No.

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

arshall C. Spiegel
Pro Se
618D Sheridan Road
ilmette, Illinois 60091
elephone: 847/853-0993
Telecopier: 847/853-0990

1
W

M

T

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

Did the D.C. Circuit Court of Appeals erroneously apply this Court's holdings and Constitutional standards for "cases" and "controversies" in dismissing on grounds of mootness, his petition for review of an order of the Securities and Exchange Commission ("SEC") that ***effectively*** validated the *ultra vires* action of the board of directors of the Chicago Board Options Exchange ("CBOE") to revise the substance of its Articles of Incorporation without the required vote of its membership, when Petitioner **(1)** ***had vigorously challenged the CBOE's board's action at all stages of proceedings and before the SEC,*** **(2)** ***challenged the SEC's jurisdiction to determine corporate governance issues controlled by state law,*** **(3)** ***challenged the SEC's determination as contrevening controlling state law, and*** **(4)** ***had a continuing financial and legal interest in the outcome of the review of the SEC's order because such order, as a matter of law, materially thwarted his ability to proceed with an action for damages against the CBOE arising from its ultra vires board action?***

Are Petitioner's statutory rights to judicial review pursuant to Section 25(a)(1) of the Exchange Act conditioned exclusively on demonstrating financial harm and exclude a public interest exception to the mootness doctrine as a commentator's right to free speech.

Are the separation of powers between the Federal Executive and State Judiciary being usurped when the administrative agency SEC becomes the sole arbiter of voting disputes concerning issues of Corporate Governance between CBOE's Board of Directors and its

disenfranchised constituency (minority equity owners) that had been the exclusive jurisdiction of State Court Chancellors over questions of State Law and Contracts?

Is the Equal Protection Clause of the U.S. Constitution and due process being violated when the SEC relies exclusively on a legal opinion from CBOE in the rule making process, allows CBOE unrestricted time to file rebuttals in support of its rule filings, refuses to hear disenfranchised commentators own legal opinion opposing rule changes even though "CBOE consented to an extension of time . . . for the Commission to consider" commentator rebuttals that had previously been allowed in these matters?

Is due process being denied when legal and customary administrative comment periods were sidestepped for prior rule approvals by the SEC which prohibits disenfranchised corporate constituents from being able to seek judicial review in questions of corporate governance in current disputes?

Are due process protections being ignored when an administrative agency is derelict in providing timely proper FOIA disclosures when it becomes the exclusive arbiter as to what is discoverable in its own proceedings?

Do these actions of the administrative agency rise to the level of being arbitrary and capricious and in violation of the Securities Exchange Act of 1934 ("Exchange Act")?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

Petitioner, Marshall Spiegel, respectfully prays that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit to resolve the question of whether he has standing to challenge the United States Securities and Exchange Commission's (hereinafter "SEC" or "the Commission") jurisdiction to hear and decide a novel issue of "first impression"; when do changes to a Corporation's Articles of Incorporation, as governed by the Exchange Act of 1934, reach the threshold of being amendments that would require approval by a vote of its constituency, per articles of incorporation, rather than its Corporate Board who avoids such approval and becomes the sole arbiter for said disenfranchised constituency by rationalizing away their actions as "interpretations" with the blessing of Respondent and prohibiting any due process rights to legal review.

OPINIONS BELOW

The unpublished order issued by the D.C. Circuit Court of Appeals dismissing the appeal appears at page 1a of the appendix. The denials of the Petition For Rehearing and Rehearing En Banc is reprinted at pages 3a and 4a. The Court's scheduling order is reprinted at page 5a. The SEC Order Denying Request For Extension pending Petitioner's Freedom of Information Act (hereinafter "FOIA") request is reprinted at page 7a. The SEC's April 11, 2006 letter showing Petitioner's FOIA request remaining open and required to be addressed pursuant to Petitioner's FOIA appeal is reprinted at 9a. Legal Opinion of Delaware Counsel concerning rule changes acting as amendments is reprinted at 10a. Respondent's decisons that gives rise to this Petition is reprinted as SEC Release No.'s

34-51252 (70 FR 10442) at 33a, 34-51568 (70 FR 20953) at 60a and 34-51733 (70FR 30981) at 74a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The D.C. Circuit Court of Appeals rendered its decision on December 12, 2005. Petitioner filed a timely Petition for Rehearing and Rehearing En Banc, denied on March 28, 2006.

RELEVANT PROVISIONS (110a-end)

STATEMENT

The D.C. Circuit erroneously applied this Court's holdings and Constitutional standards for "cases" and "controversies" in dismissing on grounds of mootness, Petitioner's Petition for Review of an order of the SEC soley on the misperceived basis that Petitioner did not have a financial interest in the outcome of the appeal. The SEC by its order and to Petitioner's detriment improperly and arbitrarily and capriciously, in terms of both substance and process, validated the *ultra vires* action of the board of directors of the CBOE to revise the substance of its Articles of Incorporation, without the vote of the CBOE membership required by the Articles of Incorporation. Petitioner was a full CBOE member during all times of the *ultra vires* action of the CBOE board and during the SEC's improper review and validation of the CBOE's board's action and at the time he filed his Petition for Review of the SEC's order. Petitioner had vigorously challenged the CBOE board's action at all stages of the CBOE's proceedings and, by statutory right under the Exchange Act, as amended, before the

SEC. Petitioner challenged the SEC's jurisdiction to determine corporate governance issues controlled by state law and their determination as contravening controlling state law. As an active participant in and galvanizer of the SEC's agency proceedings, Petitioner has a right under the Exchange Act and the Administrative Procedure Act ("APA") to a fair and non-arbitrary and capricious agency action. The Exchange Act and APA, by their terms, do not condition or limit Petitioner's rights to fair and non-arbitrary and capricious agency action and to judicial review of arbitrary and capricious action based on the extent of his financial interest in the outcome of agency action. As an active participant in and galvanizer of the agency proceeding, Petitioner had standing and a legal right *conferred by statute* as a "person aggrieved" under Section 25(a)(1) of the Exchange Act, to obtain judicial review of the SEC's erroneous order and the invalid and arbitrary and capricious administrative process that gave rise to the erroneous order. Pursuant to the terms of Section 25(a)(1) of the Exchange Act, Petitioner's statutory right to judicial review is not conditioned on demonstrating financial harm. In any event, Petitioner has a continuing financial and legal interest in the outcome of the review of the SEC's orders because he was an active participant in and galvanizer of the agency proceedings and the SEC process and orders. As a matter of law, they violated his rights under the Exchange Act and APA and materially thwart his ability to proceed with an action for damages against the CBOE arising from its board's *ultra vires* action.

This appeal is brought because the United States Court of Appeal for the District of Columbia Circuit granted the Respondent's Motions to Dismiss "the

petition in No.05-1211 (a)s moot" and that "petitioner has not demonstrated that he has standing to challenge the order at issue in No. 05-1279." Both cases were consolidated by petitioner's request in the Court of Appeals for the D.C. Circuit on August 25, 2005.

Case 05-1211 arose from appeals taken by Petitioner that resulted in an Order Granting Petition For Review entered as SEC Release No. 50464 on September 29, 2004, an Order Setting Aside Earlier Order Issued by Delegated Authority Granting Approval to a Proposed Rule Change SEC File No. SR-CBOE-2004-16 entered as Release No. 34-51252 on February 25, 2005 with reconsideration denied April 18, 2005, No. 34-51568.

Case 05-1279 arose from an appeal taken by Petitioner of an Order Granting Approval to a Proposed Rule Change SEC File No. SR-CBOE-2005-19 entered as SEC Release No. 34-51733 on May 24, 2005.

From November 2000 until July 19, 2005, when he sold his membership, Petitioner was an equity member of the Chicago Board Options Exchange (hereinafter "CBOE"). Prior to that he was an equity member of the Chicago Mercantile Exchange commencing in July 1983. Before and since the purchase of Petitioner's CBOE membership, litigation was rampant between CBOE and The Chicago Board of Trade (hereinafter "CBOT") in CBOE's valiant efforts to protect its equity members interests.

Prior to purchase during his due diligence period, Petitioner learned no fewer than three lawsuits were filed against CBOE in the Circuit Court of Cook County [*Buckley v. CBOE*, 109 Ill. App. 3d 462, 440 N.E. 914 (1st Dist. 1982), *CBOT v. CBOE* 00 CH 1500, *CBOT v. CBOE* 00 CH 9725]. These cases were

brought by the CBOT or their members concerning their right to trade at CBOE hereinafter known as "the exercise right". This was conveyed to all full CBOT members in 1972 by CBOE's Articles of Incorporation for creating CBOE. The 00 CH 9725 case was brought in retaliation for CBOE filing a rule change to extinguish the exercise right at the SEC, SR-CBOE-2000-44, because CBOT was unable to meet the criteria to sustain the exercise right under Article FIFTH.

Even as late as summer of 2000, after consulting with the Chancellor's law clerk over the issues of the latest lawsuit, 00 CH 9725, Petitioner learned that Respondent SEC had requested copies of that litigation, from the Circuit Court Clerk's Office concerning the exercise right. In the three lawsuits brought against CBOE, it has always prevailed.

In 2001, after CBOE's director and then deposed Bank One Vice-Chairman, David Vitale defected to CBOT to become President for a two year tenure, CBOE's management decided to surrender to CBOT's demands. CBOE withdrew the 2000-44 rule filing and replaced it with rule filing SR-CBOE-2002-01, recognizing an agreement executed by both exchanges on August 7, 2001 hereinafter known as "the 2001 agreement". As a result, CBOT was permitted to restructure, demutualize, maintain all the rights and privileges granted it in 1972 and participate in any like kind stock and/or dividend distribution if CBOE demutualized per a 1992 agreement with CBOT after another dispute was resolved concerning CBOT members being able to trade at night and double dip in the day by trading at CBOE. When (hereinafter) "the 1992 agreement" was executed, the SEC ratified it in SR-CBOE-92-42 [1993 WL 199325(F.R.), 58 FR 32969].

Consequently, Petitioner along with 9 of his

fellow members, including a CBOT exerciser, former CBOE board members and vice-chairmen that included then acting director, Tom Bond, brought a fourth suit ("the 2001 litigation") in the Circuit Court of Cook County, *Bond et al v. CBOE and CBOT* 01 CH 14427 (Appealed by Petitioner in the First District 01- 3846) concerning the protection of CBOE equity members interests regarding the exercise right. They demanded a vote pursuant to Article FIFTH be taken for 80% of each respective class of members, CBOE equity members (treasury seat holders) and CBOT exercisers (holders of the exercise right who traded at CBOE).

Consideration of the SR-CBOE-2002-01 rule filing amending the exercise right by its own admission erroneously considered to be an "interpretation" of the 1992 agreement lacking the necessary 80% approval of the respective classes of members was suspended while the CBOT was resolving restructuring litigation of its own including the exercise right.[*Feldheim v. Simms*, 344 Ill.App.3d 135 (2003), 2003 WL 21673666 at 5,9]

In 2003, CBOE entered into another illegal agreement with CBOT to separate exercise rights from full CBOT memberships to be bought and sold in the open market. The 1992 agreement that Respondent approved as described above forbade this. The substantive provision of the 1992 Agreement being violated is contained in Section 3(a): "Exercise Members shall not have the right to transfer (whether by sale, lease, gift, bequest or otherwise) their CBOE regular memberships or any of the trading rights and privileges appurtenant thereto." When that agreement was disseminated to CBOE and CBOT members for approval and submission to the Commission a Q & A "interpretation" was distributed that provided: "5. Q. -

Can a CBOT Full member sell his right to trade on the CBOE at the same time keep his Full Membership intact and continue trading on CBOT? A. No. The exercise privilege attaches to the CBOT Full Membership and *cannot* be severed from membership."

However, by this time litigation was forbidden against CBOE, by its membership. The SEC permitted CBOE upon application, to amend Rule 6.7A without the legal and customary comment period, under Section 19(b)(3)(A). Petitioner was directed by CBOE to withdraw his 01-3846 appeal under threat of CBOE charging him litigation costs that exceeded $50,000 arising from the 2001 litigation pursuant to Rule 2.24.

The 2003 agreement resulted in another rule filing, SR-CBOE-2004-16, the subject of this appeal. Petitioner later learned that CBOE subsequently withdrew the 2002-01 filing encompassing the 2001 agreement and later substituted it for SR-CBOE-2005-19 part of this appeal and SR-CBOE-2005-20.

In essence these rule changes amended the definition of what a member of the Board of Trade of the City of Chicago is under Delaware law pursuant to Article FIFTH without taking a vote of the membership getting the necessary super-majority approval as prescribed by it. A member of an organization like the CBOT is when equity and voting privileges are all tied together, no different than a private club. When CBOT demutualized and CBOE entered into the 2001 agreement with SEC blessing on May 24, 2005, they ceased to act or be recognized as a membership organization. Equity, voting and exercise rights were stripped from each other as contemplated by the 2001 agreement without the respective 80% approval of CBOT exercisers and CBOE equity owners that changed CBOT from a membership organization to

a Corporate structure.

REASONS FOR GRANTING THE PETITION

I. MOTION TO DISMISS 05-1211 IS UNTIMELY

The D.C. Circuit's June 24, 2005 Scheduling Order specifically ordered that dispositive motions must be file by August 8, 2005. The Respondent in belatedly filing its Motion on August 18, 2005, did seek leave to file out of time. The SEC offers no explanation why it was unable to comply with the time limits of the Court's June 24, 2005 Order, and no justifiable excuse exists on this record. The SEC had advance notice of this issue to permit it both to rule timely on the Petitioner's Motion for a Stay and to comply with the Court's June 24 Order. Their contention in fn1 that claims mootness may be raised at any time does not justify willfully ignoring the dictates of the June 24 Order.

II. THERE ARE SUFFICIENT ADVERSARIAL INTERESTS TO SATISFY CONSTITUTIONAL "CASE" OR CONTROVERSY" REQUIREMENTS

A case is not considered moot, and hence justifiable, if the passage of time has caused it completely to lose "its character as a present, live controversy of the kind that might exist if [a court is] to avoid advisory opinions on abstract propositions of law."*Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). This Court has viewed mootness as "'the doctrine of standing set in a time frame: The requisite personal interest must exist at the commencement of litigation

(standing) must continue throughout its existence (mootness) .'" *U.S. Parole Commission v. Geraghty*, 445 U.S. 338, 397 (1980), *quoting* Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale L.J. 1363, 1384 (1973).

