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Mr. Jonathan G. Katz
Secretary
The Securities and Exchange Commission
450 Fifth Street N W
Washington, D C 20549-0609

Re: SR-CBOE – 2005-19 & 20

April 27, 2005

SR-CBOE-2005-20

Dear Sirs:

We the undersigned members of the Chicago Board Options Exchange (CBOE) believe the Securities and Exchange Commission (SEC) should not approve CBOE's rule filings SR-CBOE – 19 & 20 and should mandate that the Chicago Board of Trade's (CBOT) demutualization be subject to CBOE's Certificate of Incorporation Article Fifth (b) vote of the CBOE's membership. Our initial reasoning was stated in our letters of April 28, 2004 and June 8, 2004 and is further stated below:

A. CBOT will cease to be a membership organization

As of April 22,2005, the CBOT has demutualized into a "for profit" holding company which will issue stock and contain two subsidiary trading companies which will conduct open outcry trading and electronic trading. These changes will affect:

1. EQUITY – Under the new structure, the CBOT members will not receive all of equity of the existing CBOT today. Initially, they receive approximately 77% of the CBOT's equity but could be diluted further with an I.P.O. In theory, if CBOT members are not required to own 100% of the equity, then logically there is no requirement to own any equity in order to be considered a member.
2. GOVERNANCE – The petition process and committee system will change to where management will gain control instead of former members.
3. VOTING RIGHTS – The voting rights of former members will be limited.
4. ARBITRATION – The new agreement calls for an arbitration process to be used in disputes over the impact the new CBOT corporate structure has upon the exercise right. This new process is an

amendment to Article 5(b) in that decisions that should be made by the CBOE membership in an Article 5(b) vote is being decided by an arbitration panel.

The CBOE in its release in the Federal Register states "When all steps of the restructuring of CBOT as originally proposed were fully implemented, CBOT would no longer have a membership corporation." The SEC in its release of February 26, 2005 on page 14, second paragraph, states "change CBOT makes to its membership such as CBOT's pending restructure and in so doing recognizes that CBOT is changing." From these above quotes, the CBOE and the SEC recognize that the CBOT is changing its corporate structure. One can only conclude that this change is an amendment in wording and meaning to Article 5(b). There will no longer be "Full Members of the Board of Trade of the City of Chicago, Inc." after the CBOT's demutualization. The SEC can not approve a CBOE interpretation of Article 5(b), where the purported interpretation in fact substantively and materially changes the meaning of the express terms of Article5(b) and disregards the plain and historic meaning of the term "member of the CBOT" (which has a precise meaning relating to a particular membership organization) with the new words "stockholder of CBOT" (which refers to an entirely different person in a new and different corporate structure). The CBOE's proffered rule change substantively amends Article5(b). The CBOE's Articles of Incorporation do not authorize the CBOE Board to change the words of (i.e.amend) Article5(b). Indeed, the Articles prohibit the Board from doing so. The express terms of the Articles require that the Articles may be amended only by an 80% vote of the membership themselves. This is true regardless of whether the Board on attempting to amend the Articles is acting in good faith and equitably. Amending Article 5(b) is simply beyond the Board's powers.

B. Section C in Federal Register on SR-CBOE-2005-19

Under Section C of the Federal Register on 2005-19, the CBOE gives an incomplete record of the history of the interpretation of Article 5(b). For instance, the CBOE states that "the interpretation embodied in the 2001 Agreement does not change either the language or intended meaning of Article 5(b)." This last statement is false and misleading. Just because the CBOE chooses not to change the language or wording does not mean that the intended meaning has not been changed. As we stated above the demutualization of CBOT has changed the CBOT such that the current

organization and its stockholders are not referenced in or within the meaning of the terms of Article 5(b).

The CBOE states that it has made interpretation of Article 5(b) in 1992 and 2003. In 1992, CBOT did try to change its membership by trying to divide its rights and privileges into separate pieces to make exercising easier and cheaper. In that instance, CBOE tightened the requirements by limiting number of CBOT seats and requiring all rights and privileges be attached in order to exercise. At that time, the CBOT continued to be a membership corporation. In 2003, the CBOT was skirting the membership requirements to be approved as full CBOT member by allowing only exercise applicants to take a shorten application process and not be eligible to trade other CBOT products. After CBOE found out about the process, it notified the CBOT to change its process. Here again, the CBOT was still a membership organization.

The CBOE in its discourse would have the reader believe that it always has to interpret Article 5(b) to agree with changes to CBOT's structure. This has not always been the case. In examples below, the CBOE has extinguished or threatened to extinguish the exercise right and has not agreed to the CBOT's changes. In 1982, when the CBOT tried to separate the CBOT's trading rights from the exercise right by allowing the delegate (lessee) to trade on the CBOT and the leaser exercise to trade on the CBOE. In this case the CBOE extinguished the CBOT's leaser exercise right. Buckley and CBOT sued the CBOE in Illinois Appellate Court but did not prevail.

In 2000, when the CBOT threatened to demutualize, the CBOE submitted rule filing SR-CBOE-2000-44 which was subsequently withdrawn. In that rule filing, CBOE proposed to extinguish the exercise right because of violations of Article 5(b) in that CBOT would no longer be a membership corporation. In 1990, the CBOE also proposed to extinguish the exercise right for CBOT members who had separated their night time trading privileges (SR-CBOE-90-11 & 26). These are examples of past CBOE policy of extinguishing the exercise right when the CBOT changed its structure.

