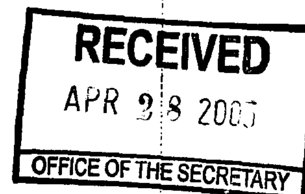
SR-CBOE-2005-19



April 28, 2005

Via Facsimile (202-942-9651) and U.S. Mail

Mr. Jonathan G. Katz
Secretary
Securities Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: **SR-CBOE-2005-19 and SR-CBOE-2005-20**

Dear Mr. Katz:

This letter is submitted as a comment for consideration by the Commission and its Staff with respect to the pending rule submissions of the Chicago Board Options Exchange ("CBOE") referenced above.

This letter makes two essential points: The CBOE's proposed rule change should not be approved because (1) the CBOE already is effectuating, implementing and acting upon the interpretation of its Articles of Incorporation that is the subject of this proceeding without prior Commission approval of it and therefore would appear to be violating Section 19 of the Securities Exchange Act, as amended; and (2) the CBOE's purported interpretation of its Articles of Incorporation is not a proper or lawful interpretation of the Articles of Incorporation or action by the CBOE Board in any event. The reasons for these points are outlined below and also are set forth in my letter to CBOE Chairman William Brodsky dated April 26, 2005, a copy of which is enclosed herewith and the points of which are incorporated herein by reference.

We are treasury seat members of the CBOE and, in that capacity, will be harmed if the Commission approves the CBOE's interpretation and am currently being harmed by the CBOE's effectuation of the interpretation prior to a Commission approval of it.

A. The CBOE's Offer to Purchase Exercise Rights would appear to be in violation of Section 19 of the Exchange Act by effectuating the interpretation of Article Fifth(b) that is the subject of this proceeding before the Commission has approved it.

As of April 22, 2005, the former membership organization known as the Chicago Board of Trade ceased to exist. On the same day, a new, for-profit Delaware stock corporation known as Chicago Holdings, Inc. and a stock corporation trading subsidiary were created and assumed the business operations of the former and extinguished CBOT. Accordingly, subsequent to April 22, 2005, there in fact are no members of the CBOT. The CBOT's extinguishment of memberships renders the exercise right for a "member of [CBOT]" set forth in Article Fifth(b) of

the CBOE Articles of Incorporation nugatory – *i.e.*, Article Fifth(b) no longer confers an exercise right on any person since there no longer are any members of the CBOT.

In 2001, the respective Boards of the CBOE and CBOT apparently anticipated that this problem would arise in the event the CBOT demutualized, and sought to circumvent it by agreeing to redefine "member of [CBOT]" to mean certain stockholders of a corporate successor organization to the former CBOT. The August 7, 2001 agreement between the CBOT and Chicago Board of Trade ("CBOT"), the October 7, 2004 agreement between the CBOE and CBOT, and the February 25, 2005 letter agreement between the CBOE and CBOT (collectively, the 2001 Agreement, as amended"), embody an interpretation of Article Fifth(b) that seeks to redefine "member of [CBOT]" in Article Fifth(b).

The 2001 Agreement, as amended, among other things, purports to establish a future definition for the terms "Eligible CBOT Full Member" and "Eligible CBOT Full Member Delegate" that, upon consummation of the CBOT's restructuring into a Delaware for-profit stock corporation, will become the controlling definition of the term "member of [CBOT]" in Article Fifth(b). That future definition to be applied upon consummation of the CBOT restructuring defines "Eligible CBOT Full Member" and "Eligible CBOT Full Member Delegate" in terms of persons who would certain numbers and classes of shares in the new CBOT stock corporation and its subsidiaries.

Pursuant to Section 19 of the Exchange Act, the 2001 Agreement, as amended, and the interpretation it embodies cannot become effective prior to Commission approval of it. Accordingly, unless and until the Commission in accordance with applicable law approves the 2001 Agreement, as amended, and the interpretation it embodies, the CBOE has no authority under Article Fifth(b) to recognize any exercise right for any person. Not only is this a matter of law under Section 19 and the Commission's rules thereunder, the 2001 Agreement, as amended, expressly acknowledges that Commission approval is a condition of its effectiveness.