"In seeking to have a case dismissed as moot, . . . the defendant's burden is a 'heavy one.'" *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 66 (1987), quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). That burden should be especially heavy where the moving party is a federal agency seeking to escape judicial review of final agency action. Such cases implicate Constitutional concerns not present in private damage actions. Given the broad powers reposed in federal agencies such as the SEC, the Constitutional system of checks and balances, as well as the Constitutional protections of individual rights and liberties, cannot fulfill their intended purpose where agencies' final action can easily evade judicial review.

This Court's decisions on the standing of persons to seek review of agency or legislative action have generously and flexibly applied the "injury-in-fact" test for standing. Thus, for example, the Supreme Court has recognized in *Sierra Club v. Morton*, 405 U.S. 727 (1972), that future harm and impairment of even an indeterminate "aesthetic" interest is sufficient to confer standing on persons who would be affected by such future harm. Id, at 734-735. See also, e.g. *U.S. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88 (1973) (Upholding the rights of law students to obtain review of and Interstate Commerce Commission order authorizing increase in all freight rates, on grounds that the students faced alleged injury in the form of increases in

air pollution and litter, notwithstanding that such harm is not exclusive to them); and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (Persons living near a proposed site for a nuclear power plant held to have standing to challenge the constitutionality of the statute limiting the potential tort liabilities of the owner of such a plant in the event of a major disaster).

Similarly, this Court has declined to find cases moot even though the plaintiff may no longer be immediately affected by the outcome, where the conduct is "capable of repetition, yet evading review". See, e.g. *Honig v. Doe*, 484 U.S. 305, 318-323 (1988).

Consistent with the foregoing, the Court of Appeals has opined that mootness is met only where "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clarke v. U.S.*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc), quoting, *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990).

Here, for the reasons set forth below, the Court of Appeals rulings on mootness and standing should be rejected because, clearly, the outcome presently affects Petitioner's rights and has a more-than-speculative chance of affecting his rights in the future. Further, it cannot be concluded that (1) the issues before the Court could not possibly ever recur (see, e.g. *U.S. v. Concentrated Phosphate Export Assn.*, 3939 U.S. 199, 203 (1968), (2) SEC's decision could have no possible future affect on the parties or other interested persons (see, e.g., *Atherton Mills v. Johnston*, 259 U.S. 13 (1922), and (3) Petitioner has no legally cognizable interest in the outcome whatsoever such that the Court cannot be confident that a sufficiently adversarial

process will exist to support the exercise of proper judicial decision making and preclude an advisory opinion on an abstract or hypothetical question (see e.g. *Benton v. Maryland*, 395 U.S. 784, 788 (1969), and (4) the outcome has only a speculative effect on Petitioner's claims now and in the future (*Clarke v. U.S.*, supra).

Petitioner's continuing interest in the outcome, notwithstanding the sale of his seat on the CBOE, is sufficient to satisfy Constitutional principles of standing and the case-or-controversy requirement. Petitioner believes he has a claim for damages against the CBOE and its Board for, at a minimum, breach of fiduciary duty in connection with the Board's unauthorized amendment of the Certificate of Incorporation, which diminished the value of his seat and abridged his rights as a member and equity holder in the Exchange. In addition, Petitioner, as a long time investor in the seats of Financial Exchanges and, in particular, the CBOE, is actively evaluating reinvesting in a CBOE seat. The SEC's Orders of February 25 and May 24, 2005 leading to both appeals in this case adversely affects both of those interests.

Those Orders adversely affects Petitioner's ability to pursue a claim for damages through its validation of the CBOE's unauthorized action. Those Orders of February 25 and May 24 possibly even might be argued to preempt the power of Delaware state court to determine the merits. A preemption argument might be made as follows: Section 19 of the Exchange Act reposes in the SEC the exclusive jurisdiction to determine the legality, propriety and enforceability of SRO rule changes. Similarly, this occurred in the 2001 litigation when the Illinois Chancellor ruled:

"All right, first of all in ruling on this case on the

standing issue, you state that should an issue arise regarding a member of either exchange's right to vote pursuant to 5B of the 1992 agreement, I think it's clear that that right would be sufficient to afford the exchange member standing. It's a protectible right I believe. That being said, looking at 5B itself, it reads, 'No amendment may be made with respect to this paragraph B of Article Fifth without prior approval of the 80 percent majority. Requirement follows.' With regard to the specific subject matter of this alleged referendum, to the extent it may be germane, 5B states, 'Every present and future member of said Board of Trade who applies for membership in the corporation and who otherwise qualifies shall so long as he remains a member of said Board of Trade be entitled to be a member of the corporation.' Notwithstanding any such limitation on the number of members and without the necessity of requiring such membership for consideration of value from the corporation, meaning the CBOE (sic), it's my conclusion that the subject matter of the quote, 'Referendum,' does not implicate Paragraph 5B. Accordingly that necessarily leads to the conclusion that the election may proceed and that the question of whether or not this is a fair interpretation; that is, the subject of the referendum should it pass, if there's a possibility it will not pass, be viewed as a fair interpretation of the agreement between the parties is exclusively within the province of the SEC. Prepare an order."

Since this "Referendum" was actually an

"advisory" vote conducted by CBOE and by its own admission had no binding affect on their Board and the 2002-01 rule filing that culminated from this "advisory" vote was withdrawn, the 2001 litigation became moot.

The shadow cast by the SEC's February 25 and May 24 Orders could also result in a trial court decision as depicted in *Cutner v. Fried*, 373 F.Supp. 4, 9 (S.D.N.Y. 1974):

> [I]f we were to attempt to substitute our judgment for that of the SEC, theprobability of inconsistent rulings as to the adequacy of exchange rules would be very great, thus creating havoc in the regulatory scheme designed by Congress....It is not the function of this court to usurp the regulatory or rule-making power of the SEC and, in the guise of granting legal or equitable relief, promulgate rules . . .

Where, as here, the determination of Delaware law is necessary to the SEC's determination that a proposed rule change is consistent with the Exchange Act, the SEC's determination of the state law is controlling and preempts a state court from ruling to the contrary. Petitioner's interest in his claim for damages precludes a finding of mootness. Clearly, the outcome of this proceeding has a "more-than-speculative" chance of affecting Petitioner's rights and damage claims in the future. See *Clarke v. U.S.*, supra, 915 F.2d at 701. See also *Powell v. McCormack*, 395 U.S. 486, 497 (1969) (Although Congressman's injunctive demand to be seated as a member of the 90th Congress became moot with the termination of that Congress and his seating in the 91st Congress, the suit

could continue on his claim for back salary).

The SEC's recent contention in its Reply in Support of its Motion to Dismiss in Case No. 05-1211 that Petitioner's claim for damages is speculative or that Petitioner has not incurred any damage at all is erroneous and waived. Petitioner has asserted throughout the administrative proceeding that the CBOE's rule harmed and diminished the value of his seat. The SEC never found to the contrary and never contested that fact. The SEC may not through the *post hoc* rationalization in its counsel's brief seek to determine the merits of Petitioner's claim of damages, when it failed to address that issue in the administrative proceeding. See, e.g., *Federal Power Commission v. Texaco*, 417 U.S. 380, 395-97 (1974); *Arizona v. Thompson*, 281 F.3d 248, 258-59 (D.C. Cir 2002). Further, the SEC's contention at page 9 of its Motion that Petitioner's only claim of harm in the proceedings below was to his voting rights as a member mischaracterizes the record. Loss of voting rights clearly was one of the harms Petitioner suffered, but Petitioner also repeatedly asserted that the CBOE's rule harmed the value of his seat – a contention that the SEC never contested. In addition, the merits of SEC counsel's analysis of how damages should or should not be measured or determined (SEC Motion at page 11, note 3) are not relevant and not justiciable here; those issues are for a trial court to determine upon the pleading before it.

The injury caused by the SEC's erroneous decision-making is heightened by the fact that the SEC has and CBOE have exercised their respective powers to bar all members of the CBOE from commencing any action against the CBOE or any directors, officers or employees for claims relating to the business of the

Exchange. Section 111 of the Delaware General Corporate Law guarantees CBOE members as equity holder access to Delaware courts for declaratory and injunctive relief to determine the propriety of the CBOE Board's action. CBOE Rule 6.7A, however, which the SEC approved, extinguishes those statutory rights and protections for CBOE members. Rule 6.7A prohibits CBOE members – and prohibited Petitioner when he was a member – from bringing any action against the CBOE or any director, officer, employee, contractor, agent or other official business of the Exchange, except to the extent such actions or omissions constitute a violation of the federal securities laws for *which a private right of action exists*. Accordingly, in the absence of fraud giving rise to a private right of action under Commission Rule 10b-5 (see also *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), Rule 6.7A eliminates the statutory rights equity holders would otherwise have under Del. law to bring actions to challenge an unauthorized Board action.

The February 25 Order explained at p. 10, footnote 33, that CBOE Rule 6.7A was promulgated under Section 19(b)(3)(A) of the Exchange Act, was never subject to public comment, and was never challenged by the Commission (notwithstanding, Petitioner notes, that it is antithetical to the rights of CBOE equity holders under Delaware law).

Since the SEC has never opined on the validity of CBOE Rule 6.7A, as conceded at footnote 33 of their February 25 order, and thus a court in considering the validity would do so without the benefit of definitive Commission views. This explanation of what Commission views a court would or would not have the benefit of misses the point that, unless a CBOE member extinguishes his or her membership, judicial

review can never occur at all because the Rule prohibits court challenges to CBOE Board action.

The SEC, by effectively permitting the CBOE Board through Rule 6.7A to insulate its corporate governance from judicial review, can become, for CBOE members, effectively the sole arbiter of CBOE Board action. The circumstances here also fall within the "capable of repetition yet evading review" exemption from mootness. The CBOE Board has repeatedly sought to "interest" Article Fifth(b), and there is no basis to assume it will not seek to "interpret" it in the future. Given that CBOE Rule 6.7A prohibits members from bringing judicial proceedings for review of corporate governance issues. CBOE equity holders who wish to pursue claims against the CBOE for actions otherwise validated by the SEC can never obtain judicial review on the merits of their personal claims because, while remaining an equity holder, they are prohibited from pursuing such claims in court and, according to the SEC's arguments, once they sell their equity stake, they lose the ability to obtain judicial review of the SEC's validating action.

Accordingly, Spiegel's sale of his seat also is not the kind of "voluntary" act that the Court deems to preclude application of the"capable of repetition yet evading review" doctrine.

The SEC's contention (page 19, n.7) in its September 1, 2005 Motion to Dismiss 05-1279 that "CBOE Rule 6.7A is not before the Court" is misplaced. Whether Rule 6.7 A was properly approved by the SEC is not relevant here; Petitioner's point is that the Rule has at all relevant times been in effect and materially harmed and extinguished Petitioner's right to obtain judicial review of CBOE Board action while he was a CBOE member, except through the SEC proceeding.

The SEC cannot have it both ways. It cannot bless the CBOE Rule 6.7A that prevents judicial review of CBOE Board action in state court and then claim that a challenge to the SEC's validation of the CBOE Board's unauthorized action is moot because Petitioner takes the only action available to him – the sale of his seat – to free him from the restraints imposed by the CBOE and the SEC to pursue a civil action for his claims that the SEC's Order undermines and might foreclose. The SEC's contention, citing *Liu v. I.N.S.*, 274 F.3d 533, 536 (D.C. Cir. 2001), that Petitioner's damage claim does not confer standing lacks merit. Liu stands only for the proposition that a claim for attorneys fees that is byproduct of an underlying claim will not confer standing where the claim itself is moot. Here, Petitioner's claims against the CBOE are not moot and the SEC's February 25 Order potentially can foreclose and preempt those claims. The February 25 Order clearly presently adversely affects Petitioner's legal rights and has more than a speculative chance of affecting them in the future.

As a person actively evaluating repurchase of a CBOE seat, Petitioner also has an interest in overturning the SEC Order because it abridges members' rights now and in the future. Such abridgment will repress CBOE seat prices indefinitely & diminish corporate governance into the foreseeable future & beyond. Such financial and investment interests are similar to the interests of those harmed from governmental action altering competitive conditions. As this Court acknowledged in *Clinton v. New York*, 524 U.S. 417 (1998):

> The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient satisfy the [Article Three "injury-in-fact" requirement] . . . It follows logically that any . . . petitioner was likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test.

Similarly, many cases confer standing on consumers injured by an agency action whose job or wage levels are jeopardized by an action that is likely to have an adverse effect on their employer's revenues or on any other individual or group that is likely to suffer an adverse economic effect of an agency action. See, e.g., *Consumer Fed'n of Am v. FCC*, 348, F.3d 1009, 1011-12 (D.C. Cir. 2003); see also *Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005)

The SEC's contentions in its Briefs that Petitioner's future purchase of another seat would not give him standing is misplaced. The SEC cites no authority for its contentions.

Voting rights are the same for all CBOE treasury seats. Petitioner is equally aggrieved by the CBOE Board's unauthorized amendment to the Certificate of Incorporation regardless of which treasury seat he owns. The only distinction between treasury seats is the internal identifying number assigned to it by the CBOE for administrative purposes to identify it with a particular owner. As long as Spiegel's seat is adversely affected by the CBOE's and SEC's action, he has standing to challenge that action.

The Petitioner's long history of zealously advocating his position before the SEC and the Court of Appeals for the D.C. Circuit provides more than an

adequate basis reasonably to conclude that future proceedings in this case will not lack zealous advocacy or adversarial relationships between the parties. He is not "asking for an advisory opinion on an abstract or hypothetical question." *Benton v. Maryland*, 396 U.S. At 788. Accordingly, there is no basis to conclude that, if the case is permitted to proceed, the D.C. Circuit will face a non-adversarial proceeding giving rise to an advisory opinion or process that does not adequately support valid judicial decision making.

III. SINCE STATE LAW AND FEDERAL SECURITIES LAW DO NOT CONFLICT HERE, NO FEDERAL PREEMPTION EXISTS AND THE SEC HAD NO JURISDICTION TO EVEN CONSIDER THIS CASE

The Exchange Act is carefully crafted to prevent federal impingement on the traditional state regulation of corporate governance. This Court has said in connection with considering the reach of SEC Rule 10b-5, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the Corporation." *Santa Fe Industries, Inc. v. Green*, 430 U.S. At 479, (emphasis in original, quoting *Cort v. Ash*, 462 U.S. 66, 84 (1975). See also *The Business Roundtable v. SEC*, 905 F.2d 406, 412-413 (D.C. Cir. 1990). Further, SEC approval of these rules has invaded the "firmly established" state jurisdiction over corporate governance and equity holder voting rights. *See CTS Corp. v. Dynamics Corp. of American*, 481 U.S. 69, 89 (1987).