Finally, CBOE claims "If CBOE were not able to interpret Article 5(b) under unanticipated change circumstances without satisfying the 80% class vote requirements that apply in the case of an amendment to that Article, CBOE would be placed on the horns of a dilemma." Nothing could be

further from the truth. Because the CBOT has demutualized, no persons still exist who come within the terms of the exercise right i.e. the former membership organization known as the CBOT no longer exists and no members of it continue to exist. Those former members relinquished access to the exercise right when they voted to demutualize and create a new stock corporation. Accordingly , as a result of the CBOT demutualization, the exercise right in Article 5(b) is now only a historical remnant that has no continued life. Hence, no action by the CBOE is needed to address the exercise right and is no "dilemma." The only "dilemma" could be for persons who would like to amend the Articles to create an exercise for the benefit of the new CBOT stockholders and lack confidence that 80% of the CBOE membership would vote to create such an exercise right. But that is an issue for another day, should such a vote be taken. In addition, to the extent controversy over the existence of the exercise right were to exist, the former CBOT members and the CBOE have the ability to seek resolution of any legal dispute in the courts. Also, the CBOE and CBOT can, on their own, negotiate an solution which could include swapping partial CBOE seats and/or cash for consideration for the extinguishment of the exercise right.

C. Conflict of Interest

We believe the CBOE management and Board of Directors are conflicted in their decision not to require an Article 5(b) vote. The CEO of the CBOE announced on January 11, 2005, that the CBOE is exploring demutualization. We also understand the CBOE Board of Directors has formed a committee or task force to examine demutualization and that they have talked to several investment bankers. We assume that time is of the essence because other exchanges have or in the process of demutualizing and because the stock market at this time appears receptive to exchange IPOs. We also assume that some or all of top management, directors, and/or outside counsel will directly benefit from fees and/or incentives in the demutualization and IPO and that these individuals are indifferent as to the number of CBOE members because the financial benefits that would flow to top CBOE management are independent of the number of CBOE members.

Added to this conflict is that top management and the Board have entered into this agreement in 2001 in which they certify they will "use best efforts to obtain approval" of this agreement and if failing to gain approval; CBOE will "agree to consider in good faith the adoption of necessary changes to

obtain approval." Based on the above language, the CBOE Board is conflicted between its commitment to the CBOT in the 2001 agreement and upholding its reputation and its obligation to abide by the requirements of the Articles with respect to amendments.

Because of these conflicts, the SEC should not approve the Board's purported interpretation and it should allow any amendment to the Articles to be decided by the membership under Article 5(b).

D. CBOE member's inability to sue the Exchange

Under CBOE Rule 6.7A, a member is prohibited from suing the exchange, management, and directors. The SEC in its Release 34-51252 dated February 25, 2005, footnote 33 states "the Commission did not issue an order finding that the rule change is consistent with the requirements of the Exchange Act." The SEC appears inconsistent by passing a rule restricting a member from pursuing its rights for a judicial review on corporate governance and structure matters, when such rule may be inconsistent with the Exchange Act.

E. Reliance on Delaware Counsel

In presenting this rule, the CBOE relies on an opinion from the Delaware counsel Richard, Layton, and Finger (RL&F)that the CBOE has acted "within the general authority of the Board to interpret Article 5(b) when question arise as to its application." The SEC in its February 25' 2005, release sights CBOE's outside counsel's opinion as an important step in interpreting Article 5(b). We believe that Richard, Layton, and Finger's opinion is logically flawed and consequently should not allow the CBOE's Board of Directors to interpret Article 5(b) in the CBOT's demutualization. Our reasons are elaborated below:

1. In the scope of the Board's authority, RL&F states "governing body of the Corporation should be its Board of Directors . . . except to the extent that authority, powers, and duties of such management shall be delegated to a committee or committees of the Corporation established pursuant to the by-laws." We believe that committee can easily be interpreted to be the membership in a membership corporation such as the CBOE is and that the by-laws (the Certificate

of Incorporation) specifically states that these decisions are to be decided by the membership in a vote stated in Article 5(b).

2. Under Section II Amendment of Certificate of RL&F's opinion, it states "when questions arise to the application of Article Fifth (b) in circumstances not directly addressed by that Article, the Board may interpret that Article so long as in doing so the Board acts in good faith, in a manner consistent with the terms of Article Fifth (b) and not for inequitable purposes." This rationale has no merit when applied to an action that is outside the Board's power to make. The Board's good faith is irrelevant when it acts without authority and ,indeed, as here, in contravention of the powers exclusively reposed in the membership by the Articles with respect to amendments to the Articles. Moreover, if the standard advocated by RL&F were applied, the Board has not met these requirements:

   a. The Board is not acting in good faith when it is conflicted as we pointed out in the above section.

   b. The Board has not acted "consistent with terms of Article Fifth (b)" because CBOT's demutualization effectively extinguishes the continued viability or relevance of the exercise right and any action by the Board to amend Article Fifth (b) to create a new exercise right for CBOT stockholders contravenes Article 5(b)'s requirements of a 80% vote of the membership.

   c. The Board's attempt to create a new exercise right for the benefit of CBOT stockholders has "an inequitable purpose "because such action is detrimental to the members of the CBOE because it establishes rights that even the Board has publicly acknowledged frustrate the CBOE's ability to demutualize and successfully compete in the future.

