs to the CBOT members. Petitioner seems to suggest that the CBOE’s rule filings effectively allowed the CBOT to establish separately transferable Exercise Right Privileges. This is incorrect. The CBOE’s sole concern, and the focus of each of the rule filings at issue here, is how the CBOE is to apply the terms of its Article Fifth(b) in light of the changes that occurred at the CBOT. As the CBOE notes in its response, “[t]he Exercise Right Privilege represents the Exercise Right component of a CBOT Full Membership. Although the Exercise Right Privilege is transferable, the Exercise Right itself may not be transferred separately from a transfer of all of the other rights and privileges represented by a CBOT Full Membership.”³⁶

Finally, Petitioner’s steadfast insistence that the rule filings imposed “so material a change to the historic and well-established meaning and terms of Article Fifth(b) as to be in reality an amendment” is unsupported.³⁷ Without elaborating on his conclusory statements, Petitioner argues that the rule filings “confer[] rights on persons in contravention of the terms of Article Fifth(b),” give “a significant measure of economic and political power over CBOE governance and the CBOE’s ability to restructure itself” to outside parties, and “effectively

³² Petitioner’s First Brief, supra note 3, at 3.

³³ Id.

³⁴ Id. at 4.

³⁵ Id. at 4-5.

³⁶ Response of CBOE, supra note 4, at 2.

³⁷ Petitioner’s First Brief, supra note 3, at 4.

dilut[e] the economic value and voting power of CBOE members.”³⁸ Petitioner fails to provide support for these claims. For example, while Petitioner suggests that the CBOE’s rule change “had the effect of altering shareholder rights[,]” he fails to specify which shareholder rights have been altered.³⁹ The Exercise Rights of CBOT members to become CBOE members, which are enshrined in Article Fifth(b), operate to the same extent as they operated before the issuance of the separately transferable Exercise Right Privileges.⁴⁰ The Commission does not find support for Petitioner’s claim that the CBOE’s rule filings imposed “so material a change” to Article Fifth(b) as to be an amendment to that provision.

In accordance with the foregoing, the Commission does not believe, based on the record before us, that Petitioner has met the requisite burden of showing that his appeal is likely to succeed on the merits.⁴¹

B. Petitioner Has Not Demonstrated That He Would Suffer Irreparable Injury in the Absence of a Stay

In order to obtain a stay, Petitioner must also demonstrate that he will suffer irreparable injury absent a stay of the Commission’s Orders. Petitioner has failed to articulate any irreparable injury in the absence of a stay.

Petitioner argues that he will suffer irreparable harm if a stay is not granted because the Commission Orders deny CBOE members voting rights guaranteed by Article Fifth(b).⁴² As

³⁸ Id. at 5. Petitioner also attempts to argue that “the reason the CBOE had to file its proposed rule change under Section 19 was precisely because its interpretation in fact materially changed the meaning of Article Fifth(b).” Petitioner’s Second Brief, supra note 3, at 10. This is incorrect. The reason the CBOE filed its proposed rule change under Section 19 of the Exchange Act was because it revised CBOE Rule 3.16(b) to incorporate the new interpretation of the term “member of [the CBOT].”

³⁹ Petitioner’s First Brief, supra note 3, at 9, note 4.

⁴⁰ If a CBOT seat holder sells his or her Exercise Right Privilege to a non-CBOT seat holder third party, that person cannot invoke the provisions of Article Fifth(b) to become a CBOE member because that third party would not be considered to be a “member of the [CBOT]” under Article Fifth(b). The third party could, however, tender the Exercise Right Privilege to someone (e.g., the CBOE) for value. At one point in his brief, Petitioner curiously asserts that “[p]ursuant to the 2003 interpretation, potentially all of [the remaining] 1,334 Exercise Rights could be held by persons who are not members of the CBOT.” Petitioner’s First Brief, supra note 3, at 6. First, as stated above, the 2003 Agreement does not confer onto CBOT members the Exercise Right Privileges, CBOT’s own restructuring is the source of the Exercise Right Privileges. Second, it is only Exercise Right Privileges, not Exercise Rights, that could be held by non-CBOT members. In order to invoke the Exercise Right, a person must possess all rights and privileges of CBOT membership in addition to an Exercise Right Privilege.

⁴¹ Additionally, the fact that Petitioner sold his seat on the CBOE on July 14, 2005 raises the question of whether the challenges reflected in Petitioner’s Petitions for Review before the D.C. Circuit are moot.

⁴² See Petitioner’s First Brief, supra note 3, at 11-12; Petitioner’s Second Brief, supra note 3, at 14.

CBOE highlights, however, the right to vote on the interpretations at issue would not be irreparably lost absent a stay because the Commission Orders would be set aside and the interpretations submitted to a vote of CBOE and CBOT members if the petitions in the Court of Appeals are successful.