Section 28(a) of the Securities Exchange Act makes clear that Congress intended for the state common law remedies to coexist with federal securities law: "the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. para. 78bb(a). Based on that Section, courts have held that Congress did not intend the Act generally to displace state law (known as field preemption). Instead, the Act preempts state law only where an actual conflict exists (conflict preemption). See e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (Congress intended "that state law continues to apply where the Act itself does not").

Specifically, courts have held that Congress did not intend for the Act to generally displace state law with respect to corporations. See e.g., *CTS Corp. v. Dynamics of America*, 481 U.S. 69, 91 (1987) ("It is thus an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."); *Herpich v. Wallace*, 430 F.2d 792, 809 (5th Cir. 1970) (relying on Section 28(a) to hold that Congress did not intend to displace state law regarding the management of corporations).

For purposes of federal preemption, an actual conflict between state law and federal law occurs when "compliance with both federal and state regulations is a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." E.g. *Pacific Gas & Electric v. State Energy Resources Comm'n.*, 461 U.S. 190, 204 (1983). Enforcing the rights of CBOE minority seatholders will not result in any such conflict. Further, 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).

Since the 2001 agreement is considered by CBOE and SEC a further interpretation of the 1992 agreement it is important to understand those terms. The parties already contracted to remove any prospect for a conflict between the 1992 Agreement and federal securities law. In Section 4(d) of the 1992 Agreement, "the parties mutually agree that it is appropriate, and within the meaning and spirit of Article Fifth(b), for the CBOE to interpret Article Fifth(b) in accordance with the provisions of this Agreement." Since the provisions of the 1992 Agreement govern how CBOE must interpret Article Fifth(b), and since the SEC has found those provisions to be consistent with the Securities Act, a conflict between the contract and federal securities law is non-existent. Section 6(b) of the 1992 Agreement provides further assurance against a conflict by confirming that "the Agreement shall be governed and construed in accordance with the laws of the State of Illinois," except to the extent the Agreement and accompanying rule changes are governed by federal law.

In addition, the plain language of the 1992 Agreement itself confirms the absence of any possible conflict with federal securities law arising out of these kinds of disputes. However, the one thing that the 2001 agreement does change from the 1992 agreement is that any further disputes are to be arbitrated; a change from the Article FIFTH (b) dealing with "a(ny) final order of any court or regulatory agency having

jurisdiction in the matter. . ." Respondent has not established the prerequisites for federal preemption.

IV. SEC RELIANCE ON CBOE'S LEGAL OPINION UTILIZING BUSINESS JUDGEMENT INSTEAD OF FIDUCIARY PRINCIPLES OF DELAWARE AND FEDERAL LAW AND REFUSING TO HEAR DISSENTING COMMENTATORS OWN LEGAL OPINION IS ARBITRARY AND CAPRICIOUS & VIOLATES DUE PROCESS & EQUAL PROTECTIONS

Under the guise of giving deference to form over substance in these proceedings, Respondent's claim that if CBOE's Board relies on the legal opinions of their Delaware Counsel, SEC has to believe the CBOE Board is acting in good faith. The problem with this reasoning is the Legal Opinions of CBOE's Delaware counsel never got to the heart of the question; when do changes to Articles of Incorporation reach the threshold of being subject to interpretation versus and amendment that would then require a super-majority approval as prescribed above by Article FIFTH.

Where there are conflicting interests between or among classes of CBOE equity interest holders with respect to an alteration of rights, the CBOE Board *immune from liability* 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. [*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).

The Respondent's reliance on CBOE's legal opinion becomes a red-herring since SEC says that it can rely on the CBOE's Board acting in good faith because it fails to provide an opinion that addresses the substantive issues. Respondent and fellow commentators provided a legal opinion from their own Delaware Counsel (see Appendix 8a) showing the actions of CBOE's Board was amending the provisions of Article FIFTH (b) and was not an interpretation as well as disputing CBOE's legal opinion; which 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.

At minimum, this created an issue of fact that should be deferred to in the States' Chancery Courts. But the Commission chose to turn a blind eye to this. Though Petitioner's and Commentators' opposing legal opinion is part of the record in this case as part of the motions to stay at the SEC and D.C. Circuit Court of Appeals, the SEC refused to consider it as part of their decision making on the SR-CBOE-2005-19 rule approval. While allowing CBOE's legal counsel, Joanne Moffic-Silver to file rebuttal material and/or opinions without time restrictions in 2005-19, SR-CBOE-2005-20 and SR-CBOE-2004-16, as well as commentators being able to do the same in 2004-16, the Commission

suddenly imposed a deadline in refusing to consider their Delaware Legal Opinion in 2005-19, 2005-20, and in a motion to reconsider the same. To Petitioner's knowledge and understanding the 2005-20 rule filing was withdrawn by CBOE unknown reasons to him.

To add insult to injury the record is strewn with questions raised by Petitioner's Counsel Charles R. Mills of Kirkpatrick and Lockhart, representing him during the SEC proceedings, concerning possible communications between Respondent SEC and CBOE with ominous overtones. Fn. 1 of his Counsel's Legal Memorandum Of Points And Authorities In Support Of Petitioner In Opposition To Staff Action stated:

> "On October 25, 2004, the CBOT website known as 'trade talk' stated that the Chairman of the CBOT discussed with members of the CBOT Lessors Committee that 'we have been informed that on October 28, 2004, the Securities & Exchange Committee [sic] should respond to CBOE member Marshall Spiegel's petition precluding the separate offer and sale of CBOT Exercise Right Privileges.' Petitioner Spiegel has no knowledge whether this is accurately reported, whether any such information is well founded or how someone could know with such specificity when the Commission would act on his Petition. If the information is correct and the Commission is intending to reject the Petition, Petitioner Spiegel respectfully would question whether the Commission has prejudged the merits of his Petition, before receiving his Statement in Opposition."

On October 26, 2004, CBOT Chairman, Charley

Carey, informed Petitioner that the above information was relayed to him by recently ousted CBOT Legal Counsel Carol Burke who in turn learned it from CBOE's Legal Department. Shortly thereafter, in the presence of CBOE's Legal Counsel Moffic-Silver, two of Petitioner's fellow commentators in the underlying proceedings, Tom Bond CBOE's former Vice-Chairman, and treasury seat holder Norm Friedland, had the opportunity to confirm from Ms. Burke that the source of her information was *her contacts*.

As the record reflects, in a May 5, 2005 letter concerning the rule approval process to then Director of the SEC Division of Market Regulation and current Commissioner Annette L. Nazareth, Petitioner's Counsel Charles R. Mills stated:

> "Ms. Moffic-Silver('s letter dated April 28, 2005) states that the CBOE 'strongly disagrees' with Mr. Spiegel's views and has been 'in close communication with the SEC' with respect to its Offer to Purchase, implying that the CBOE has received and followed guidance from the Commission or its Staff that assure its compliance with Section 19."

On May 18, 2005 Petitioner's counsel Mills with prescience wrote respondent:

> "By this letter we respectfully request on behalf of Marshall Spiegel, who is a treasury seat member of CBOE, that the time for submitting comments in the above-referenced rulemaking [SR-CBOE-2005-19 and SR-CBOE-2005-20] be extended to and including May 24 to permit the public time to submit comments in response to

> the comment of the CBOE filed on or about May 9, 2005 in the form of the letter to you dated May 6, 2005 from CBOE's Executive Vice President and General Counsel, Joanne Moffic-Silver, Esq. CBOE's comment letter was filed eleven days after the public comment period closed. Mr. Spiegel did not receive notice of the comment until the Commission posted the letter on its website yesterday afternoon (May 17). . . .

In, addition, the representations of the CBOE in its May 6 letter raise questions about the regularity in the Commission's process in these public proposed rule change review proceedings. Specifically, with respect to the new subject matter interjected by the CBOE, the May 6 letter at pages 8-9 attempts to justify the commencement of the Offer to Purchase prior to any Commission approval of the purported 'interpretation' on the basis that the CBOE apparently had a reasonable expectation that the Commission would approve the CBOE's purported interpretation before the Offer to Purchase closes. By its terms, the Offer to Purchase closes May 25, 2005, although the CBOE also has the right to extend the period of the Offer.

Based on the experience of the related proposed rule change review proceeding SR-CBOE-2004-16 (which took many months to conclude), the CBOE could not have had a reasonable expectation on April 26, 2005, when it commenced its Offer to Purchase, or even on May 6, that these proposed rule change review proceedings will be concluded before May 25, 2005. In these circumstances, such CBOE representations raise issues whether the CBOE, prior to commencing its Offer to Purchase on or about April 26, 2005
, received from the Commission some sort of assurance

ex parte that the purported 'interpretation' that is the subject of these proceedings in fact *would be approved before May 25, 2005*. Such assurances would be highly irregular because at the time the Offer to to Purchase commenced the period for filing of public comments had not expired and comments in fact were not filed until April 28. Underscoring the concerns about regularity is the fact that the CBOE has earlier advised Mr. Spiegel that it was in 'close communication with the SEC' with respect to its Offer to Purchase, implying that the CBOE's decision to proceed with the Offer had the blessing of the SEC. (See the enclosed letter from Joanne Moffic-Silver, esq. to Marshall Spiegel dated April 28, 2005.)

The Administrative Procedure Act ('APA') requires an open process where the record of the proceeding is known to all and the Commission's deliberations and decisions await the receipt and consideration of all comments. A secret assurance given in advance of and in derogation of the receipt of public comments would violate the spirit and letter of the APA. We are not asserting at this point that a secret assurance in violation of the APA in fact has occurred here, but the representations of the CBOE outlined above and the other circumstances raise concerns as to the regularity of the process of these proceedings. In the circumstances, it is necessary and appropriate to extend the time for public comment in these proposed rule change review proceedings."

Respondent's May 24, 2005 Release, No, 34-51733 page 6, footnote 15 admits: "On May 18, 2005, the CBOE consented to an extension of time until June 10, 2005, for the Commission to consider this filing." Of course, the SR-CBOE-2005-19 rule filing was approved by the Commission on that May 24, one day before the

deadline for CBOE to purchase exercise rights. The Legal Opinion (at appendix 10a) from Delaware counsel provided by Tom Bond on or around June 5, on behalf of his fellow commentators in the underlying proceedings was summarily rejected by Respondent. In light of the extension granted by CBOE pursuant to 15 U.S.C. 78s(b), SEC has created a chilling effect on the comment process as part of its rulemaking.

As a consequence, Petitioner is at a loss to understand how SEC's actions in this matter meets the threshold of his Constitutional guarantees to due process and equal protection under the law in their arbitrary and capricious conduct.

V. DUE PROCESS PROTECTIONS ARE IGNORED WHEN THE SEC IS DIRELICT IN PROVIDING TIMELY PROPER FOIA DISCLOSURES WHILE BEING SOLE ARBITER AS TO WHAT IS DISCOVERABLE IN ITS OWN PROCEEDINGS THAT IT SETS FILING DEADLINES FOR

On October 5, 2004, Respondent SEC denied Petitioner's "request[ed] for an extension of time within which to file a supporting statement, under the Commission's September 29, 2004 Order Granting Petition for Review and Scheduling Filing of Statements, pending Freedom of Information Act Request(s) he submitted to the [SEC]."

The Commission has deprived Petitioner his rights to due process by not timely complying with his FOIA requests in these proceedings. Between Petitioner's request of September 30, 2004 as well as filings of October 5th, 7th, and 8th, that Petitioner requested a brief continuance, reconsideration, and

response to CBOE's disingenuous oppositions and refusals to turn over relevant information, respectively, the Commission placed Petitioner in bureaucratic jeopardy by not complying with his FOIA request(s) beginning September 3, 2004, which prevented him from adequately articulating what was relied on in approving the 3.16 Rule Amendment and to be able to accurately show "exceptions to any findings or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist". See e.g. *SEC Rules of Practice: Rule 430 (b)(2).*

The Commission controls the schedule of Filing of Statements as well as how to proceed with FOIA requests. In these instances, unlike discovery in a court proceeding, Petitioner's only recourse is a FOIA appeal within Respondent SEC's internal structure. SEC controls how and when FOIA requests are dealt with before an appeal can be filed. There is no other recourse available to Petitioner or those under similar circumstances.

Deafened by the SEC's Silence, He Sued: NY Times (5/28/06)appendix 99a. Petitioner's FOIA request remains unanswered as shown at appendix 9a. In an April 11, 2006 letter to Petitioner, the SEC stated, "I have been advised that due to staff changes, this request was apparently unaddressed. I have been assured that a response should be forthcoming."

The very documents Petitioner was waiting on which he believed, among others, to be central to his case against Respondent, was the subject of the Order Denying Request For Extension that allowed respondent to violate his due process in not making timely proper disclosures that were exclusive to a FOIA administrative proceeding. Petitioner asks this

Court to adopt a standard for Administrative Rulemaking as set forth by author Steven J. Bella; *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking* [I/S: A Journal of Law and Policy (Vol. 1:1 2005 p. 59 – 94)]

CONCLUSION

For all the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari for plenary review on the questions whether Petitioner has standing to ask the D.C. Circuit for review as to if the SEC has jurisdiction to hear a novel question of "first impression"; that allows a corporate board to strip its constituency of its voting rights by rationalizing away their actions in what the ***Random House Dictionary Unabridged Edition*** (1967) defines as an *Amendment* – a change made by correction, addition or deletion and instead, disingenuously calling it an "*interpretation*" making that board the sole arbiter in such determinations. All of this done with the blessing of Respondent SEC ; prohibiting any due process right to review and violating the purpose of their existence: *protecting the rights of equity owners among which voting privileges are a paramount part of that duty.* Alternatively, Petitioner asks that this Court summarily reverse the D.C. Circuit and remand with instructions to hear Petitioner's appeal since he has a viable action for damages.

Respectfully submitted,
Marshall Spiegel, *Pro Se Petitioner*
1618D Sheridan Road
Wilmette, Illinois 60091
Telephone: 847/853-0993

(any footnotes trail end of each document)

No. 05-1211 Consolidated with 05-1279

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marshall Spiegel,
Petitioner

v.

Securities and Exchange Commission,
Respondent

December 12, 2005, Filed

NOTICE: RULES OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: BEFORE: Rogers, Tatel, and Griffith, Circuit Judges.