F. Recent Developments

On April 18, 2005, the SEC issued Release No. 34-51568 File No.SR-CBOE 2004-16 covering subject matter which is germane to the current rule filings CBOE 2005-19&20. We would like the SEC to consider arguments made in the "Brief in Support of Motion Marshall Spiegel for the Reconsideration of the Commission's February 25, 2005 Order" dated March7,2005 by Charles

R. Mills of Kirkpatrick & Lockhart Nicholson Graham LLP to be part this letter. A copy is attached. We would request additional time to study and comment on the April 18th release as it pertains to these rule filings.

For the reasons stated above we request that the SEC not approve this rule filing and mandate the CBOE hold an Article 5(b) vote. If you have any questions or need any further information, pleases contact us.

Sincerely,

Thomas A Bond
Member & former Vice Chairman CBOE
1114 Wrightwood
Chicago IL 60614-1315
773/880-5518
Curtinbond@aol.com

Norman Friedland
Member CBOE
142 Lincolnwood Road
Highland Park IL 60035

Gary P Laney
Member & former Vice Chairman CBOE
P O Box 1125
Wayne IL 60184

Anthony Arciero
Member CBOE
11645 Briarwood Lane
Burr Ridge IL 60527

Marshall Spiegel
Member CBOE
1618 Sheridan Rd
Wilmette IL 60091

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:	)	
	)	**File No. SR-CBOE-2004-16**
MARSHALL SPIEGEL	)	
	)	

BRIEF IN SUPPORT OF MOTION MARSHALL SPIEGEL FOR RECONSIDERATION OF THE COMMISSION'S FEBRUARY 25, 2005 ORDER

Charles R. Mills
Kirkpatrick & Lockhart Nicholson Graham LLP
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 778-9096
(202) 778-9100 (fax)

Attorneys for Petitioner Marshall Spiegel

[redacted]

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:	)	
	)	**File No. SR-CBOE-2004-16**
MARSHALL SPIEGEL	)	
	)	

MOTION OF PETITIONER MARSHALL SPIEGEL FOR RECONSIDERATION OF THE COMMISSION'S FEBRUARY 25, 2005 ORDER

Pursuant to Commission Rules 154 and 401, Petitioner Marshall Spiegel respectfully moves for Reconsideration of the Commission's February 25, 2005 Order in this proceeding. The reasons for the Motion are set forth in the attached supporting Brief.

Respectfully submitted,

Charles R. Mills

Charles R. Mills
Kirkpatrick & Lockhart Nicholson Graham LLP
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 778-9096
(202) 778-9100 (fax)

Attorneys for Petitioner Marshall Spiegel

Dated: March 7, 2005

MAR 7, 05

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:	)	
	)	**File No. SR-CBOE-2004-16**
MARSHALL SPIEGEL	)	
	)	

BRIEF IN SUPPORT OF MOTION OF MARSHALL SPIEGEL FOR RECONSIDERATION OF THE COMMISSION'S FEBRUARY 25, 2005 ORDER

Pursuant to Commission Rules of Practice 154 and 470, Petitioner Marshall Spiegel respectfully files this Brief in Support of his Motion for Reconsideration of the Commission's Order dated February 25, 2005 (Release No. 34-51252) ("Order") in this proceeding.

I. SUMMARY

Petitioner respectfully moves for reconsideration on grounds that the Order should be set aside based on manifest errors of law and fact. Petitioner understands that, pursuant to settled Commission precedent, upon the filing of this Motion, the Order is not deemed to be a final order of the Commission and its effectiveness is stayed, until, at a minimum, the Commission determines the merits of this Motion.[1]

1. This is a case of first impression and it does not present easy questions. The heart of the points that follow is that the Commission's lengthy Order does not even deign to address – and appears oblivious to – the material conflict of interest of the Board of Directors of the Chicago Board Options Exchange ("CBOE") in attempting to "interpret" the Certificate of Incorporation, when, as here, such interpretation has the effect of materially altering the

[1] *In the Matter of the Application of Reuben D. Peters, et al.*, Admin. Proc. File No. 3-11277, 1934 Act Release No. 51237 at note 8 (February 22, 2005).

respective, relative and competing rights of the several classes of CBOE equity interest holders.[2] Under Delaware law and the CBOE's Certificate of Incorporation, such material changes to equity holder rights constitute amendments to the Certificate, that may be adopted only pursuant to a duly authorized equity holder vote. Delaware law does not empower boards of directors to act unilaterally to change equity holder rights. And, in any event, the CBOE Board, which owes fiduciary duties of honesty, loyalty and good faith to all equity holders, is conflicted with respect to the interpretation it has made and therefore should be precluded under both Delaware and the federal securities laws from attempting to so act unilaterally rather than through the amendment process.

The contention of the Commission ,Order (at pp. 8-9), the CBOE, and its outside counsel that a board of directors may "interpret" a certificate of incorporation is not dispositive of the issues here. Where an "interpretation" changes equity holder rights, it also is an amendment and is nugatory until the change in rights is approved by the equity holders themselves through a vote in compliance with the law and the Certificate of Incorporation.