Any effectuation or application of the interpretation by the CBOE in advance of Commission approval of would appear to violate Section 19. Indeed, in the context of the rulemaking SR-CBOE-2004-16, the CBOE expressly declared to the Commission that the 2001 Agreement, as amended, and interpretation should not be required to be a part of that proceeding for approval and that no one could be adversely affected by its exclusion from that proceeding because the 2001 Agreement, as amended, could not be relied upon and had no effect unless and until the Agreement was approved by the Commission:

> "Finally, Spiegel falsely insinuates that CBOE somehow is seeking to circumvent the Exchange Act's notice, comment and approval process with respect to the interpretations in the 2001 Agreement. It is difficult to understand how Spiegel believes this supposed circumvention could ever work, because those "interpretations by law

> cannot become effective unless and until they are filed with, the Commission. In any event, CBOE in no way is attempting to avoid submitting these interpretations for Commission review. CBOE will do so at the appropriate time."

CBOE November 10, 2004 submission in SR-CBOE-2004-16.

Further, the Commission, in addressing that issue in SR-CBOE-2004-16 in its February 25, 2005 Order, specifically declared at page 16 of the Order that any implementation of an interpretation prior to Commission approval of it would violate Section 19 and the Commission could take appropriate action to stop it:

> "To the extent . . . that any part of an agreement is a 'policy, practice, or interpretation' of the CBOE's rules and that 'policy, practice, or interpretation' has not been approved by the Commission it would be a violation of Section 19(b) of the Exchange Act and the Commission could take appropriate action against the CBOE."

The CBOE's "Offer to Purchase for Cash Exercise Right Privileges" ("Offer to Purchase") that it disseminated to purported Exercise Right Privilege holders on or about April 26, 2005, effectuates, relies on and implements the interpretation in the 2001 Agreement, as amended, and thus would appear to violate Section 19 of the Exchange Act. The Offer to Purchase is expressly directed to each person whom the CBOE deems to be a "CBOT Full Member" and solicits each such person to tender by May 25, 2005 his or her purported CBOT Exercise Right Privilege in exchange for cash in an amount to be determined through a modified Dutch auction. The aggregate amount committed for purchasing all such tenders is over $50 million.

The CBOE's Offer to Purchase at page 1 expressly defines "CBOT Full Member" as follows (emphasis in the original):

> **"Please note that as the CBOT restructuring (referenced in various sections of this Offer to Purchase) became effective last Friday, April 22, 2005, whenever we use the terms "CBOT Full Member," "CBOT Full Membership," or similar terminology in this Purchase Offer, we are referring to what previously was known as a "CBOT Full Member" but now means the holder of the requisite number of Series A shares of CBOT Holdings, Inc. the requisite number of Series B-1 shares of its trading subsidiary, the Board of Trade of the City of Chicago, Inc. and the Exercise Right associated with such Series B-1 shares, as**

further described in the relevant CBOT restructuring documents."

This definition of "CBOT Full Member" is precisely the definition contained in the 2001 Agreement, as amended. Accordingly, the CBOE is implementing the 2001 Agreement as amended and the interpretation it embodies by relying on that interpretation – prior to Commission approval of it – to solicit tenders and pay very substantial sums of money to third parties. No other basis exists to support the use of the CBOE Board's definition of "CBOT Full Member" other than the 2001 Agreement, as amended.

B. The Commission should disapprove the CBOE's proposed rule change, where, as here, the CBOE apparently is wilfully violating Section 19 of the Exchange Act by effectuating its 2001 interpretation prior to obtaining Commission approval of it.