Petitioner also asserts that the transferability of the Exercise Right Privilege allows third parties to “gain influence over the CBOE” pending the outcome of his appeal,⁴³ yet he fails to elaborate how such third parties would gain influence over the CBOE or what type of influence they would hold, or what harm this influence would cause, particularly in light of the fact, as discussed above, that an Exercise Right Privilege is only useful to invoke the Exercise Right if the person holding the Exercise Right Privilege possesses all the other rights and privileges of CBOT membership.⁴⁴

Petitioner argues further that the harm inflicted by the Commission’s Orders is heightened by the fact that, under CBOE Rule 6.7A, CBOE members cannot bring an action against the CBOE or its officials to redress perceived wrongs.⁴⁵ Petitioner believes that the Commission effectively permitted the CBOE to insulate its corporate governance from judicial review through Rule 6.7A because that rule was promulgated under Section 19(b)(3)(A) of the Exchange Act,⁴⁶ which rendered it effective upon filing, and was therefore never subject to public comment or approval by the Commission. As the Commission explained in its February 25th Order, however, since the rule was promulgated under Section 19(b)(3)(A), the Commission did not issue an order finding that the rule change was consistent with the requirements of the Exchange Act, and therefore a court considering a challenge to this rule preventing review of CBOE actions would not have the authoritative views of the Commission and would have to

⁴³ Petitioner’s First Brief, supra note 3, at 12. The Commission notes that, subsequent to the filing of the opening brief, Petitioner sold his seat on the CBOE. See Response of CBOE, supra note 3, at Exhibit 1. In his reply brief, Petitioner claims that he is currently considering proposals to participate in a partial purchase of a seat. Petitioner’s recent sale of his CBOE membership and the uncertainty over whether he will purchase a CBOE seat in the future debilitate his argument that he will suffer irreparable harm if the Commission’s Orders are not stayed.

⁴⁴ To the extent that Petitioner argues that the transferability of Exercise Right Privileges to third parties will harm CBOE members by diluting their voting power and therefore decreasing the economic value of their seats, the Commission has held repeatedly that financial detriment does not rise to the level of irreparable injury warranting issuance of a stay. See, e.g., Robert J. Prager, Order Declining to Review Denial of Stay on Delegated Authority, Securities Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 162, 163; see also William Timpinaro, Order Denying Stay, Securities Exchange Act Rel. No. 29927 (Nov. 12, 1991), 50 SEC Docket 283, 290 (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”) (citing Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)).

⁴⁵ Petitioner’s First Brief, supra note 3, at 13.

⁴⁶ 15 U.S.C. 78s(b)(3)(A).

consider whether the rule was consistent with the Exchange Act or preempted state law de novo.⁴⁷

C. Substantial Harm to Other Parties Would Occur If a Stay Is Granted

The third factor to be considered in determining whether to grant a stay is the harm, if any, such a stay would impose on other parties. Petitioner argues that a stay would not impose any substantial harm on any person.⁴⁸ Petitioner argues that CBOT Exercise Right holders assumed the risk that, should the Commission commence disapproval proceedings with respect to the rule filings at issue, then the “viability of their Exercise Rights could be significantly impaired and perhaps extinguished.”⁴⁹ Petitioner contends that CBOT members have already assumed the risk that the resolution of this matter could be stayed pending judicial review.⁵⁰

The Commission disagrees with Petitioner’s analysis. If the Commission were to issue a stay of both rule filings, the CBOE could suffer substantial harm, as could holders of the Exercise Right Privileges. The CBOE would be left in the precarious position of having to consider requests by CBOT members, made during the course of a stay, to invoke their Exercise Right without the benefit and certainty of the rule filings approved by the Commission. Accordingly, the status and ability of the CBOT members who have retained their Exercise Right Privileges to invoke their rights under Article Fifth(b) to become CBOE members would be placed in doubt and the CBOE would be left without any guidance as to how to comply with its own rules. In addition, the status of those CBOT members who have exercised their right to become CBOE members would be brought into question.

D. Issuance of a Stay Would Not Serve the Public Interest

Finally, Petitioner contends that a stay would serve the public interest, in that it would protect the rights of CBOE members in connection with a matter involving potential agency mistake.⁵¹ However, Petitioner fails to explain how a stay would serve the public interest beyond the interests of CBOE members who disagree with the rule changes. As the Commission

⁴⁷ In footnote 33 of the February 25th Order, the Commission noted that a court considering the validity of the rule would not have the benefit of the Commission’s views on the rule because the rule was filed under Section 19(b)(3)(A) of the Exchange Act and thus became effective upon filing. Petitioner argues that the Commission missed the point because judicial review could never occur in the first instance since the rule prohibits court challenges to CBOE Board actions. The relevance of the filing under Section 19(b)(3)(A), however, is that, were a court to consider a challenge to Rule 6.7A itself, the court could consider whether the rule validly operated to preclude action against the CBOE.

⁴⁸ See Petitioner’s First Brief, supra note 3, at 13-14; Petitioners Second Brief, supra note 3, at 14-15.

⁴⁹ Petitioner’s First Brief, supra note 3, at 13. Petitioner references the disclosures made to CBOT members in CBOT’s Form S-4 distributed to its members in connection with its demutualization. See id.

⁵⁰ See id. at 13-14.

⁵¹ See id. at 14; Petitioner’s Second Brief, supra note 3, at 15.

has repeatedly found, the CBOE, in both rule filings, presented sufficient evidence to warrant a Commission finding that the CBOE's rule filings were consistent with the Exchange Act. Accordingly, the Commission does not believe that the issuance of a stay in these matters would serve the public interest.

III. Conclusion

Petitioner's arguments largely reiterate positions that were raised in his public comments on the proposed rule changes and evaluated by the Commission in approving the proposed rule changes. Nevertheless, the Commission has reviewed Petitioner's Motions to Stay and finds that Petitioner has failed to satisfy any of the four criteria requisite to the granting of a stay pending judicial review. Accordingly, the Commission finds that, in these instances, justice does not require a stay.

IT IS THEREFORE ORDERED, pursuant to Section 25(c)(2) of the Exchange Act, that the application of Petitioner filed on July 18, 2005 for stays of the Order approving SR-CBOE-2004-16 and the Order approving SR-CBOE-2005-19 be, and hereby are, denied.

By the Commission.

Jonathan G. Katz
Secretary