OPINION: ORDER

Upon consideration of the motion to dismiss No. 05-1211, the opposition thereto, and the reply; the motion to dismiss No. 05-1279, the opposition thereto, and the reply; the motions for stay, the opposition thereto, and the replies; the motion for summary reversal, the opposition thereto, and the reply; the motions for leave to intervene, the opposition thereto, and the replies; the motion to supplement the record (styled as "combined

motion to object to and amend certificate listing and describing the record"), the opposition thereto, the reply, and the supplement to the certified index to the record; the motion to strike a portion of the record, the opposition thereto, and the reply; it is

ORDERED that the motions to dismiss be granted. After petitioner filed the petition in No. 05-1211 and before he filed the petition in No. 05-1279, petitioner sold his membership seat on the Chicago Board Options Exchange, Incorporated. Accordingly, the petition in No. 05-1211 is moot. See Arizonans for Official English v. Arizona, 520 U.S. 43, 67-72, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997); 21st Century Telesis Joint Venture v. FCC, 355 U.S. App. D.C. 1, 318 F.3d 192, 198 (D.C. Cir. 2003). Moreover, petitioner has not demonstrated that he has standing to challenge the order at issue in No. 05-1279. See Sierra Club v. EPA, 352 U.S. App. D.C. 191, 292 F.3d 895, 899 (D.C. Cir. 2002). It is

FURTHER ORDERED that the remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

No. 05-1211 Consolidated with 05-1279

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marshall Spiegel,
Petitioner

v.

Securities and Exchange Commission,
Respondent

March 28, 2006, Filed

JUDGES: BEFORE: Rogers, Tatel, and Griffith, Circuit Judges.

ORDER

Upon consideration of petitioner's petition for rehearing filed January 17, 2006, it is

ORDERED that the petition be denied.

Per Curiam

No. 05-1211 Consolidated with 05-1279

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marshall Spiegel,
Petitioner

v.

Securities and Exchange Commission,
Respondent

March 28, 2006, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, and Griffith, Circuit Judges.

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 05-1211
September Term, 2004

Marshall Spiegel, Petitioner

v.

Securities and Exchange Commission, Respondent

O R D E R

This case was filed and docketed on 6/17/05. The case was filed as a petition for review and was assigned the above number.

It is ORDERED that petitioner(s) shall submit the following document(s) (original and one copy required, unless otherwise noted) by the indicated date(s)

7/25/05 Docketing statement.

7/25/05 Statement of issues to be raised.

7/25/05 Certificate of Counsel (Cir. R. 28(a)(1)).

7/25/05 Statement as to whether or not a deferred appendix under

F.R.A.P. 30(c) will be utilized. (A motion will not be necessary.) 7/25/05 Original and four copies of procedural'motions which would affect the calendaring of this case.

8/8/05 Dispositive motions, if any. See Cir. R. 27(g). (Original and four copies.)

Petitioner's failure to comply with this order will result in dismissal of the petition for review for lack of prosecution. See D.C. Cir. Rulee 38.

It is FURTHER ORDERED that respondent(s) shall submit the following document(s) (original and one copy

required, unless otherwise noted) by the indicated date(s)

8/8/05 Entry of Appearance form. 8/8/05 Certified Index to Record. 8/8/05 Certificate of Counsel (Cir. R. 28(a)(1)).

7/25/05 Original and four copies of procedural motions which would affect the calendaring of this case.

8/8/05 Dispositive motions, if any. See Cir. R. 27(g). (Original and four copies.)

It is FURTHER ORDERED that briefing in this case is deferred pending further order of the Court.

The Clerk is directed to certify and transmit a copy of this order, along with the petition for review, to respondent(s).

FOR THE COURT:
Mark J. Langer, Clerk

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
October 5, 2004

ORDER DENYING REQUEST FOR EXTENSION

In the Matter of Marshall Spiegel

Marshall Spiegel has requested an extension of time within which to file a supporting statement, under the Commission's September 29, 2004 Order Granting Petition for Review and Scheduling Filing of Statements, pending a Freedom of Information Act request he submitted to the Commission. The September 29 order was issued in connection with Mr. Spiegel's petition for review of an order of the Division of Market Regulation on delegated authority issued on July 15, 2004 in SR-CBOE-2004-16 (Chicago Board Options Exchange; Order Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3.16(b). Counsel for the CBOE has today filed an objection to the granting of any extension.

On September 30, 2004, Mr. Spiegel was advised by the Office of the Secretary that the Commission had posted on its website two memoranda by the Division of Market Regulation made available to complete the public record. It does not appear that the addition of those materials provides a reason for any extension of the September 29 filing date. Therefore,

It is ORDERED that Marshall Spiegel's request for an extension of time is DENIED.

For the Commission, by its Secretary, pursuant to delegated authority.

UNITED STATES
EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
OFFICE OF THE GENERAL COUNSEL

April 11, 2006

Marshall Spiegel
168 Sheridan Road
Wilmette, Illinois 60091

Re: Freedom of Information Act (FOIA) Request No. 005-0673

Dear Mr. Spiegel:

As you requested, I spoke with staff in the Commission's FOIA/Privacy Act Office regarding your October 25, 2004 request for documents. I have been advised that due to staff changes, this request was apparently unaddressed. I have been assured that a response should be forthcoming. As we noted in our conversations, footnote 2 of the Office of the General Counsel's letter dated January 11, 2005 in response to your appeal of Request Nos. 2004-8593 and 2005-0070 indicated that no additional responsive records to those two requests were identified in the period September 3 through October 19, 2004. As the FOIA Officer will be responding to your request which was imbedded in that appeal and reiterated on October 25, 2004, the letter of January 11, 2005 will not be revised.

Sincerely,
Celia L. Jacoby
Senior Counsel

June 3, 2005

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

Re: Proposed Rule Changes: File Nos. SR-CBOE-2005-19 SR-CBOE-2005-2020 -Q

Dear Mr. Bond:

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

You have asked us whether it is within the power and authority of the Board of Directors of the CBOE (the "Board") to interpret Article Fifth(b) when questions arise as to its application and whether the determinations of the Board in approving the interpretations of Article Fifth(b) contemplated by the proposed rule change constitute amendments to the Certificate necessitating the approval by a vote of the

CBOE's membership, we note that the questions raised herein ordinarily would be determined only through a litigated proceeding. The outcome of any such court proceeding depends in large part upon the facts and circumstances as they would be developed in such proceeding.

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

It also is my understanding that in an agreement entered into between the CBOE and the CBOT, dated September 1, 1992 (the "September 1992 Agreement"'). filed as proposed rule change in SR-CBOE-1992-42, and

approved by the Commission in Exchange Act Release No. 32430, dated June 8, 1993, the CBOE and the CBOT agreed upon a definition of the term "member of the [CBOT]" as applied in Article Fifth(b). Specifically, the term "member of the [CBOT)" is not defined in the Certificate. It is my understanding that the meaning of the term was understood by reference to the CBOT's certificate of incorporation as constituted in 1973 (at the time that the Certificate was adopted) and at the time that the CBOT only had one class of membership and 1402 members. It also is my understanding that, following the CBOT's creation of additional classes of members, a definition of "member of the [CBOT]" in Article Fifth(b) was agreed upon by the CBOE and the CBOT in the September 1992 Agreement, as reflected in CBOE Rule 3.16(b). CBOE Rule 3.l6(b) provides that "for the purpose of entitlement to membership on the [CBOE] in accordance with [Article Fifth(b)] the term `member of the [C]BOT],' as used in Article Fifth(b), is interpreted to mean an individual who is either an `Eligible CBOT Full Member' or an `Eligible CBOT Full Member Delegate' as those terms are defined in the [September 1992 Agreement]." The September 1992 Agreement defines "Eligible CBOT Full Member" as an individual who at the time is the holder of one of 1,402 existing CBOT full memberships ("CBOT Full Memberships"), and who is in possession of all trading and privileges of such CBOT Full Memberships, and defines "Eligible CBOT Full Member Delegate" as an individual to whom a CBOT Full Membership is "delegated" (i.e, leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership.

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

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

a. The Certificate;

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

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

d. The September 1992 Agreement;

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

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

g. Exchange Act Release No. 34-50028 of the Commission, dated July 15, 2004, in connection with File No. SR-CBOE-2004-16, entitled "Order Granting Approval to a Proposed Rule Change and Amendment No. l Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3.16(b)";

h. Exchange Act Release No. 34-51252 of the Commission, dated February 25, 2005, in connection

with File No. SR-CBOE-2004-1 b, entitled "Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3,16(b)";

i. Exchange Act Release No. 34-51462 of the Commission, dated March 31, 2005, in connection with File No. SR-CBOE-2005-20, entitled "Notice of Proposed Rule Change and Amendment No. I Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)",

j. Exchange Act Release No. 34-51463 of the Commission, dated March 31, 20105, in connection with File No. SR-CBOE-2005-19, entitled "Notice of Proposed Rule Change and Amendment No. I Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)";

k. Exchange Act Release No. 34-51568 of the Commission, dated April 18, 2005, in connection with File No. SR-CBOE-2004-16, entitled "Order Denying Motion for Reconsideration of Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and Amendment No. 1 hereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(6)",

l. Exchange Act Release No. 34-51733 of the Commission, dated May 24, 2005, in connection with File No. SR-CBOE-2005-19, entitled "Order Granting Approval to proposed Rule Change As Amended By Amendment Nos. 1, 2, and 3 Thereto Relating to an Interpretation of paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(6)" ("Release No. 34-51733");

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

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

o. Letter of Thomas A. Bond, Norman Friedland, Gary P. Lahey, Anthony Arciero and Marshall Spiegel, dated April 27, 2405, to Jonathan G. Katz, Secretary, the Commission;

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

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

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

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

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

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

Discussion

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

Although a board of directors generally has the power and authority to interpret provisions of a corporation's certificate of incorporation, see 8 Del. C. § 141 (a): see also Stroud v. Grace, 606 A.2d 75, 93 (Del. 1992), such power and authority is not unlimited. The interpretation must be based upon the unambiguous language of the provisions, and, if the meaning of the language of the provisions cannot be determined solely from the document itself, then the interpretation must be fair and reasonable,[2] and must support the franchise

rights of the members. See infra pp. 8-14. To the extent that the. interpretation is not based upon unambiguous language, or is not fair and reasonable, and does not support the members' franchise rights. then the "interpretation" of the board of directors would be considered an amendment of the certificate of incorporation and the procedural requirements of Section 242 of Delaware's General Corporation Law (the "DGCL") must be satisfied, see 8 Del. C. § 242(b)(3), which would include any voting requirements of the members as set forth the in the certificate of incorporation.[3]

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

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

Holland v. National Auto. Fibres., Inc., 2 A.2d 124, 127 (Del. Ch. 1938); see also Fletcher Cyclopedia of the Law of Private Corporation ch. 43, § 3655 (2004) ("[i]n interpreting the intent of an amendment to a corporate charter, evidence outside the document is restricted to interpretative aid in accordance with the principles of statutory construction rather than in accordance with principles applicable to the construction of ordinary contracts"). Simply stated, an interpretation of a provision of a certificate of incorporation must be based upon the provision's unambiguous language. See In re Explorer Pipeline Co., 781 A.2d 705, 713 (Del. 2001) (quoting Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192,1196 (Del. 1992)):

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

See also In re Gen. Motors (Hughes) S'holder Litig., 2005 WL 1089021, at *20 (Del. Ch.) ("[b]oth parties have urged the Court to look behind the contractual language for the meaning of this Article. This task is unnecessary as I conclude that Article Seventh, by its own unambiguous terms, is not in conflict with Delaware law"); Kirby v Kirby, 1987 WL 14862, at *4 (Del. Ch.) ("[I]f the provisions in question are unambiguous, they must be applied as written, giving the language chosen its ordinary meaning"); Flerlage v. KDI Corp., 1986 WL 4275, at *4 (Del. Ch.) ("[t]he Certificate of Preferences is clear and unambiguous and parol evidence is therefore irrelevant").

Based upon the foregoing, the "starting point" of certificate of incorporation construction "is to determine whether a provision is ambiguous, i.e. whether it is reasonably subject to more; than one interpretation." NBC Universal Inc. v. Paxson Communications Corp., 2005 WL 1035997, at *5 (Del. Ch.). A provision of a certificate of incorporation "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning," City Investing Co. Liquidation Trust v. Cont'l Cas. Co., 624 A.2 d 1191, 1198 (Del. 1993), "[n]or is it rendered ambiguous simply because the parties `do not agree upon its proper construction."' NBC Universal, 2045 WL 1038997, at * 5 (quoting Rhone-Poulenc, 616 A.2d at 1196). A provision of a certificate of incorporation is ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Rhone-Poulenc, 616 A.2d at 1196; see also Stroud, 606 A. 2d at 93 (court determined that the word "substantial" was subject to different interpretations and had different meanings).

To determine whether a provision of a certificate of incorporation is ambiguous, Delaware courts have recognized that "[t]he words employed by contract (or certificate of incorporation) drafters" must be examined to ascertain the "apparent purposes of the drafters." Telcom-SNI Investors, L.L.C. y. Sorrento Networks, Inc., 2401 WL 1117505, at *6 (Del. Ch.); see also Pasternak v. Glazer, 1996 WT 549960, at *3 (Del. Ch.) ("[i]n determining whether a charter provision is ambiguous, the intent of the stockholders in enacting the provision is instructive"); TCG Sec. Inc. v. Southern Union Co , 1990 WL 7525, at * 10 (Del. Ch.), the language of the certificate of incorporation "is consistent with the underlying purpose of Southern Union's certificate, which was obviously designed to safeguard preferred stockholders from certain mergers or consolidations that might affect adversely the preferred stockholders"). The ""true test," however, "is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Rhone-Poulenc, 616 A.2d at 1196. quoted in Kaiser, 681 A.2d at 395. Indeed, in the context of corporate securities, "[w]here . . . the ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights, the reasonable expectations of the purchaser of the securities must be given effect." Kaiser, 681 A.2d at 395.

In contrast, if the language contained in a certificate of incorporation in ambiguous, "then all objective extrinsic evidence is considered: the overt statements and acts of the parties, the business context, prior dealings between the parties, and other business customs and usage -in the industry."' Explorer Pipeline, 781 A.2d at

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

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

In fact, based upon such "theories," interpretations that impact adversely the stockholder franchise should be viewed with disfavor. See Centaur Partners IV v.