The CBOE's apparent violative conduct, even in the face of the Commission's February 25, 2005 Order effectively warning the CBOE not to effectuate the 2001 Agreement, as amended, in advance of the Commission's approval of its interpretation, would appear to be a wilful violation of Exchange Act Section 19. This apparent wilful violation calls into question the CBOE Board's good faith with respect to its actions in purporting to interpret Article Fifth(b).[1] The CBOE's apparent violation is a basis for the Commission not to approve the CBOE's interpretation. To approve it would be to reward recalcitrant conduct calculated to override the terms and purposes of the Exchange Act.

Moreover, there are additional reasons as set forth below, in the April 26, 2005 letter to Chairman Brodsky from Marshall Spiegel and in the April 28, 2005 Comment Letter of former CBOE Vice Chairman Thomas Bond and joining members, that the 2001 Agreement, as amended, and the interpretation it embodies are not lawful and authorized actions of the CBOE Board and are not in accordance with Delaware law and their approval would not be in accordance with the Exchange Act or the Administrative Procedure Act.

C. The Commission should not approve the CBOE's 2001 Interpretation because the CBOE Board lacks authority to implement an interpretation that creates exercise right in persons who are not in fact members of the CBOT and that effects a material and substantive amendment of Article Fifth(b) without first obtaining an 80% approval vote of the CBOE

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[1] In a letter from the CBOE's General Counsel to Marshall Speigel of today's date, the CBOE has denied that it is violating the Exchange Act and asserts it is working in close communication with the Commission staff to assure compliance with the law, but the CBOE's letter does not identify any facts to support its conclusions and denial or any explanation of why its actions comply with the law.

membership, as required by the plain terms of the CBOE Articles of Incorporation and Delaware statutory law.

1. The purported interpretation of Article Fifth(b) embodied in the 2001 Agreement, as amended, is in fact and substance an amendment of the terms of the Article. There is no simpler example or definition of an amendment to an Article of Incorporation than an action that changes the words and meaning of the document. The interpretation in the 2001 Agreement, as amended, substantively changes the meaning of the key terminology -- "member of the CBOT" -- in the Article. It changes the meaning 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 (the for-profit and corporately governed CBOT Holdings, Inc. and its corporate subsidiaries).

Specifically, pursuant to the purported "interpretation" in the 2001 Agreement, as amended, the words of Article Fifth(b) are changed (*i.e.*, amended) from "member of [CBOT]" to the words of the 2001 Agreement, as amended – *i.e.*, persons who own 27,338 shares of Class A common stock of CBOT Holdings, Inc., who own the Series B-1 common stock of the CBOT trading subsidiary (as described in the CBOT Holdings, Inc. Form S-4 Registration Statement filed by CBOT Holdings, Inc., and who own a so-called "Exercise Right" *created by CBOT Holdings, Inc.* that is associated with the Series B-1 shares.

Delaware law provides additional guidance that supports the conclusion that the interpretation of Article Fifth(b) in the 2001 Agreement, as amended, is an amendment of that Article. The CBOE is a Delaware nonstock corporation. Section 242 of the Delaware General Corporation Law expressly addresses requirements relating to the amendments of certificates of incorporation of nonstock corporations. Section 242(b)(3) sets forth the permissible procedures for amending the certificate of incorporation of a nonstock corporation. Section 242(b)(3) does not contain specific examples of corporate actions that constitute amendments, but clear guidance in that regard can be gleaned from Section 242(a), which identifies actions that constitute amendments to a stock corporation's certificate of incorporation. Section 242(a)(1) expressly identifies such actions as including, among others, "reclassification, subdivision, combination or cancellation of stock or rights of stockholders." Section 242(a)(3) similarly makes clear that amendments include any actions that change "preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights" of shareholders. These statutory examples set forth clear principles that corporate actions that reclassify, subdivide, limit, restrict, cancel or otherwise materially alter rights of equity holders of nonstock corporations are amendments to the certificates of incorporation and must comply with the procedures and standards set forth in Section 242(b)(3).