Here, the Commission's Order accepts in substance Petitioner's position that the Chicago Board of Trade's ("CBOT") changes to the exercise rights alter the respective, relative rights of the CBOE equity holders in a fashion that requires a determination of how those changes will be treated under the CBOE Certificate of Incorporation: "The Commission agrees that it is

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[2] Consistent with the principles set forth in Commission orders in other cases that motions for reconsideration should address only manifest errors of law and fact or new evidence that might compel the Commission to grant reconsideration, this Brief will not restate all of Petitioner's arguments made before, but Petitioner preserves all of them in the event of later judicial review. Petitioner hereby expressly reserves all objections, challenges, points and bases on which the Order should be set aside pursuant to Section 25 of the Securities Exchange Act of 1934, as amended, and the Administrative Procedure Act, in the event he seeks judicial review of the Commission's final action.

circumstances external to this proposed rule change that present the question about what it means to be a 'member of the CBOT' under Article Fifth(b)." (Order at pp. 9-10.) The Order, however, manifestly errs in concluding that the CBOE Board has independent, unilateral, and final authority to determine the answer to that question. Delaware law regarding amendments to certificates of incorporation does not permit it, and, given the conflict extant here, the fiduciary obligations of the Board under Delaware and federal law preclude the Board from doing so as well.

2. Petitioner also respectfully suggests that the CBOT's recent formal actions to demutualize have the capacity to render the proposed rule change moot.[3] The proposed rule change has relevance only if the CBOT is structured as a membership organization. Petitioner raises for the Commission's consideration whether in these circumstances the better course for both the CBOE and the Commission is to hold final determination of the validity of the proposed rule change in abeyance until it can be known whether the rule change is needed, following the CBOT members' vote on whether to demutualize.

II. ARGUMENT

The novelty and complexity of the corporate governance issues here are the product of the dynamics of the uniquely symbiotic relationship between the CBOE and CBOT arising from the exercise right for CBOE memberships granted to CBOT members in CBOE's Certificate of Incorporation. The CBOT created that exercise right for its members as the incorporator of the CBOE in 1972.

[3] It apparently is not in the record of this proceeding considered by the Commission that the CBOT has recently formally commenced a vote of its membership to authorize demutualization of the CBOT, such that it will no longer be a membership organization but, rather, a stock corporation. (See Order, p. 14 at note 46.)

Due to the exercise right, any action by the CBOT that purports to change its membership structure or the ownership or control of the CBOE exercise rights necessarily calls for a determination of whether and to what extent such changes will be recognized and honored under the CBOE Certificate of Incorporation. What process should be followed to make such determinations is the legal issue presented by this proceeding. The CBOE Board contends, and the Commission's Order finds, that the Board may make that determination unilaterally by purporting to "interpret" the Certificate. Petitioner contends the issue involves a change of equity interest holder rights and as such must be presented to the membership for a vote in accordance with the voting procedures set forth in Article Fifth(b) of the CBOE's Certificate of Incorporation ("Article Fifth(b)"), and, if such a vote does not resolve the issue, it may be presented to a court for declaratory relief.

Emblematic of the difficulty of the issues is the fact that the Commission's Order does not even attempt to state in its own words for the parties' and the public's understanding a rationale for its central holding that the Board's proposed rule change is an "interpretation" of the CBOE Certificate of Incorporation within the Board's power to make and not a substantive "amendment" of it, which is outside the Board's authority to make. Rather, in a fashion perhaps unprecedented for Commission orders, the Commission seeks to justify its fundamental holding by only incorporating by reference without exposition (1) arguments set forth at page 6 of the Statement of CBOE in Support of Approval of Rule Delegated Authority, October 26, 2004 ("CBOE's Statement in Support of Approval") and (2) a bare conclusion in the letter of the

CBOE's outside counsel that CBOE submitted to the Commission in support of its request for approval of the proposed rule.[4]

The self-serving arguments in those sources do not support the Commission's ruling. They fail to cite any relevant Delaware statute and case law that should control the disposition of the issues. They also fail to address the CBOE Board's conflict of interest in attempting through the guise of an "interpretation" to bless CBOT action, when that "interpretation" materially alters the relative and competing rights of the different classes of CBOE equity interest holders.

A. The Order Contravenes Delaware Statutes

The CBOE is a Delaware nonstock corporation governed by Delaware law. The Order correctly finds at page 8 that, if the proposed CBOE rule change does not comply with state law governing the Board's authority, it would be inconsistent with the Securities Exchange Act of 1934, as amended ("Exchange Act") and, thus, could not be approved under Section 19 of that Act. However, the Commission's ruling that the CBOE Board's "interpretation" of the term "member of the [CBOT]" in Article Fifth(b) of the CBOE Certificate of Incorporation was a valid exercise of the Board's power manifestly contravenes Delaware statutes that limit the authority of corporate boards of directors unilaterally to change fundamental terms of certificates of incorporation and equity holder rights.

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. Those procedures require that the governing body of a nonstock

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[4] Order at pp. 8-9 and notes 27 and 28. The letter of CBOE's outside counsel is the letter from Michael D. Allen, Richard, Layton & Finger, to Joanne Moffic-Silver, Esq., CBOE General Counsel and Corporate Secretary, CBOE (June 29, 2004).

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." With respect to Article Fifth(b), the Commission's Order correctly recognizes at page 3 that the CBOE's Certificate of Incorporation requires that no amendment may be made 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.

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).