National Intergroup Inc., 582 A.2d 923, 927 (Del. 1990) ("there exists in Delaware `a general policy against disenfranchisement.' This policy is based upon the belief that `[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of the directorial power rests") (quoting Blasius Indus. v. Atlas Corp., 564 A.2d 651, 669 (Del. 1988)). Accordingly, based upon the foregoing, where the language contained in a certificate of incorporation in ambiguous, such language should be interpreted in a fair and reasonable manner and should not be interpreted in a manner that would result in the disenfranchisement of stockholders or members.

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

Article Fifth(b) of the Certificate provides;

In recognition of the special contribution made to the organization and development of the Corporation by the members of the Board of Trade of the City of Chicago, a corporation organized and existing by Special Legislative Charter of the General Assembly of the State of Illinois, and for the further purpose of promoting the growth and liquidity of the Corporation, developing a broad financial base of dues-paying members, and assuring participation on a continuing basis of persons experienced in the trading and clearing of contracts for future purchase car delivery on a central marketplace, every present and future member of said Board of Trade who applies for membership in the Corporation and who otherwise qualifies shall, so long as be remains a member of the Board of Trade, be

entitled to be a member of the Corporation notwithstanding any such limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the Corporation, its members or elsewhere. Members of the Corporation admitted pursuant to this paragraph (b) shall as a condition of membership in the Corporation, be subject to fees, dues, assessments and other like charges, and shall otherwise be vested with all rights and privileges and subject to all obligations of membership, as provided in the by-laws. No amendment may be made with respect to this paragraph (b) of Article FIFTH without the prior approval of not less than $80% of (i) the members of the Corporation admitted pursuant to this paragraph (b) and (ii) the members of the Corporation admitted other than pursuant to this paragraph (b), each such category of members voting as a separate class . . . .

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

meaning of such language, and (c) the interpretation of the language contained in Article Fifth(b) must be fair and reasonable, and must support the franchise rights of the members of the CBOE.

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

In addition to altering the status of the individuals who have the right to become members of the CBOE pursuant to Article Fifth(b), the "interpretation" of Article Fifth(b) proposed by the CBOE and approved by the Commission also alters the transfer restrictions

imposed upon such individuals. As set forth above, the September 1992 Agreement was entered into to clarify -- and preserve -the restriction on the transfer rights of "Eligible CBOT Full Members" and "Eligible CBOT Full Member Delegates" pursuant to Article Fifth(b). Specifically, the September 1992 Agreement provides that "Eligible CBOT Full Members" and "Eligible CBOT Full Member Delegates" "shall not have the right to transfer (whether by sale, gift, bequest or otherwise) their CBOE regular memberships or any of the trading rights and privileges appurtenant thereto" separate and apart from the transfer of the CBOT "full" membership, September 1992 Agreement at § 3(a). The rule change proposed by the CBOE and approved by the Commission permits the CBOE memberships (and all of the trading rights and privileges appurtenant thereto) received by the CBOT "members" pursuant to Article Fifth(b) to be transferred to third parties separate from the transfer of the shares of stock of CBOT Holdings and the Class B, Series 13- l membership of the CBOT in direct violation of the September 1992 Agreement. Accordingly, the "'interpretation" of Article Fifth(b) proposed by the CBOE and approved by the Commission, alters the rights and privileges of the CBOE members by eliminating a prohibition on transfer that existed in connection with the CBOE memberships that were available to the CBOT's members in accordance with Article Fifth(b).

Ill. Conclusion

The "interpretation" of Article Fifth(b) by the CBOE and the Commission is unfair and unreasonable, and does not support the franchise rights of the members of

the CBOE, because such "interpretation" (a) alters the status of persons who may become members of the CBOE, (b) alters the rights and privileges of the CBOE membership, and (c) denies the CBOE membership the right to vote in connection with amendments to the Certificate in violation of Section 242(b)(3) of the DGCL and Article Fifth(b). In contrast, to determine that the CBOE's and the Commission's "interpretation" of Article Fifth(b) is an amendment of Article Fifth(b), and to determine that such amendment of Article Fifth(b) requires a vote of the CBOE members pursuant to Section 242(b)(3) of the DGCL and Article Fifth(b), would be fair and reasonable, and would support the franchise rights of the members of the CBOE, because such determinations (a) would recognize that the proposed rule change alters the status of persons who may become members of the CBOE, (b) would recognize that the proposed rule change alters the rights and privileges of the CBOE membership, and (e) would recognize and enforce the franchise rights of the members of the CBOE as provided by Section 242(b)(3) and Article Fifth(b). In conclusion, a determination that the CBOE's and the Commission's "'interpretation" of Article Fifth(b) is an amendment of Article Fifth(b) would be consistent with the rules of construction adopted by Delaware courts.[5]

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

A. The subject matter of this letter are limited to Delaware law, and we have not considered the effect of any other laws of any jurisdiction (including, without limitation, federal laws of the United States of

America), or rules, regulations, orders, or decisions relating thereto.

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

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

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

This letter is rendered solely for your benefit in connection with the matters addressed herein. It is my understanding that you may furnish a copy of this letter to the Commission in connection with the matters addressed herein and I consent to your doing so. Except as stated in this paragraph, this letter may not be furnished to or quoted to, nor may this letter be relied upon by, any other person or entity for any purpose without my prior consent. This letter speaks only as the date hereof, and we assume no obligation to advise you of any changes in the foregoing subsequent to the delivery of this letter. In the event that you or the Commission has any questions with respect to this letter, do not hesitate to contact me as (302) 652-0367.

Sincerely,

Michael J. Maimone

Footnotes

Fn1It is my understanding that, on May 24, 2005, the Commission granted approval to the proposed rule change, as amended, contained in File No. SR-CBOE-2005-19.

fn2See Stroud, 606 A. 2d at 93 ("The trial court was troubled that the meaning of `substantial' could vary depending on how the board defined the term. The Vice Chancellor nonetheless around that the board had the authority to define the term as long as they exercised their discretion fairly.")

fn3In the March 2005 Letter, Richards, Layton & Finger stated that "'it is within the general authority of

the Board to interpret Article Fifth(b) in good faith when questions anise as to its application," and that "the determinations of the Board in approving the interpretations of the Certificate contemplated by the Agreements do not constitute amendments to the Certificate and thus do not need to be approved by a vote of the CBOE's membership." March 2005 Letter at 2. The March 2005 Letter also states that such conclusions are based upon Section 141 (a) of the DGCL, Article Eighth of the Certificate and the decision in Stroud, 606 A.2d at 92. Although the Board does have the power and authority to interpret provisions of the Certificate under Section 14l(a), Article Eighth and the decision in Stroud such power and authority is limited. The March 2005 Letter completely ignores these limitations and, because such limitations are relevant to the issues set forth in the March 2005 Letter and set forth herein, the conclusions set forth in the March 2005 Letter are fatally flawed. As set forth herein, based upon these limitations, the Board's interpretation of Article Fifth(b) should he deemed to be an amendment of the Certificate and a vote of the CBOE membership is required under Section 242(b)(3) of the DGCL and Article Fifth(b).

Fn4The CBOE recognizes that the former "Eligible CBOT Full Members" and the former "Eligible CBOT Full Member Delegates" would have no rights pursuant to Article Fifth(b) after the restructuring by stating that it "believes" that a rule change - the definition of "member of the [CBOT] -- is "necessary." See Release No. 34-51733 at 4.

fn5The Commission, in Release No. 34-51733, states that "[t]he actions identified in Section 242(a) are

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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51252; File No. SR-CBOE-2004-16)

February 25, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of its Certificate of Incorporation and an Amendment to Rule 3.16(b)

I. Introduction

On March 4, 2004, the Chicago Board Options Exchange, Inc. ("CBOE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend CBOE Rule 3.16(b). The proposed amendment would interpret certain terms used in paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation ("Article Fifth(b)"). On April 9, 2004, the CBOE filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the Federal Register on May 3, 2004.[4] The Commission received one comment letter on the proposed rule changes On May 25, 2004, the CBOE submitted a response to the comment letter, [6] and two of the original commenters replied to CBOE's response in a letter submitted on June 14, 2004.[7] On July 15, 2004, the Commission approved, by authority delegated to the Division of

Market Regulation, the proposed rule change, as amended.[$]

On August 23, 2004, Marshall Spiegel ("Petitioner") filed with the Commission a notice of intention to file a petition for review of the Commission's approval by delegated authority, [9] and on September 13, 2004, Petitioner filed a petition for review. [10] On September 17, 2004, the Commission acknowledged receipt of these documents from Petitioner and confirmed that the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice was in effect.[11] The Commission has considered the petition and for the reasons described below, has determined to set aside the earlier action taken by delegated authority and grant approval of the proposed rule change, as amended. [12]

II. Description of the Proposed Rule Change A. Background

As compensation for the time and money that the Board of Trade of the City of Chicago ("CBOT") had expended in the development of the CBOE, a member of the CBOT is entitled to become a member of the CBOE without having to acquire a separate CBOE membership. This entitlement is established by Article Fifth(b) of the CBOE's Certificate of Incorporation ("Article Fifth(b)"). Article Fifth(b) provides, in relevant part:

> [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] ("Exercise Rights").

Article Fifth(b) also 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.

In 1992, the Commission approved the CBOE's proposed interpretation of the meaning of the term "member of the [CBOT]" as used in Article Fifth(b). The interpretation proposed by the CBOE was one agreed upon by the CBOE and the CBOT, is embodied in an agreement dated September 1, 1992 ("1992 Agreement"), and is reflected in CBOE Rule 3.16(b). CBOE Rule 3.16(b) states that "for the purpose of entitlement to membership in the [CBOE], in accordance with ... [Article Fifth(b)] ... the term `member of the [CBOT],' as used in Article Fifth(b), is interpreted to mean an individual who is either an `Eligible CBOT Full Member' or an `Eligible CBOT Full Member Delegate,' as those terms are defined in the [1992 Agreement] . . . "[13]

B. CBOE's Current Proposal

The CBOE is again proposing an interpretation of the term "member of the [CBOT]" as used in Article Fifth(b). The CBOE believes that this interpretation is necessary to clarify which individuals will be entitled to the Exercise Right upon distribution

by the CBOT of a separately transferable interest ("Exercise Right Privilege") representing the Exercise Right component of a CBOT membership. The CBOT's intention to issue these Exercise Right Privileges is set forth in an agreement dated September 17, 2003 between the CBOE and the CBOT ("2003 Agreement"). In the 2003 Agreement, the CBOE and CBOT agreed on an interpretation of the term "member of the [CBOT]" as used in Article Fifth(b) once these Exercise Right Privileges are issued. Specifically, the 2003 Agreement modifies the definitions of "Eligible CBOT Full Member"[14] and "Eligible CBOT Full Member Delegate" used in the 1992 Agreement. The CBOE's proposed rule change would revise Rule 3.16(b) to incorporate the definitions of "Eligible CBOE Full Member" and "Eligible CBOT Full Member Delegate" found in the 2003 Agreement.

III. Discussion and Commission Findings

As noted above, the Commission received a comment letter and a follow up letter on the proposed rule change from several members of the CBOE.[15] In addition, the Commission received a petition for review of the action taken by delegated authority. [16] Discussed below are these commenters' and the Petitioner's arguments as to why the Commission should not approve the proposed rule change.

A. The Commission's Jurisdiction to Consider the Proposed Rule Change

The Petitioner argues that the Commission should not approve the proposed rule change because the filing proposes to interpret contracts and

instruments created in and under Illinois law and subject to "interpretation" under Illinois and Delaware state law. [17] Thus, Petitioner contends that the Commission is overstepping its jurisdiction and should not approve the proposal on that basis. In this regard, Section 3(a)(27) of the Exchange Act defines the "rules of an exchange" to include, among other things, the constitution, articles of incorporation, and instruments corresponding to the foregoing of an exchange, as well as the stated policies, practices, and interpretations of such exchange. [18] Rule 19b-4 under the Exchange Act[19] defines the term "stated policy, practice, or interpretation" broadly to include

> (1) any statement made generally available to (a) the membership of the self-regulatory organization ("SRO"), or (b) to a group or category of persons having or seeking access to facilities of the SRO, that establishes or changes any standard, limit, or guideline with respect to the rights, obligations, or privileges of such persons, or
> (2) the meaning, administration, or enforcement of an existing SRO rule.

The CBOE's Certificate of Incorporation, as well as the interpretation in CBOE Rule 3.16 of terms used in the Certificate, are "rules of the exchange." As such, Section 19(b)(1) of the Exchange Act requires CBOE to file with the Commission any proposed changes to those rules.[20] Once filed, Section 19(b) of the Exchange Act requires the Commission to publish notice of the proposed rule change and approve it, or institute proceedings to determine whether the proposed rule change should be disapproved. Accordingly, the

Commission believes that the Exchange Act establishes clearly that the proposed rule change is within its jurisdiction.

B. Petitioner's Right to Receive Notice of Commission Approval of the Proposed Rule Change

The Petitioner also claims that it is premature for the Commission to consider this Petition for Review because the Commission never served actual notice on him of its approval of CBOE's proposed rule change. [21] There, however, is no requirement that the Commission notify those who comment on a proposed rule change that it is approved. Instead, the Commission publishes its approval orders in the Federal Register and posts them on its Web site. Accordingly, the Commission does not believe it is premature to consider the petition for review.

C. The Commission Finds CBOE's Determination that the Proposal Is an Interpretation of Article Fifth(b) to Be Consistent with the Exchange Act

The commenters' and Petitioner's principal argument as to why the Commission should not approve the CBOE's proposed rule change is that the proposed rule change does not constitute an interpretation of Article Fifth(b) as CBOE claims, but an amendment to Article Fifth(b) instead. Thus, Petitioner states that the CBOE's Board of Directors ("Board") acted inconsistently with the CBOE's Certificate of Incorporation by failing to obtain the approval of 80% of those CBOT members who exercised their right to be CBOE members and 80% of other

CBOE members.[22] The commenters to the CBOE proposal made similar arguments as to why the Commission should not approve the proposal .[23] In this regard, the Petitioner's legal memorandum states that the Commission's order is not in compliance with Section 19(b)(1) of the Exchange Act because the order purports to decide fundamental issues of corporate governance of the CBOE, which are matters that should fall within the province of Delaware law and the state courts, not the Commission. [24]

The CBOE filed a proposed rule change to adopt an interpretation of Article Fifth(b) by amending CBOE Rule 3.16. Section 19(b) of the Exchange Act[25] requires that the Commission approve an exchange's proposed rule change if it finds that the proposal is consistent with the requirements of the Exchange Act, and the rules thereunder applicable to exchanges. Among other things, national securities exchanges are required under Section 6(b)(1) of the Exchange Act[26] to comply with their own rules. Thus, if CBOE has failed to comply with its own Certificate of Incorporation, which is a rule of the exchange, the Commission believes that this may not only violate state corporation law, but it would also be inconsistent with the Exchange Act and, thus, the Commission could not approve the proposed rule change under Section 19.