Here, the interpretation in the 2001 Agreement, as amended, materially alters the respective rights, powers and interests of the different classes of CBOE equity holders. The

CBOE Articles of Incorporation recognize two different classes of equity interest holders: (1) CBOT members who have exercised their right to be CBOE members ("hereinafter referred to as "CBOE exercise members"), and (2) all other CBOE members, *i.e.*, those who have purchased CBOE seats (hereinafter "CBOE treasury seat holders"). Any restructuring of the rights and interests of any one of the classes of CBOE equity interest holders necessarily materially affects the interests of the other class and, importantly, the value of the rights and interests of each class. In important ways, those changes are in the nature of a "zero sum" game – for example, enhancing the rights of CBOT exercise members can correspondingly diminish the rights of CBOE treasury seat holders by, among other things, diluting their voting power and the economic value of their seats. Here, the interpretation in the 2001 Agreement, as amended, creates a whole new group of CBOE equity interest holders – particular stockholders of the new CBOT Holdings, Inc. and its trading subsidiary. The interpretation thereby denigrates the rights and interests of CBOE treasury seat holders, by diluting their interests and power. Regardless of what label is applied to the Board's action, it functionally and substantively is an amendment of Article Fifth(b) within the meaning of Section 242.

2. ***The CBOE Board is without power to agree to or effectuate the 2001 interpretation.*** Pursuant to the express requirements of the CBOE Articles of Incorporation and Section 242 of the Delaware General Corporation Law, the words of Article Fifth(b) cannot be changed (*i.e.*, amended) absent an 80% vote of the CBOE membership.[2] The CBOE Board has fiduciary duties to the CBOE membership to conduct itself in accordance with the organization's Articles of Incorporation and with controlling Delaware and federal law. Those controlling legal authorities over the CBOE Board do not permit it to do indirectly by agreement with third parties (the CBOT and CBOT Holdings, Inc.) that which it may not do directly.

The constraints on the Board's authority in this regard are absolute – amendments to the Articles of Incorporation may only be effected by an 80% affirmative vote of the membership. The Board is without authority to amend the Articles of Incorporation regardless of whether or not it acts in good faith or might be considered to be acting fairly with respect to an amendment

[2] Delaware statutes limit the authority of corporate boards of directors unilaterally to change fundamental terms of certificates of incorporation and equity holder rights. Section 242(b)(3) of the Delaware General Corporation Law sets forth the permissible procedures for amending the certificate of incorporation of a nonstock corporation. Those procedures require that the governing body of a nonstock corporation "shall adopt a resolution setting forth the amendment proposed and declaring its advisability." Thereafter, such proposed amendment "shall be submitted to the members or to any specified class of members of such corporation without capital stock in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation [Section 242(a)]." Further, Section 242(b)(3) provides that the determination of the members of a nonstock corporation must be in accordance with any "provision requiring any amendment thereto to be approved by a specified number or percentage of the members." Article Fifth(b), requires that no amendment may be made without the approval of at least 80% of the CBOE members.

it would favor. As discussed above, however, the Board cannot be considered to be acting in good faith, where, as here, it appears to be wilfully violating Section 19 and the Commission's clear guidance in its February 25, 2005 Order.[3]

Nothing in the Exchange Act supercedes these authorities. To the contrary, it would contravene the purposes and provisions of the Exchange Act to permit a corporate board to evade and denigrate the governing corporate documents and state law that control its governance. Accordingly, the Commission should not approve the interpretation embodied in the 2001 Agreement, as amended, as it is beyond the Board's power to agree to or implement and is contrary to the Exchange Act.