The CBOE Certificate of Incorporation recognizes 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"). The Certificate of Incorporation also recognizes a third class of interested parties who, although not equity holders, have certain contractual exercise rights: CBOT members who own exercise rights but who have not in fact exercised them to become CBOE exercise members (hereinafter "CBOT exercise right holders").

The Commission's Order correctly recognizes that external events at the CBOT can potentially change the relative rights and interests of the CBOE equity interest holders (Order at pp. 9-10). In this connection, when the CBOT restructures the terms of its membership and the exercise right component of the membership, that can, as in this instance, change the respective and relative separate rights and interests of the classes of CBOE equity interest holders. Any restructuring of the rights and interests of any one of the classes of CBOE equity interest holders or of the CBOT exercise holders necessarily materially affects the interests of the other class or interested party 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 right holders and CBOE exercise holders 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.

Previously, exercise rights were inalienable from full CBOT membership. Here, the CBOT unilaterally has sought to change the exercise rights into separate securities that may be transferred to and owned, rented or controlled by persons who are not full members of the

CBOT. Whether this action will affect the legal and economic rights that pertain to the CBOT exercise rights will depend on how the CBOT's changes will be treated under the CBOE's Article Fifth(b). Honoring the CBOT changes will, at a minimum, diminish the rights and interests of CBOE treasury seat holders, because it necessarily recognizes a new (and fourth) class of persons who may own and control exercise rights, and thereby repose in them a measure of economic influence over the CBOE at odds with CBOE treasury seat holders. However, a different result would obtain, if, for example, it were determined and declared under Article Fifth(b) that an exercise right would be extinguished if ever transferred apart from the sale or rental of a full CBOT membership.

Here, the Board's "interpretation" of the term "member of the [CBOT]" in Article Fifth(b) effectively alters the rights of the various and distinct classes of CBOE equity interest holders, by recognizing new rights that enhance the rights of CBOT exercise right holders and CBOE exercise members at the expense of CBOE treasury seat holders. As such, regardless of what label is applied to the Board's action, it functionally and substantively is an amendment to the Certificate of Incorporation within the meaning of Section 242.

Delaware Section 242 and the Certificate of Incorporation require that the CBOE Board permit the CBOE exercise members and all other CBOE members to vote on whether the alteration of exercise rights will be recognized under Article Fifth(b) and, if so, what the terms of the alteration will be. Those determinations cannot, consistent with Delaware law and the CBOE's Certificate of Incorporation, be determined by the CBOE Board alone.

B. Fiduciary Principles of Delaware and Federal Law Preclude CBOE Board Interpretations that Materially Change the Relative and Competing Rights of the CBOT Exercise Right Holders and CBOE Exercise Members at the Expense of CBOE Treasury Seat Holders

Where there are conflicting interests between or among the classes of CBOE equity interest holders with respect to an alteration of rights, the CBOE Board is conflicted from attempting to unilaterally referee and 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.[5] Under Delaware law, the Board should step back and follow procedures governing amendments. Underscoring this point is the fact that the Certificate of 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" is designed to enhance the rights of CBOT exercise right holders, who have only contractual relations with the CBOT, at the expense of CBOE treasury seat holders to whom the CBOE Board owes fiduciary duties.

Moreover, the Order at page 8 manifestly errs in adopting the CBOE's factual contention at page 6 of its Statement in Support of Approval that the CBOE Board's "interpretation" does not amend Article Fifth(b) because that purported interpretation "makes no ... attempt to change the nature of CBOT 'member's rights, but rather seeks only to give sharper definition to what it means to *be* a CBOT 'member'" (emphasis in original). This contention is at best an illusory

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[5] *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).

distinction of what the CBOE's purported interpretation is and has no basis in fact. When the CBOT changes the nature of a CBOT member's exercise rights in a way that changes the relative rights and interests among classes of CBOE equity interest holders, any CBOE Board action undertaken to validate those changes by redefining (or even, to use the CBOE's euphemism, "sharpening") what it means to "be" a CBOT member is itself a material alteration of CBOE equity holders' rights.[6]

The CBOE's argument at page 6 of its Statement in Support of Approval that the Board's interpretation is not an amendment because it does not change the rights of "CBOT 'members'" also misses the point – the issue is whether it effectively changes CBOE members' rights and interests.

C. The Commission's Application of Principles of Contract Interpretation to Uphold the CBOE Board's Interpretation is Manifestly Erroneous

The Commission's Order also manifestly errs in its conclusion incorporated from the CBOE's Statement in Support of Approval that principles of contract interpretation support the Commission's ruling. 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).

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[6] The 1992 interpretation is distinguishable from the 2003 interpretation. Unlike the 2003 interpretation, the 1992 interpretation did not place the CBOE Board in a conflicted role of reclassifying CBOE equity interest holder rights in a way that advantages any particular class of holder at the expense of another. The 1992 Agreement simply recognized that the Article Fifth(b) could not fairly be interpreted to permit expansion of the term "member of the [CBOT]" to include new and lesser forms of membership created by the CBOT, such interpretation did not disadvantage then current full CBOT members who held unexercised rights, CBOE exercise members, or all other CBOE members (CBOE treasury seat holders).

Here, commonly applied principles of contract interpretation support the conclusions that "member of the [CBOT]" in Article Fifth(b) does not recognize a right to separate a CBOT exercise right from a CBOT full membership and that for a CBOT to do so would extinguish that member's right to be within the term "member of the [CBOT]" as that terms appears in Article Fifth(b). 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.