The Commission has reviewed the record in this matter and believes that the CBOE provides 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 is an interpretation of, not an amendment to, Article

Fifth(b). The Commission finds persuasive CBOE's analysis of the difference between "interpretations" and "amendments,"[27] and the letter of counsel that concludes that it is within the general authority of the CBOE's Board to interpret Article Fifth(b) and that the "Board's interpretation of Article Fifth(b) contemplated by the [2003 Agreement] does not constitute an amendment to the Certificate and need not satisfy the voting requirements of Article Fifth(b) that would apply if the Article were being amended." [28]

Petitioner argues that the 2003 Agreement denigrates 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 membership under Article Fifth(b)," and that "[t]his fundamental change and augmentation in the economic and legal rights of CBOT members and the structure of CBOT membership materially and profoundly affect the economic and legal rights of CBOE membership and governance ."[29] Accordingly, Petitioner states that "[i]t cannot be fairly concluded that by altering the economic and corporate control relationships among CBOT members, third parties and current CBOE members in such material ways does not constitute an amendment to the provisions of Article Fifth(b)."

The Commission does not believe that Petitioner's argument refutes, to any degree, CBOE's analysis of why its proposed rule change is an interpretation to Article Fifth(b), not an amendment. As discussed further below, the Commission does not believe that either the 2003 Agreement or the proposed rule change alter CBOT membership in the way

Petitioner claims. To the extent changes to CBOT memberships are being made, they are being done by the CBOT as part of its restructuring. Once the CBOT issues the exercise rights, which it states is its intent, the CBOE believes it must interpret Article Fifth(b) to address the ambiguity with respect to the definition of member of the CBOT that will be created by CBOT's actions .[30] The Commission agrees that it is 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).

Petitioner's legal memorandum also states that by purporting to decide issues of corporate governance, the July 15th rder [31] materially compromises the rights of CBOE members to obtain judicial review of those issues. Petitioner argues that the issues do not implicate market integrity concerns under the Exchange Act and thus the Commission should maintain neutrality on these corporate governance issues .[32] Except to the extent that the Commission's analysis of state law informs its finding 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 is an interpretation of, not an amendment to, Article Fifth(b), the Commission is not purporting to decide a question of state law. [33]

D. The CBOT Restructuring

1. The Commission is Not Approving the CBOT's Breaking of Its Memberships into Separate, Transferable Interests

Petitioner's legal memorandum states that the 2003 Agreement amends Article Fifth(b) by redefining the term CBOT member in a manner other than was originally contemplated when Article Fifth(b) was adopted in 1972, when all of the rights and benefits that constituted a CBOT membership were an integrated whole that could not be separated and transferred to third parties, as was further confirmed in the 1992 Agreement.[34] The legal memorandum also states that the 2003 Agreement now permits CBOT members to divide membership rights and sell them separately to third parties without extinguishing the right to exercise and become a CBOE member under Article Fifth(b) .[35]

The Commission believes that the Petitioner mischaracterizes the 2003 Agreement in several respects. First, the 2003 Agreement does not permit the CBOT to divide membership rights by issuing Exercise Right Privileges. The 2003 Agreement begins by stating that the CBOT intends to issue these Exercise Right Privileges. The purpose of the agreement is to resolve who will be a "member of the [CBOT]," and therefore entitled to the Exercise Right under Article Fifth(b), following the issuance of these Exercise Right Privileges. In addition, the Commission does not believe that the 1992 Agreement confirms that all the rights and benefits that constitute a CBOT membership were an integrated whole. To the contrary, the 1992 Agreement was necessitated by the division of CBOT memberships into trading rights that could be leased and ownership rights.[36]

The Commission notes that it is required under the Exchange Act to make a finding that CBOE's

proposed interpretation is consistent with the CBOE's own rules, and the Exchange Act. The Commission is not approving either the CBOT's action to separate or to transfer interests in the Exercise Right or the 2003 Agreement. With regard to Petitioner's argument that the 2003 Agreement is not consistent with the 1992 Agreement, and thus cannot be an interpretation of Article Fifth(b), an exchange may propose a new interpretation or new rule that is, in practice, fundamentally different from a previous interpretation or rule, so long as the proposed interpretation is consistent with the Exchange Act.

2. The Commission Does Not Have to Consider the CBOT's Restructuring

The commenters argued that the CBOT's proposed changes to its corporate structure, which are pending, are an amendment to Article Fifth(b) of the CBOE's Certificate of Incorporation because, following the demutualization of the CBOT, CBOT will no longer be a membership organization.[37] Commenters also contended that "[w]hen the CBOE was created in 1972, the equity of the CBOT was only contained in the `member of the Board of Trade.[38] Also, because CBOT is proposing in its demutualization that the current members of the CBOT would receive approximately 77% of the equity in a new holding company, the definition of "member of the Board of Trade" as used in Article Fifth(b) of the CBOE's Certificate of Incorporation is being amended.[39] Commenters also claimed that because CBOT's demutualization would affect the CBOT's governance, the CBOE's proposed rule change is an amendment to Article Fifth(b) .[40]

Similarly, Petitioner asserts in his legal memorandum that the 2003 Agreement denigrates the definition of CBOT member "by permitting CBOT members to carve up membership rights and sell them separately to third parties without extinguishing the right to exercise and become a CBOE member under Article Fifth(b) ."[41] The Commission, however, does not believe that the proposed rule change is what allows the CBOT to divide equity ownership in the CBOT into several parts and issue separately transferable securities representing each part. The proposed rule change merely sets forth how the CBOE proposes to apply its rules once the CBOT issues such securities, and does not ask the Commission to approve any action being taken by the CBOT with regard to its memberships.

The Petitioner asserts that the CBOT has moved ahead with its demutualization by separating the Exercise Right as described in this proposal, and opening its market to the trading of memberships without Exercise Rights and the trading of the Exercise Right itself.[42] Petitioner further argues in his legal memorandum that third parties controlling membership Exercise Rights will have substantial powers and influence over the future course of CBOE governance, and that altering the "economic and corporate control relationships among CBOT members, third parties and current CBOE members in such a material way" constitutes an amendment to Article Fifth(b) .[43] The Petitioner also believes that the dilution of CBOT equity through an initial public offering expected in 2005 will allow less costly access to CBOE.[44] Thus, according to Petitioner's legal memorandum, the CBOT's impending restructuring is

material to the Commission's discussion on the issues presented in the proposed rule change.[45]

The Commission does not believe that changes CBOT makes to its memberships, such as CBOT's pending restructuring, could be considered an amendment to CBOE's Certificate of Incorporation. The CBOT and CBOE are separate corporate entities. The Commission does not believe that any changes that the CBOT makes to its corporate structure should, by themselves, be considered a change to the CBOE's Certificate of Incorporation. The Commission is not approving in this order the CBOT's separation of the Exercise Rights or any other aspect of its restructuring. [46]

E. The Commission Does Not Have to Consider Proposed Rule Changes that CBOE May File in the Future

The Petitioner contends that the Commission should require the CBOE to file other agreements that the Petitioner considers relevant to the proposed rule change the Commission is currently considering.[47] In particular, Petitioner objects to the CBOE's withdrawal of its proposed rule change SR-CBOE-2002-01.[48] Petitioner claims that the interpretation of Article Fifth(b) in the August 7, 2001 agreement between the CBOE and CBOT is integrally related to the proposed rule change.[49] Subsequently, Petitioner similarly argued that the Commission should require the CBOE to file this August 7, 2001 agreement, as well as other subsequent, related agreements because[50] the CBOE and CBOT are acting to effectuate the terms of such agreements. Petitioner contends that the CBOE

and CBOT should not effectuate the terms of these agreements until such agreements are filed and approved by the Commission.

As discussed above, Section 19(b)(1) of the Exchange Act requires CBOE to file with the Commission any proposed changes to its rules. Once filed, Section 19(b) requires the Commission to take certain actions. The Commission is not required to consider proposed rule changes that may be filed by an SRO at a future date.

The Commission also notes that agreements between SROs and third parties are not, her se, proposed rule changes that must be filed with the Commission. In fact, as noted above, the Commission is not approving the 2003 Agreement, but is approving only the interpretation of Article Fifth(b), which references certain terms as used in the 2003 Agreement. Whether or not agreements entered into by the CBOE are proposed rule changes is a judgment that, in the first instance, CBOE must make. To the extent, however, that any part of an agreement is a "policy, practice, or interpretation" of 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.

F. The Commission Does Not Have to Find That the Proposed Rule Change is Consistent with the 1992 Agreement

Commenters have contended that the entire 1992 Agreement is part of CBOE Rule 3.16(b) and,

therefore, any change to the terms of that agreement is an amendment of Article Fifth(b), which Rule 3.16(b) interprets.[51] In particular, commenters noted that the 1992 Agreement states that a CBOT "exercise member shall not have the right to transfer ... their CBOE regular memberships or any other trading rights and privileges appurtenant thereto ."[52] Petitioner argues that the 2003 Agreement is not consistent with the 1992 Agreement because the 1992 Agreement prohibits the un-bundling of CBOE trading rights.[53] The commenters also contended that the proposed rule change allows the CBOT to demutualize into A, B, and C shares, which are separately transferable, in contravention of the 1992 Agreement. [54] Similarly, Petitioner asserts that the CBOE's new interpretation of Article Fifth(b) contradicts the 1992 Agreement's meaning of what a CBOT member is and changes the structure of CBOT memberships in a way not contemplated in Article Fifth(b).[55]

The Commission notes that it did not approve the 1992 Agreement itself. Instead, the Commission approved CBOE Rule 3.16(b), which refers to the 1992 Agreement only for the definitions of "Eligible CBOT Full Member" and "Eligible CBOT Full Member Delegate" contained in that agreement. Thus, the Commission disagrees with commenters' contention that the entire 1992 Agreement is part of CBOE Rule 3.16(b). In addition, as discussed above, the Commission does not believe that the proposed rule change is what allows CBOT to demutualize and separate its memberships into A, B, and C shares. Because the 1992 Agreement is not part of the CBOE's rules, the Commission does not believe it is inconsistent with the Exchange Act if the new interpretation of Article

Fifth(b) contradicts that agreement. Agreements between the CBOE and CBOT may be amended without Commission approval unless such an amendment is a proposed rule change that must be filed under Section 19(b). In the matter before it, the Commission must find that the CBOE's proposal is consistent with the Exchange Act, not the 1992 Agreement.

G. The Commission Has Considered Whether the Proposed Rule Change Promotes Efficiency, Competition and Capital Formation

Petitioner argues in its legal memorandum that the proposed rule change is not consistent with efficiency, competition and capital formation because CBOE's Board actions were contrary to its powers under the Certificate of Incorporation and adversely affect efficiency, competition and capital formation by creating legal uncertainties, necessitating litigation and compromising the rights of CBOE equity holders.[56] Section 3(f) of the Exchange Act requires, in the review of an SRO rule, the Commission to consider whether the action will promote efficiency, competition, and capital formation.[57] The Commission is not required to make a finding under Section 3(f) in all cases. The Commission has considered whether the proposal promotes efficiency, competition, and capital formation, and believes that it is important to clarify that Petitioner's claim is not that the proposed interpretation itself compromises the rights of CBOE equity holders, but instead that the Board's action to approve the proposed interpretation without a vote under Article Fifth(b) has compromised CBOE equity holders' rights.

H. Prescribing New Conditions to Membership Not Permitted Without a Vote of CBOE Members

The Petitioner's legal memorandum states that the 2003 Agreement is invalid because it alters the conditions of membership by introducing a new membership eligibility regime never before contemplated .[58] Petitioner contends that Section 2.2 of CBOE's Constitution provides that "membership shall be limited to individuals, partnerships, and corporations, subject to their meeting the conditions of approval as stated in the Constitution. "[59] Petitioner then concludes that because Section 2.1(a) of the CBOE Constitution provides that "membership in the Exchange shall be made available by the Exchange ... and ... shall be proposed by the Board and approved by the affirmative vote of the majority of voting members. . ." the CBOE Board usurped the exclusive power of the voting members of CBOE to make, alter, or repeal the Constitution. Section 2.2 of CBOE's Constitution, however, states in relevant part: "[m]embership shall be limited to individuals, partnerships, and corporations, subject to their meeting the conditions of approval as stated in the Constitution and Rules." Emphasis added. Thus, a full reading of the CBOE's Constitution indicates that CBOE may introduce new conditions of membership in accordance with its rules which would not necessitate an affirmative majority vote by CBOE members.

I. Timeliness of Petitioner's FOIA Requests

The Petitioner argues that the Commission is depriving him of his due process rights by not timely

complying with his FOIA requests. However, the records that Petitioner seeks in his FOIA requests are also available as part of the public file in this matter. Thus, the FOIA request is not relevant to Petitioner's due process rights.

J. The Proposal is Consistent with Section 6(b)(5) and Section 6(c)(3)(A) of the Exchange Act

The Petitioner's legal memorandum states that the proposal is not consistent with Section 6(b)(5) of the Exchange Act because it circumvents the requirements of CBOE's Certificate of Incorporation which cannot be deemed to promote just and equitable principles of trade or to protect investors and the public interest .[60] Section 6(b)(5) of the Exchange Act requires that the rules of the exchange be designed to, among other things, promote just and equitable principles of trade .[61] As discussed above, in approving the proposed rule change, the Commission is not deciding whether the Board's action was consistent with state corporation law. Rather, the Commission finds that the proposed interpretation of Article Fifth(b) is consistent with the Exchange Act, including Section 6(b)(5).

The Petitioner's legal memorandum states that the proposal is not consistent with Section 6(c)(3)(A) of the Exchange Act "because the proposed rule does not address the qualifications of CBOT members to become CBOE members in accordance with the voting rights and procedures established by Article Fifth(b) ."[62] Section 6(c)(3)(A) of the Exchange Act provides that an exchange "may deny membership to, or condition the membership of, a registered broker-dealer" if, among other things, such broker-dealer does

not meet financial responsibility or operational capability standards set forth in the exchange's rules.[63] This provision is further qualified by Section 6(c)(4) of the Exchange Act, which permits an exchange to limit the number of members of the exchange, provided that the exchange does not decrease the number of memberships below such number in effect on May 1, 1975.[64] Article Fifth(b) states that a member of the CBOT is entitled to be a member of the CBOE, notwithstanding any limitation on the number of CBOE members, if such CBOT member applies for membership and otherwise qualifies for membership. The CBOE is proposing to interpret the meaning of the term "member of the [CBOT]" as used in Article Fifth(b). This interpretation does not implicate Section 6(c)(3)(A) and is consistent with Section 6(c)(4) because the CBOE is not proposing to reduce the number of members of the exchange.