3. ***The 2001 interpretation implicates a breach of fiduciary duty.*** Where, as here, there are conflicting interests between the classes of CBOE equity interest holders with respect to an alteration of rights, the CBOE Board is conflicted from attempting to determine the competing and conflicting reclassification of rights and interests among the different classes of CBOE equity interest holders, because its determination will necessarily favor one class of equity interest holder over another.[4] Under Delaware law, the Board should step back and follow procedures governing amendments. Underscoring this point is the fact that the Certificate of

[3] The letter of CBOE's outside counsel Richards, Layton & Finger, P.A. submitted by the CBOE is not reliable authority to support approval of the 2001 interpretation. The letter does not cite any authority for the legal difference between an interpretation and an amendment and does not provide any rationale as to why the CBOE's purported "interpretation" in the 2001 Agreement, as amended, should be not be considered an amendment of the Article Fifth(b). At most, the letter seems to rely on the spurious notion that, as long as the CBOE Board chose to label its determination as an "interpretation" rather than an "amendment" and did not invoke the procedures for adopting amendments to the Article, the determination should be considered to be an interpretation and not an amendment. Such a contention unreasonably elevates form over substance by mechanically looking to labels rather than the substance of Board action. Nor does the letter address the circumstances when an "interpretation" must also be deemed in substance an amendment and what consequences flow from that. The letter cited but one relevant Delaware court decision that opined only that a board of directors had authority to interpret certain terms in a corporate charter (*Stroud v. Grace*, 606 A.2d 75 (Del. 1992)), but that case did not address an interpretation that had the effect of altering shareholder or equity holder rights. Accordingly, it did not reach the issue before the Commission. Nor did the letter consider the Board's apparent lack of good faith evidenced by its apparent violation of Section 19. Where, as here, a law firm is retained to provide its view as to the legal character of a particular act, but its view fails to provide any relevant statutory or case authority or creditable rationale for its conclusion, it might be reasonably inferred that no such authority exists and the view should not be entitled to any weight.

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

Incorporation's requirement of an 80% vote is there in part to protect minority equity holders from reclassifications that would prejudice their equity rights.

Here, the CBOE Board's conflict is aggravated by the fact that its "interpretation" overtly benefits one class of equity holder over another even when the favored class by its own election to demutualize the CBOT necessarily caused the extinguishment of any rights they might have qualified for under Article Fifth(b). Moreover, many of the beneficiaries of the CBOE's purported interpretation are not CBOE members of any stripe – they merely may have qualified for an exercise right but did not in fact exercise it.

4. ***The interpretation of the 2001 Agreement, as amended, is not a fair or valid interpretation of Article Fifth(b).*** A certificate of incorporation is deemed to be a contract between the state and the corporation and among its shareholders and members, and certificates thus typically are interpreted using the rules for contract interpretation. *In re New York Trap Rock Corp.*, 141 B.R.. 815, 822 (U.S. Bankr. S.D.N.Y. 1992) (and Delaware authorities cited therein).

Here, since creation of the CBOT in the early 1970s, the plain meaning of "member of [CBOT]" in Article Fifth(b) has been understood to identify a full member of the former CBOT. There is no basis in fact or law to understand those words to mean a stockholder of a future organization. This well-established meaning and commonly applied principles of contract interpretation support the conclusions that "member of the [CBOT]" in Article Fifth(b) does not recognize a stockholder in CBOT Holdings, Inc. and its stock corporation subsidiaries. In this connection, a court interpreting Article Fifth(b) pursuant to principles of contract interpretation would perforce have to consider the meaning of the term as understood at the time the Article was created and any other well-settled understanding of the term thereafter. As stated in Section 223 of the Restatement of Contracts (Second):

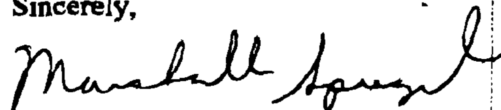
> (1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

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

D. The Commission's February 25, 2005 order in CBOE's rule approval proceeding No. SR-CBOE-2004-16 addressed issues that are distinguishable from the issues presented with respect to the proposed rules change at issue in this proceeding and the analysis relied on by the Commission in that order does not support approval of the proposed rule change in this proceeding.