It is undisputed that when exercise rights were created under the Certificate of Incorporation, they were integral rights appurtenant to a full membership of the CBOT, that could not be transferred separately from the sale or leasing of the full membership itself. That fact has remained in place at all times since adoption of the Certificate of Incorporation. Further, the parties reiterated that understanding of the exercise right in the CBOT and CBOE Agreement entered into in 1992. The Commission's Order errs to the extent at pages 11-12 it suggests that prior to the 2003 Agreement, exercise rights could be transferred separately from a transfer or leasing of the full membership itself.

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). The Commission's legal and factual

finding that the CBOE Board may disregard the longstanding interpretation of "member of the [CBOT]" and may unilaterally adopt a new interpretation in opposition to it is thus manifestly erroneous.

D. The Commission's Reliance on the January 29, 2004 Letter of CBOE's Outside Counsel is Manifestly Erroneous

The January 29, 2004 letter of CBOE's outside counsel did not cite any authority for the legal difference between an interpretation and an amendment and did not provide any rationale as to why the CBOE's purported "interpretation" in the 2003 Agreement should be not be considered an amendment of the Certificate of Incorporation.[7] 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 as an "amendment" and did not invoke the procedures for adopting amendments to the Certificate of Incorporation, 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 did the letter address the circumstances when an "interpretation" must also be deemed in substance an amendment and what consequences flow from that. The January 29, 2004 letter also did not consider the issue of the CBOE Board's conflict of interest in making and enforcing the interpretation at issue here.

We note that where, as here, a law firm is retained to provide an opinion as to the legal character of a particular act, but fails to provide any relevant statutory or case authority or

[7] 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 rights. Accordingly, it did not reach the issue before the Commission.

creditable rationale for its conclusion, it might be reasonably inferred that no such authority exists and the opinion should not be entitled to any weight.

E. The Order's Finding that Not Approving the CBOE Board's Interpretation Would Paralyze the Exchange is Without Basis in Fact

The Commission's Order finding (incorporated from page 6 of the CBOE's Statement in Support of Approval) that failing to approve the CBOE Board's "interpretation" would "paralyze" the Exchange is without basis in fact. First, if the Board's resolution did not receive the 80% approval, the Board could act sensibly in the face of the information received through the voting process to propose a different resolution or amendment that might be more likely to receive the 80% approval. Further, if that alternative was not pursued or did not succeed, the CBOE could invoke rights under Section 111 of the Delaware General Corporation Law to place the issue before a Delaware Court of Chancery to interpret, apply, enforce or determine the Certificate of Incorporation. That remedy provides an appropriate means of resolution that avoids the Board acting unilaterally when there is a conflict between the interests of one class of equity interest holders over another with respect to alteration of rights.

The Certificate of Incorporation and the law thus provide effective remedies that avoid a conflicted CBOE Board arrogating to itself the power to alter the competing rights among classes of CBOE equity interest holders, to the advantage of some holders and to the detriment of others.

III. CONCLUSION

For all the foregoing reasons, the Commission should reconsider its February 25, 2005 Order, set it aside, and either (1) commence proceedings to determine whether to disapprove the CBOE's proposed rule change, and/or (2) hold further proceedings in abeyance pending the CBOT's membership vote on demutualization, which could render further proceedings on this proposed rule change moot.

Respectfully submitted,

Charles R. Mills
Kirkpatrick & Lockhart Nicholson Graham LLP
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 778-9096
(202) 778-9100 (fax)

Attorneys for Petitioner Marshall Spiegel

Dated: March 7, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2005, I caused to be served a true and correct copy of the Motion of Petitioner Marshall Spiegel for reconsideration of the Commission's February 25, 2005 Order by telefax and U.S. Mail, postage prepaid, on the following:

Paul E. Dengel, Esq.
Schiff Harden
6600 Sears Tower
Chicago, IL 60606-6437
(312) 258-5500
(312) 258-5600 (Fax)

Joanne Moffic-Silver, Esq.
Chicago Board Options Exchange
400 South LaSalle Street
Chicago, IL 60605-1023
(312) 786-7462
(312) 786-7919 (Fax)

Charles R. Mills
Kirkpatrick & Lockhart Nicholson Graham LLP
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 778-9096 (Phone)
(202) 778-9100 (Facsimile)

June 8, 2004

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

Re: File No.SR-CBOE-2004-16 and SR-CBOE-2002-01

Dear Mr. Katz:

This letter is being submitted in response to a CBOE letter dated May 24, 2004.

1. We understand that CBOE rule filing SR-CBOE-2002-01 is being withdrawn because the Chicago Board of Trade has not finalized their restructuring. In a May19,2004 letter from Charles P Carey, Chairman of the Board of the Chicago Board of Trade, to his fellow members, he writes "On May 18, 2004, the court granted preliminary approval of our settlement agreement with the plaintiffs in the minority member lawsuit. Once this settlement receives final court approval and the Securities and Exchange Commission (SEC) declares our registration statement effective, we can then move forward with a membership vote and complete our restructure process." We believe that this restructuring will take place soon and therefore believe the SEC should not separate rule 2004-16 from 2002-01. In addition rule 2004-16 refers to rule 2002-01 in a foot note on page 3 of the filing and Amendment No.1 to SR-CBOE-2004-16 filed in a letter of April 8, 2004 references agreements between CBOT and CBOE concerning CBOT's restructuring. For the above reasons, we believe that the SEC should not act on this rule filing alone, but should instead tie both rule filings together and require an article 5(b) vote.