VI. Conclusion

IT IS THEREFORE ORDERED, that the earlier action taken by delegated authority[65] is set aside and the proposed rule change (SR-CBOE-2004-16), as amended, is approved pursuant to Section 19(b)(2) of the Exchange Act .[66]

By the Commission.
Margaret H. McFarland Deputy Secretary

Footnotes

fn1 15 U.S.C. 78s(b)(1).

fn2 17 CFR 240.19b-4.

fn3 Letter from Arthur B. Reinstein, Deputy General Counsel, CBOE, to Lisa N. Jones, Special Counsel, Division of Market Regulation ("Division"), Commission, dated April 8, 2004 ("Amendment No. I").

fn4 Securities Exchange Act Release No. 49620 (April 26, 2004), 69 FR 24205 (May 3, 2004).

fn5 Letter from Thomas A. Bond, Norman Friedland, Gary P. Lahey, Marshall Spiegel, Anthony Arciero, Peter C. Guth, Robert Kalmin, Sheldon Weinberg, David Carman and Jeffrey T. Kaufmann, Members, CBOE, to Jonathan G. Katz, Secretary, Commission, dated April 28, 2004 ("April 28th Comment Letter"). This comment letter includes comments on another CBOE proposed rule change, SR-CBOE-2002-01, that was withdrawn on April 7, 2004. See Letter from Arthur B. Reinstein, Deputy General Counsel, CBOE, to Lisa N. Jones, Special Counsel, Division, Commission, dated April 6, 2004. See also letters from Marshall Spiegel to Margaret H. McFarland, dated November 4, 2004 ("November 2004 Letter") and December 22, 2004 ("December 2004 Letter").

fn6 Letter from Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 24, 2003.

fn7 Letter from Thomas A. Bond and Gary P. Lahey, Members, CBOE, to Jonathan G. Katz, Secretary, Commission, dated June 8, 2004 ("June 8th Letter").

Fn8 Securities Exchange Act Release No. 50028 (July 15, 2004), 69 FR 43644 (July 21, 2004) ("July 15th Order").

Fn9 Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of Secretary, Commission, dated August 23, 2004.

Fn10 Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, dated September 13, 2004 ("Petition for Review").

Fn11 Letter from Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, to Marshall Spiegel, CBOE Equity Member, dated September 17, 2004.

Fn12 See July 15th Order, supra note 8.

Fn13 In the 1992 Agreement, an "Eligible CBOT Full Member" is defined as an individual who at the time is the holder of one of 1,402 existing CBOT full memberships ("CBOT Full Memberships"), and who is in possession of all trading rights and privileges of such CBOT Full Memberships. An "Eligible CBOT Full Member Delegate" is defined as the individual to whom a CBOT Full Membership is delegated (i.e., leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership.

Fn14 Under the 2003 Agreement, an individual would be deemed an Eligible CBOT Full Member (and therefore a "member of the [CBOT]" under Article Fifth (b)) only if such individual: (1) held one Exercise Right

Privilege; (2) held a CBOT Full Membership, which gives him all of the other rights and privileges appurtenant to CBOT membership; and (3) meets CBOT membership and eligibility requirements.

The holder of a CBOT Full Membership in respect of which an Exercise Right Privilege has not been issued shall qualify as an Eligible CBOT Full Member if the requirements of the 1992 Agreement are still satisfied without such holder having to possess an Exercise Right Privilege.

Fn15 See April 28th Comment Letter, supra note 5 and June 8th Letter, supra note 7.

Fn16 See Petition for Review, supra note 10.

Fn17 See Petitioner's Statement in Opposition to Action Made by Delegated Authority, October 27, 2004, at 2 ("Statement in Opposition").

Fn18 15 U.S.C. 77c(a)(27).

Fn19 17 CFR 240.19b-4.

Fn20 15 U.S.C. 78s(b)(1).

Fn21 See Petition for Review, supra note 10, at 3.

Fn22 See Statement in Opposition, supra note 17, at 2.

Fn23 For example, commenters argued that the proposed rule change is an amendment to Article Fifth(b) in that the 2003 Agreement states that disputes concerning the definitions of what constitutes

a member of the CBOT will be subject to arbitration, which commenters believed would supersede the current membership process under Article Fifth(b) in which an 80% member vote is required. See April 28th Comment Letter, supra note 5. The Commission notes that CBOE has not proposed to change the terms of Article Fifth(b), which still applies. Further, the Commission is not approving or disapproving the terms of the 2003 Agreement.

Fn24 See 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 ("Legal Memorandum").

Fn25 15 U.S.C. 78s(b).

Fn26 15 U.S.C. 77(f)(b)(1).

Fn27 See Statement of Chicago Board Options Exchange in Support of Approval of Rule Under Delegated Authority, October 26, 2004, at 6 ("CBOE's Statement in Support of Approval").

Fn28 Letter from Michael D. Allen, Richard, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE (June 29, 2004).

Fn29 Legal Memorandum, supra note 24, at 4-5.

Fn30 See id. at 7.

Fn31 See July 15th Order, supra note 8.

Fn32 See Legal Memorandum, supra note 24, at 6.

CBOE Rule 6.7A states that:

> No member or person associated with a member shall institute a lawsuit or other legal proceeding against the Exchange or any director, officer, employee, contractor, agent or other official of the Exchange or any subsidiary of the Exchange, for actions taken or omitted to be taken in connection with the official business of the Exchange or any subsidiary, except to the extent such actions or omissions constitute violations of the federal securities laws for which a private right of action exists.

Prior to April 2002, CBOE Rule 6.7A only precluded lawsuits against directors, officers, employees, contractors, agents and other officials of the CBOE. See Securities Exchange Act Release No. 37421 (July 11, 1996), 61 FR 37513 (July 18, 1996). In April 2002, CBOE filed a proposed rule change to extend the prohibition to lawsuits against the Exchange. This change was filed under Section 19(b)(3)(A) of the Exchange Act and, therefore, became effective upon filing. See Securities Exchange Act Release No. 45837 (Apr. 26, 2002), 67 FR 22142 (May 2, 2002) (notice of CBOE's proposed rule change). Accordingly, the Commission did not issue an order finding that the rule change is consistent with the requirements of the Exchange Act. When there is no approval order, a court considering a contention that a rule is not consistent with the requirements of the Exchange Act, or that the rule does not preempt state law, will not have the authoritative views of the Commission on the relevant issues, and will have to resolve those claims de novo.

Fn34 See Legal Memorandum, supra note 24, at 4.

Fn35 See id.

Fn36 In 1992, the CBOE filed a proposed rule change with the Commission that embodied in CBOE Rule 3.16 an interpretation of "member of the [CBOT]" as used in Article Fifth(b). This interpretation was agreed upon by the CBOT and CBOE in a 1992 agreement between the exchanges. The Commission approved the CBOE's proposed rule change. See Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 2993) (SR-CBOE-92-42).

Fn37 See April 28th Comment Letter, supra note 5, at 2.

Fn38 Id.

Fn39 See id.

Fn40 See id.

Fn41 Legal Memorandum, supra note 24, at 4.

Fn42 See Statement in Opposition, supra note 17, at 5.

Fn43 See Legal Memorandum, supra note 24, at 5.

Fn44 See Statement in Opposition, supra note 17, at 11.

Fn45 See Legal Memorandum, supra note 24, at 16.

Fn46 Petitioner argues in his legal memorandum that the CBOT has pending with the Commission a Form S-4, which he believes is in the final stages of review. See

Legal Memorandum, supra note 24, at 6. Thus, Petitioner believes that the CBOT's restructuring of its membership materially affects the rights of CBOE members under Article Fifth(b). See id. The Commission review of the CBOT's Form S-4 is to ensure the adequacy of disclosure about the CBOT's actions and therefore it is unclear what bearing the Commission's determination with regard to this proposal would have on the Form S-4 or CBOT's restructuring.

Fn47 See Reply of Marshall Spiegel to CBOE Response of November 10, 2004, November 17, 2004, at 3 ("Petitioner's November 2004 Reply"). See also November 2004 Letter, supra note 5; December 2004 Letter, supra note 5.

Fn48 See November 2004 Letter, supra note 5.

Fn49 CBOE explains that it withdrew SR-CBOE-2002-01 because CBOT's demutualization plans were suspended. See CBOE's Statement in Support of Approval, supra note 27, at 10.

Fn50 See December 2004 Letter, supra note 5.

Fn51 See April 28th Comment Letter, supra note 5, at 2-3.

Fn52 See 1992 Agreement, Section 3(a).

Fn53 See Statement in Opposition, supra note 17, at 11.

Fn54 See April 28th Comment Letter, supra note 5, at 2.

Fn55 See Statement in Opposition, supra note 17, at 11.

Fn56 See Legal Memorandum, supra note 24, at 7.

Fn57 15 U.S.C. 78c(f).

Fn58 See Legal Memorandum, supra note 24, at 14.

Fn59 See id. at 14-15.

Fn60 See id. at 7.

Fn61 15 U.S.C. 78f(b)(5).

Fn62 Legal Memorandum, supra note 24, at 7-8.

Fn63 15 U.S.C. 78f(c)(3)(A).

Fn64 15 U.S.C. 78f(c)(4).

Fn65 July 15th Order, supra note 8.

Fn66 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51568; File No. SR-CBOE-2004-16)
April 18, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Denying Motion for Reconsideration of Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)

I.

On February 25, 2005, we issued an order ("Order") setting aside a July 15, 2004 order[1] t hat approved by authority delegated to the Division of Market Regulation a proposed rule change (SR-CBOE-2004-16) submitted by the Chicago Board Options Exchange, Incorporated ("CBOE"), and approving the proposed rule change as amended.[2] Our Order was in response to a petition for review submitted by Marshall Spiegel ("Petitioner") on August 23, 2004.[3] The CBOE's proposed rule change interprets certain terms used in Article Fifth(b) of CBOE's Certificate of Incorporation ("Article Fifth(b)"). Article Fifth(b) relates, in part, to the ability of a Board of Trade of the City of Chicago, Inc. ("CBOT") member to become a member of the CBOE without purchasing a CBOE membership ("Exercise Right"). CBOE's stated purpose behind its proposed rule change is the interpretation of Article Fifth(b) in accordance with the original intent of the Article to clarify which individuals will be entitled to the Exercise Right upon distribution by the CBOT of a

separately transferable interest ("Exercise Right Privilege") representing the Exercise Right component of a CBOT membership.

In issuing the Order, we found that the CBOE provided a sufficient basis for finding that, as a federal matter under the Securities Exchange Act of 1934 ("Exchange Act"), the CBOE complied with its Certificate of Incorporation, as required by Section 6(b)(1) of the Exchange Act, [4] in determining that its proposed rule change was an interpretation of, not an amendment to, Article Fifth(b) .[5] Further, we found that the proposed rule change was consistent with the Exchange Act, including Section 6(b)(5) thereunder.[6]

II.

A motion to reconsider is governed by Rule 470 of the Commission's Rules of Practice.[7] Rule 470 permits us to reconsider our decisions in exceptional cases.[8] The remedy is intended to correct manifest errors of law or fact or to permit the presentation of newly discovered evidence.[9] We find that Petitioner's motion for reconsideration does not present the exceptional circumstances required to compel us to reconsider our earlier Order in that it does not present any newly discovered evidence[10] and does not support any findings of manifest errors of law or fact underlying our Order.

A. Petitioner's Assertion that the CBOE Board's Proposed Rule Change Is an Amendment Because the Change Affects Equity Holder Rights Is a New Argument

Petitioner's brief in support of his motion to reconsider contends that the CBOE's action of interpreting Article Fifth(b) alters the rights of CBOE equity holders. Petitioner states that "[p]reviously, exercise rights were inalienable from full CBOT membership," and that "[h]ere, the CBOT unilaterally has sought to change the exercise rights into separate securities."[11] Petitioner continues by noting that the way in which these changes by the CBOT are treated by the CBOE under Article Fifth(b) will affect the legal and economic rights of the CBOT exercise right. [12] Because the CBOE honors the changes being made by the CBOT, Petitioner claims it diminishes the rights and interests of CBOE treasury seat holders by recognizing a new class of persons who have economic influence over the CBOE.[13] There would be a different result, Petitioner argues, if CBOE determined that the Exercise Right under Article Fifth(b) would be extinguished if ever transferred apart from the sale or rental of a full CBOT membership. [14] Because the Petitioner believes that the interpretation by the CBOE "alters the rights of various and distinct classes of CBOE equity interest holders," he contends that such interpretation is an amendment under Delaware Law. [15]

This appears to us to be a new argument presented by Petitioner. Petitioner previously argued that the December 17, 2003 agreement between the CBOE and the CBOT ("2003 Agreement") and the CBOE's proposed rule change amended Article Fifth(b) by redefining the term CBOT member "by permitting CBOT members to carve up membership rights and sell them separately to third parties without extinguishing their rights to CBOE membership under Article Fifth(b)." [16] Petitioner argued that "[t]his fundamental

change and augmentation in the economic and legal rights of CBOT members and the structure of CBOT membership materially and profoundly affect the economics and legal rights of CBOE membership and governance."[17] In response to this argument, we noted that neither the 2003 Agreement nor the proposed rule change alter CBOT membership rights or permit the CBOT to divide membership rights by issuing Exercise Right Privileges. [18] Petitioner also argued previously that the CBOT actions alter the economic and corporate relationships among current CBOE members and, thus, constitute an amendment to Article Fifth(b).[19] The Petitioner did not, however, make an argument - as he does now - that the interpretation by the CBOE Board diminishes the rights of CBOE equity holders and, therefore, is an amendment under Delaware law. Because Petitioner cannot raise an argument for the first time on a Motion for Reconsideration, the Commission is not addressing the merits of this new argument .[20]

B. Petitioner's Assertion That the Commission Did Not Consider the CBOE Board's Conflict of Interest Is a New Argument

Petitioner contends, in another new argument first raised in his motion to reconsider, that the Commission "does not even deign to address - and appears oblivious to - the material conflicts of interests of the Board of Directors of [CBOE] in attempting to `interpret' the Certificate of Incorporation. ..."[21] Petitioner elaborates on his position by arguing that "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. ..."[22] Petitioner is not permitted to raise an argument for the first time on a Motion for Reconsideration and, for this reason, the Commission is not addressing the merits of this new argument .[23]

C. Petitioner's Assertion that the Commission Erred in Accepting the CBOE Board's Authority to Determine the Question of What it Means to Be a CBOT Member Is Without Merit

The Petitioner argues that the Commission's Order "manifestly errs in concluding that the CBOE Board has independent, unilateral, and final authority to determine the answer..." to the question of what it means to be a "member of the [CBOT]" under Article Fifth(b) .[24] Petitioner asserts that Delaware law does not permit the CBOE Board to make such an interpretation, and that the fiduciary obligations on the CBOE Board under Delaware and federal law preclude the Board from doing so.[25]

First, Petitioner mischaracterizes our conclusion. Nowhere in our Order did we conclude that the CBOE Board has independent, unilateral, and final authority to determine what it means to be a "member of the [CBOTT under Article Fifth(b). The CBOE cannot interpret the term "member of the [CBOT]" under Article Fifth(b) in a manner the Commission does not find consistent with the Exchange Act. Instead, we stated that we found "persuasive CBOE's analysis of the difference between `interpretations' and `amendments,' and the letter of counsel that concludes that it is within the general authority of the CBOE's Board to interpret Article Fifth(b) and that the `Board's interpretation of Article Fifth(b) contemplated

by the [2003 Agreement] does not constitute an amendment to the Certificate and need not satisfy the voting requirements of Article Fifth(b) that would apply if the Article were being amended. "'[26] The letter of CBOE's legal counsel also stated that in interpreting Article Fifth(b), the CBOE Board must make such determination in good faith, consistent with the terms of Article Fifth(b) and not for inequitable purposes.