The Commission's February 25, 2005 Order addressed a CBOE interpretation that concerned which members of the former CBOT would be considered full members for purposes of Article Fifth(b)'s exercise right. That interpretation at least was grounded in considering the circumstances of persons who were CBOT members. The 2001 interpretation is entirely distinguishable because it seeks to address the rights and interests of persons who are not in fact members of anything.

Sincerely,



Marshall Spiegel
1618 Sheridan Road
Wilmette, IL 6009

Donald Cleven
866 Valley
Lake Forest, IL 60045

Enclosure

April 26, 2005

Mr. William Brodsky
Chairman
Chicago Board Options Exchange, Inc.
400 S. La Salle Street
Chicago, IL 60603

Re: **Chicago Board of Trade Exercise Right**

Dear Chairman Brodsky:

This letter is submitted for the consideration of the CBOE Board. As the Board is aware, the Chicago Board of Trade ("CBOT") formally demutualized on Friday, April 22, 2005, by extinguishing its status as a membership organization and becoming a Delaware stock corporation. In light of the demutualization, there are no longer are any "members" of the CBOT. That status has been extinguished; it ceases to exist. This structural change of the CBOT has significant consequences for the CBOE Board, the CBOE's members, and the former members of the CBOT.

A. The CBOT demutualization extinguished the CBOT exercise rights under the CBOE's Articles of Incorporation. The CBOT's extinguishment of memberships renders the exercise right for "members of the CBOT" set forth in Articles of Incorporation nugatory. Since there are no longer any members of the CBOT, the exercise right set forth in the Articles of Incorporation no longer confers an exercise right on any person. Thus, the CBOE Board no longer is authorized under the Articles of Incorporation to recognize any exercise right for any person. Consequently, the CBOE exercise memberships that have been enjoyed in the past by CBOT members who had exercised their rights to become CBOE exercise member pursuant to the CBOE's Articles of Incorporation should no longer be recognized and the CBOE exercise members should be excluded from the CBOE unless and until they purchase or rent a seat consistent with the requirements applicable to all persons seeking to purchase or rent CBOE seats.

B. The CBOE-CBOT Letter Agreements purporting to interpret the CBOE Articles of Incorporation are outside the CBOE Board's Authority. I am aware that prior CBOE Boards entered into letter agreements with the CBOT dated October 7, 2004 and August 1, 2001 (hereinafter, collectively, the "2001 Agreement"), which purport to agree to an interpretation of the CBOE Articles of Incorporation to the effect that the exercise right for members of the CBOT will continue to be recognized for certain stockholders of the CBOT after CBOT demutualization. As you know, it has been my view that such letter agreements, and the interpretation embodied within them, are without legal authority because the purported interpretation of the Articles of Incorporation that those agreements seek to validate constitutes

an amendment to the Articles of Incorporation and the CBOE Board lacks authority to amend the Articles of Incorporation. In this connection, the Articles of Incorporation, by their terms, do not permit amendments except pursuant to an 80% affirmative vote of the membership. The constraints on the Board's authority in this regard are absolute – amendments to the Articles of Incorporation may only be effected by an 80% affirmative vote of the membership. The Board is without authority to amend the Articles of Incorporation regardless of whether or not it acts in good faith or might be considered to be acting fairly with respect to an amendment it would favor.

C. **The purported interpretion of the CBOE Articles of Incorporation embodied in the August1, 2001 and October 7, 2004 letter agreements with the CBOT is not effective, at a minimum, unless and until approved by the Securities and Exchange Commission ("SEC")**. Even if the current CBOE Board would seek to rely on the purported interpretation of the Articles of Incorporation set forth in the 2001 Agreement with the CBOT, the Board is without authority to do so, at a minimum, unless and until the SEC, pursuant to Section 19 of the Exchange Act, approves the interpretation. The CBOE's prior actions and public statements agree with this. The CBOE expressly advised the SEC in its October 26, 2004 submission in *In re the Petition of Marshall Spiegel*, SEC File No. SR-CBOE-2004-16 (hereinafter "SR-CBOE-2004-16") that the purported interpretation in the 2001 Agreement, by its terms, is not effective and cannot become effective unless and until the SEC approves the rule change under Section 19. The CBOE, consistent with that view, submitted the purported interpretation in the 2001 Agreement for SEC review and approval on March 31, 2005. Currently, the SEC's review process is in a stage of receiving public comment and no SEC determination has been issued.