2. If the SEC concludes that rule 2004-16 can be separated from 2002-01, it should require an article 5(b) vote on 2004-16 because the purchase of exercise privileges is a partial demutualization of CBOT and therefore an amendment to article 5(b). Under the new structure, CBOT memberships will have two classes: one with exercise rights and one without. The CBOT will act as transfer agent and registrar. Also CBOT members will able to receive separate value for the exercise right which was not recognized in article 5(b) and the 1992 agreement.

3. The CBOE keeps asserting that the CBOE Board of Directors has the sole right to interpret changes in the CBOT membership. We would not take issue with its assertion but for the fact that article 5(b) requires the CBOE membership of both classes to decide if changes or amendments to article 5(b) are permissible. The CBOE Board of Directors should not be usurping the member's rights by interpreting article 5(b) and not calling for an article 5(b) vote.

For these reasons and reasons stated in our letter of April 8, 2004, we believe that the SEC should not approve these rule filings, but instead require an article 5(b) vote of the membership. If you have any questions or need additional information, please contact us.

Sincerely,

Thomas A Bond
1114 Wrightwood Ave
Chicago IL 60614-1315
773/880-5518

Mr. Jonathan G. Katz
Secretary
U.S .Securities and Exchange Commission
459 Fifth Street, N.W.
Washington, D.C. 20549-06069

April 28, 2004

RE: Chicago Board Options Exchange – Exercise Right Rules Filings
File No.: SR-CBOE-2002-01
SR-CBOE-2004-16

Dear Mr. Katz:

The undersigned, members of the Chicago Board Options Exchange (CBOE), appreciate the opportunity to comment on the CBOE rule filings Numbers SR-CBOE-2002-01 and SR-CBOE-2004-16 concerning agreements between the CBOE and the Chicago Board of Trade (CBOT). We believe that the SEC should not approve these rule filings for reasons which are elaborated below:

HISTORY AND BACKGROUND

When the CBOE was incorporated in 1972, its Certificate of Incorporation included an Article Fifth paragraph (b) which granted a "member of the Board of Trade of the City of Chicago" the right to become a member of the CBOE "so long as he remains a member of the Chicago Board of Trade" i.e. the exercise right. This Article also states that "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 (CBOE) admitted pursuant to this paragraph (b) and (ii) the members of the Corporation (CBOE) admitted other than pursuant to this paragraph (b), each such category of members voting as a separate class." This Certificate of Incorporation was approved be the SEC.

In 1982, litigation was brought against the CBOE concerning the exercise right (Buckley v.CBOE) which resulted in the state court deferring to the SEC on the basis of federal preemption given the existence of an overall regulatory scheme determined to be preferable to state court interpretation. Since that time, at least two other state court cases concerning the exercise right have been dismissed or deferred in deference to the SEC based on the state court judge's findings in accord with the Buckley v. CBOE case rational. In addition, the CBOE with the approval of the SEC has implemented rules which limit or prevent a CBOE member from bringing suit against the CBOE. (CBOE rules 2.24 and 6.7A). As a result of these precedents and rules, minority members of the CBOE must look to the SEC to resolve member rights.

In 1992, the SEC approved CBOE rule 3.16(b) which interpreted Article 5(b) to further define and clarify but not change the definition of the "member of Board of Trade".

REASONS FOR DISAPPROVAL

Listed below are our reasons why the SEC should not approve these rule filings. If the CBOT wants to proceed with its demutualization, then the CBOE should hold a membership vote under Article 5(b) procedures to determine the effect on the exercise right.

1. The CBOT wishes to "demutualize" its membership structure as disclosed in its Registration Statement on Form S-4 with the SEC. We believe that the CBOT's proposed changes to its corporate structure is an amendment to Article 5(b) in that the CBOT will be demutualized and no longer be a membership organization. The SEC and security laws require organizations to file documents such as S-4 when they demutualize because these are changes to the organization that investors and regulators should be informed about. This is what the CBOT is doing with its S-4. We do not agree with the CBOE that this change is an interpretation to Article 5(b) but that it is an amendment and should be subject to an Article 5(b) vote.

2. Under the proposed rule changes, certain disputes concerning definitions of what constitutes a member of the CBOT will be subject to arbitration. This proposal is an amendment to Article 5(b) in that an arbitration procedure is being added, the effect of which is to remove the membership process under Article 5(b) from deciding on amendments to the definition of a member of the CBOT and giving it to an arbitration panel.

3. When the CBOE was created in 1972 , the equity of the CBOT was only contained in the "member of the Board of Trade". Subsequently, the CBOT created minor memberships (i.e. Associate members, IDEMS, COMS) which had fractional voting rights but no equity rights. According to the CBOT's registration statement, the full members of the CBOT would receive approximately 77% of the equity in the new holding company. This is another factor where the definition of a "member of the Board of Trade" is being amended and should be subject to an Article 5(b) vote.

4. In 1992, the SEC approved a CBOE rule 3.16(b) which interpreted Article 5(b) to further define and clarify but not change the definition of a "member of the Board of Trade". This rule refers to a 1992 agreement between the CBOE and the CBOT which states that a CBOT's "exercise member shall not have the right to transfer (whether by sale, lease, gift, bequest, or otherwise) their CBOE regular memberships or any other trading rights and privileges appurtenant thereto." This section limits and further defines what a CBOT member must do to maintain the exercise right in that he cannot separate the CBOE exercise right from the CBOT membership. Under the new proposed 2002-01 and 2004-16 rule filings, rather than limit what a CBOT member can do, instead it allows the CBOT to demutualize into A,B,and C shares which can be split and sold

separately. These changes are amendments and not interpretations to Article 5(b).

5. Changing from a membership structure to a demutualized stock corporation affects how the governance and operations of the entity will operate. Under existing membership structure of the CBOT, the CBOE and its members have knowledge and information on CBOT actions that affect the exercise right and the number of exercisers. With the proposed changes, committee structures, petition processes, and representation on the board of directors will all be changed which again point out why approval of these changes should be subject to an Article 5(b) vote.

6. In an exchange membership organization, the voting rights are joined with the trading rights and equity interests because these parts can not be separated. When this organization is demutualized, these parts are separated and consequently the parties owning the voting rights may be different and have different agendas than the parties having the trading rights.

7. After the August 7, 2001 agreement between the CBOE and CBOT, the CBOT sent a letter dated October 24, 2001 in which the CBOT will create a holding company (CBOT Holdings Inc.) which will issue class A shares and will hold the "Board of trade of Chicago", the registered commodity exchange as a subsidiary. As we understand it, the holding company would not be a registered commodity exchange. According to the 1992 agreement paragraph 3(d), "in the event the CBOT merges or consolidates with or is acquired by or acquires another entity" and the surviving entity is not an exchange, then "Article 5(b) shall not apply to any other merger or consolidation of CBOT with, or acquisition of CBOT by another entity". Therefore we would conclude that if this transaction does transpire, the CBOE can negate the exercise right.

8. Paragraph 2(b) of the 1992 agreement which is part of the existing CBOE rule 3.16 states "that in the event the CBOT splits or otherwise divides CBOT Full Memberships into two or more parts, all such parts, and the trading rights and privileges appurtenant thereto, shall be deemed to be part of the trading rights and privileges appurtenant to such CBOT Full Memberships and must be in possession of an individual as either an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate in order for that individual to be eligible to be an Exercise Member". Our interpretation of this paragraph would require that all equity and all trading rights would have to be assembled in order to exercise if the demutualization were to occur. The equity required to exercise should be a prorating of 100% of the CBOT equity divided by 1402 members and not 77% of the CBOT equity.

CONCLUSIONS

In conclusion, the CBOE member who purchased a CBOE treasury issued membership did so with the knowledge of the existence of potential CBOT exercise memberships as defined in Article 5(b). Over the past 30 years, the CBOT has or has attempted to change the definition or structure of the "member of the Board of Trade of the City of Chicago" on more than one occasion. The CBOE's response has been either to fail to respond, temporarily and selectively to extinguish the exercise right, to go to court, and/or to file interpretive CBOE rule 3.16. We believe that Article 5(b) was established (also approved by the SEC) to provide a mechanism for the BOTH CLASSES of CBOE members (i) to decide whether changes in definition or structure of a "member of the Board of Trade" affect the exercise right and (ii) to protect one class of member from adversely affecting the other. We would urge the SEC not to approve these rule filings and instead require these amendments be subject to the voting requirements under Article 5(b).

If you have any questions or need further clarification or information, please do not hesitate to contact us.

Sincerely,

Thomas A Bond
1114 Wrightwood Ave
Chicago, IL 60614-1315
773/880-5518
Member since 1975
Former Vice Chairman
and Director

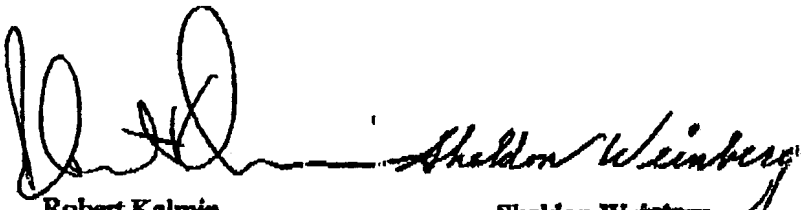
Norman Friedland
142 Lincolnwood Rd.
Highland Park, IL 60035
847/432-1654
Member since 1976

Gary P Lahey
P. O. Box 1125
Wayne, IL 60184
708/764-2265
Member since1972
Former Vice -
Chairman & Director

Marshall Spiegel
1618 Sheridan Rd
Wilmette, IL 60091
847/853-0093
Member since 2000

Anthony Arciero
11645 Brairwood Ln
Burr Ridge, IL 60527
312/460-1581
Member since 1976

Peter C. Guth
6035 W 130th Pl
Palos Heights, IL60463
708/389-4785
Member since 1974



Robert Kalmin
7945 Foster
Morton Grove IL 60053
847/967-5070
Member since 1975

Sheldon Weinberg
2818 Wildflower Ct
Glenview IL 60025
847/4121764
Member since 1978

David Carman
1749 N Wells#2211
Chicago IL 60614
312/943-6376
Member since 1978

Jeffrey T. Kaufmann
401 S. LaSalle St. #1001
Chicago, Ill. 60605
312/663-1307
Former Director
Member since 1974