If the CBOE Board were to act in a manner that seeks to effectuate the purported interpretation in the 2001 Agreement prior to a final SEC approval of it, the CBOE would violate Section 19 of the Exchange Act. The SEC's February 25, 2005 Order in SR-CBOE-2004-16 anticipates this issue, stating at page 16: "To the extent . . . that any part of an agreement is a 'policy, practice, or interpretation' of the CBOE's rules and that 'policy, practice, or interpretation' has not been approved by the Commission it would be a violation of Section 19(b) of the Exchange Act and the Commission could take appropriate action against the CBOE."

D. **The CBOE Board may not proceed with its purchase offer for purported CBOT exercise rights, at a minimum, unless and until the SEC approves the purported interpretation set forth in the 2001 Agreement**. The CBOE also is without authority to proceed with its purchase offer to purchase purported CBOT exercise rights as described in the CBOE's press releases dated April 18, 2005 and March 1, 2005. That purchase offer was commenced solely on the basis of the SEC's approval of purported interpretation of the CBOE's Articles of Incorporation set forth in the CBOE's letter agreement with the CBOT dated September 17, 2003 ("the 2003 Agreement"). That letter agreement allegedly interpreted the

Article of Incorporation to provide that only persons who possess all of the constituent rights of a CBOT full membership will be recognized as "members of the CBOT" under the Articles of Incorporation. The purported interpretation in the 2003 Agreement, by its terms, was confined to addressing the purported interpretation of "member of the CBOT" exercise rights in the context of the CBOT being a membership organization. Neither the purported interpretation in the 2003 Agreement nor the SEC's final order approving it purport to determine the meaning of "members of the CBOT" after demutualization. Accordingly, based on the fact that the CBOT has now demutualized, the purported interpretation in the 2003 Agreement no longer has any legal effect and is not a basis for proceeding with a purchase offer.

Rather, as the CBOE itself previously has recognized, following demutualization, the continuation of the exercise right is governed by the purported interpretation in the 2001 Agreement, when and if approved by the SEC. Thus, the CBOE must await final SEC approval of the purported interpretation in the 2001 Agreement, if any in fact is given in the future, before it may proceed with a purchase offer from the purported owners of purported exercise rights.

I also note that it would be a breach of fiduciary duty for the Board to proceed with the purchase offer for exercise rights prior to SEC approval of the interpretation in the 2001 Agreement. Such action not only would violate the Exchange Act, but also involve the Board in an irrational offer to pay substantial sums for exercise rights that no longer exist and to pay them to persons who are not in fact members of the CBOT as defined at the time the CBOE's Articles of Incorporation were adopted or by any other plain meaning of the term. Further, such a purchase offer would disproportionately harm CBOE treasury seat members by, among other things, subjecting them a to substantial assessments to pay for non-existent exercise rights.

E. Summary. Following the CBOT's demutualization, the CBOE Board is without power to continue to recognize any exercise right under the CBOE's Articles of Incorporation, the exercise memberships of former CBOT members obtained pursuant to the now defunct exercise right in the Articles of Incorporation are extinguished and should no longer be recognized, and the CBOE must cease all efforts to pursue its anticipated purchase offer for CBOT exercise rights. In addition, even if the Board were to disagree with the foregoing, it is

without authority to pursue the purchase offer for purported exercise rights unless and until the SEC issues a final order approving the CBOE's purported interpretation in the 2001 Agreement.

I am available at the Board's convenience to discuss these matters.

Sincerely,

Marshall Spiegel

cc: All current CBOE Board Members
Joanne Moffic-Silver, Esq.
CBOE General Counsel