Further, we do not find persuasive Petitioner's assertion that fiduciary obligations on the CBOE Board under Delaware law and federal law preclude the Board from interpreting its Certificate of Incorporation. We have previously found that the CBOE submitted sufficient support for its position that its proposed rule change involved an interpretation of Article Fifth(b) of its Certificate of Incorporation.[27] Accordingly, we do not believe that fiduciary duties preclude the CBOE Board from interpreting its Certificate of Incorporation in an attempt to address potential interpretive ambiguities that the CBOE and CBOT have identified in advance of the CBOT's restructuring. Accordingly, Petitioner's contention regarding the authority of the CBOE Board is without merit.

D. Petitioner Erroneously Asserts a Manifest Error in the Commission's Application of Contract Interpretation

The Petitioner asserts that the Commission's application of principles of contract interpretation to uphold the CBOE Board's interpretation is manifestly erroneous, arguing that the Order "errs in its conclusion incorporated from the CBOE's Statement in

Support of Approval that principles of contract interpretation support the Commission's ruling."[28] We did not, contrary to the Petitioner's assertion, apply principles of contract interpretation in our Order in the manner suggested by Petitioner, nor did we incorporate by reference any principles of contract interpretation included in the CBOE's Statement in Support of Approval. Rather, we found 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 is an interpretation of, not an amendment to, Article Fifth(b) ."[29] Further, we found persuasive CBOE's analysis of the difference between "interpretations" and "amendments" and the letter of CBOE's counsel concluding that it is within the general authority of the CBOE's Board to interpret Article Fifth(b)...."[30] Finally, we did "not believe that Petitioner's argument refuted, to any degree, CBOE's analysis of why its proposed rule change is an interpretation of Article Fifth(b), not an amendment."[31] Accordingly, we find Petitioner's assertion of error in the Commission's purported application of contract principles to be without merit.

E. Petitioner's Assertion that the Commission Improperly Relied on the Letter of CBOE's Outside Counsel Is Without Merit

Petitioner further contends that the Commission's "reliance" on the opinion of CBOE's outside counsel is manifestly erroneous.[32] Petitioner claims that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale to

support its characterization of the CBOE's action as an "interpretation" of Article Fifth(b) and accordingly should be given less weight.[33] Petitioner decried the opinion letter's elevation of "form over substance," its failure to "address the circumstances when an `interpretation' must also be deemed in substance an amendment," and its failure to discuss "the CBOE Board's conflict of interest in making and enforcing the interpretation at issue here. "[34]

Petitioner's assertion that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale is incorrect. Further, we did not solely rely on the opinion of CBOE's outside counsel. We found the opinion letter, along with the CBOE's Statement in Support of Approval, to be "persuasive," and we found that those materials provided a "sufficient basis" to support a finding 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 is an interpretation of, not an amendment to, Article Fifth(b)."[35] Further, and most importantly, we specifically noted that we did "not believe that Petitioner's argument refutes, to any degree, CBOE's analysis of why its proposed rule change is an interpretation of Article Fifth(b), not an amendment."[36] Accordingly, we find Petitioner's allegation of error based on the letter of CBOE's outside counsel to be without merit.

F. Petitioner's Allegation that the Commission Made a Finding Suggesting that Not Approving CBOE's Interpretation Would Paralyze the Exchange Is Factually Baseless

Petitioner concludes his brief by arguing that "[t]he Commission's Order fording (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. "[37] As stated above, while we cited to the CBOE's Statement in Support of Approval, we did not incorporate by reference the substance of that document into our Order. Nor did we make any finding in our Order that failing to approve the CBOE's rule change would paralyze the CBOE. Accordingly, Petitioner's argument is unsupported and will not be considered as grounds for reconsideration.

III.

In the alternative, Petitioner suggests that "the CBOT's recent formal actions to demutualize have the capacity to render the proposed rule change moot" since the proposed rule change, the Petitioner argues, is only relevant if the CBOT is structured as a member organization .[38] Accordingly, the Petitioner suggests that the Commission should consider holding final determination of the validity of the proposed rule change in abeyance until the CBOT members' vote on whether to demutualize is complete.[39] We disagree. Self-regulatory organizations are not required to delay making changes to their rules in order to account for future contingencies that may or may not impact such rule in the future. Rather, to the extent that changed circumstances warrant further revisions to the CBOE's rules, the CBOE would need to submit a subsequent rule change pursuant to Section 19(b)(1) of the Act[40] and Rule 19b-4 thereunder .[41] Accordingly, we see no reason to hold final determination of this motion to reconsider in abeyance as suggested by Petitioner.

Accordingly, we find that Petitioner's motion does not present the exceptional circumstances required for us to reconsider our earlier Order.

IT IS THEREFORE ORDERED, that the motion for reconsideration filed by Marshall Spiegel be, and it hereby is, DENIED.

By the Commission.

Jill M. Peterson Assistant Secretary

Footnotes

Fn1 Securities Exchange Act Release No. 50028 (July 15, 2004), 69 FR 43644 (July 21, 2004).

Fn2 Securities Exchange Act Release No. 51252 (Feb. 25, 2005), 70 FR 10442 (Mar. 3, 2005) (hereinafter "Order").

Fn3 Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, dated September 13, 2004.

Fn4 15 U.S.C. 78f(b)(1).

Fn5 Order, supra note 2, at 10444.

Fn6 Id. at 10447.

Fn7 17 CFR 201.470.

Fn8 See In the Matter of the Application of Reuben D. Peters, et al., Securities Exchange Act Release No. 51237 (Feb. 22, 2005), at text accompanying n. 6 (Admin. Proc. File No. 3-11277) (addressing the application of Rule 470).

Fn9 See In the Matter of KPMG Peat Marwick LLP, Securities Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351,1352-53 n.7 (Admin. Proc. File No. 3-9500) (specifying that efficiency and fairness concerns embodied in federal court practice of rejecting motions for reconsideration unless correction of manifest errors of law or fact or presentation of newly discovered evidence is sought "likewise inform our review of motions for reconsideration under Rule 470").

Fn10 Petitioner's brief does, however, appear to present new arguments in support of his position. We note that settled principles of federal court practice establish that a party may not seek rehearing of an appellate decision in order to advance an argument that it could have made previously but elected not to. See, e.g., Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (1st Cir. 1990). In considering motions for reconsideration of federal district court rulings, courts have likewise cautioned that "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence" and that a "motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made...." Z.K. Marine, Inc. v. M/V Archietis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). The efficiency and fairness concerns that underlie these

settled principles of federal court practice likewise inform our review of motions for reconsideration under Rule 470. See KPMG Peat Marwick LLP, Order Denying Request for Reconsideration, Securities Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351.

Fn11 Brief in Support of Motion of Marshall Spiegel for Reconsideration of the Commission's February 25, 2005 Order, dated March 7, 2005, at 7 ("Petitioner's Brief in Support of Motion to Reconsider").

Fn12 Id. at 8.

Fn13 Id.

Fn14 Id.

Fn15 Id.

Fn16 Legal Memorandum of Points and Authorities in Support of the Statement of Petitioner Marshall Spiegel in Opposition to Staff Action, Oct. 26, 2004, at 4 ("Legal Memorandum").

Fn17 Id.

Fn18 Order, supra note 2, at 10444.

Fn19 Legal Memorandum, supra note 16, at 5.

Fn20 See supra note 10 (discussing the standard of review for a motion to reconsider).

Fn21 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at l.

Fn22 Id. at 2.

Fn23 See supra note 10 (discussing the standard of review for a motion to reconsider).

Fn24 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at 3.

Fn25 Id.

Fn26 Order, supra note 2, at 10444 (quoting Letter from Michael D. Allen, Richard, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE (June 29, 2004), at 5).

Fn27 Order, supra note 2, at 10444.

Fn28 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at 10.

Fn29 Order, supra note 2, at 10444.

Fn30 Id.

Fn31 Id.

Fn32 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at 12. See also Statement of Chicago Board of Options Exchange in Support of Approval of Rule Under Delegated Authority, October 26, 2004.

Fn33 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at 12-13.

Fn34 Id. at 12.

Fn35 Order, supra note 2, at 10444.

Fn36 Id.

Fn37 Petitioner's Brief in Support of Motion to Reconsider, supra note 11, at 13.

Fn38 Id. at 3.

Fn39 Id.

Fn40 15 U.S.C. 78s(b)(1).

Fn41 17 CFR 240.19b-4.

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51733; File No. SR-CBOE-2005-19)

May 24, 2005

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval to Proposed Rule Change As Amended By Amendment Nos. 1, 2, and 3 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)

I. Introduction

On March 7, 2005, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")[1] and Rule 19b-4 thereunder,[2] to adopt an interpretation of paragraph (b) of Article Fifth of the Certificate of Incorporation of the CBOE ("Article Fifth(b)") pertaining to the right of the 1,402 Full Members of the Board of Trade of the City of Chicago, Inc. ("CBOT") to become members of the CBOE without having to purchase a CBOE membership. On March 28, 2005, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for notice and comment in the Federal Register on April 7, 2005.[4] The Commission received three comment letters in response to the proposal as published in the Federal Reigster.[5] On April 20, 2005, the CBOE filed Amendment No. 2 to the proposed rule change.[6] The CBOE submitted a response to the comment letters on

May 6, 2005.[7] On May 12, 2005, the CBOE filed Amendment No. 3 to the proposed rule change.[8] Subsequently, the Commission received four comment letters.[9] This order approves the proposed rule change as amended.[10]

II. Description of the Proposed Rule Change

A. Background

As compensation for the time and money that the CBOT had expended in the development of the CBOE, a member of the CBOT is entitled to become a member of the CBOE without having to acquire a separate CBOE membership. This entitlement is established by Article Fifth(b), which provides, in relevant part:

> [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] ("Exercise Rights").

Article Fifth(b) also 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.

In 1993, the Commission approved the CBOE's proposed interpretation of the meaning of the term "member of the [CBOT]" as used in Article Fifth(b).[11] This interpretation, proposed by the CBOE and agreed upon by the CBOE and the CBOT, is embodied in an agreement dated September 1, 1992 ("1992 Agreement") and is reflected in CBOE Rule 3.16(b) ("Special Provisions Regarding Chicago Board of Trade Exerciser Memberships"). CBOE Rule 3.16(b) states that "for the purpose of entitlement to membership on the [CBOE] in accordance with ... [Article Fifth(b)] ... the term `member of the [CBOT],' as used in Article Fifth(b), is interpreted to mean an individual who is either an `Eligible CBOT Full Member' or an `Eligible CBOT Full Member Delegate,' as those terms are defined in the [1992 Agreement]..... "[12]

In 2005, the Commission approved the CBOE's subsequent amendment of CBOE Rule 3.16(b) to reflect a further interpretation of the term "member of the [CBOT]" embodied in an agreement dated September 17, 2003 between the CBOE and the CBOT ("2003 Agreement"). [13] This interpretation was intended to clarify which individuals will be entitled to the Exercise Right upon distribution by the CBOT of a separately transferable interest ("Exercise Right Privilege") representing the Exercise Right component of a CBOT membership. In the 2003 Agreement, the CBOE and the CBOT agreed on an interpretation of the term "member of the [CBOT]" as used in Article Fifth(b) once these Exercise Right Privileges are issued.

B. CBOE's Current Proposal

The CBOE is again proposing an interpretation of the term "member of the [CBOT]" as used in Article Fifth(b) and reflected in CBOE Rule 3.16. The CBOE believes that this interpretation is necessary to address the effect on the Exercise Right of the restructuring of the CBOT from a mutual to a demutualized entity, as well as the expansion of electronic trading on the CBOT and the CBOE.

The interpretation of the Exercise Right that is the subject of this proposed rule change is embodied in an agreement dated August 7, 2001 between the CBOE and the CBOT ("2001 Agreement"), as modified by a Letter Agreement among CBOE, CBOT, and CBOT Holdings, Inc. dated October 7, 2004 ("October 2004 Letter Agreement"), which together represent the agreement of the parties concerning the nature and scope of the Exercise Right following the restructuring of the CBOT and in light of the expansion of the CBOT's electronic trading system. The 2001 Agreement, as modified by the October 2004 Letter Agreement, incorporates the CBOE's interpretation concerning the operation of Article Fifth(b) in light of these changed circumstances at the CBOT. In a February 14, 2005 Letter Agreement among CBOE, CBOT, and CBOT Holdings, Inc., ("February 2005 Letter Agreement") the parties confirmed the CBOT restructuring for purposes of the 2001 Agreement and the CBOE's interpretation of Article Fifth(b).

The CBOE's proposed rule change seeks to revise CBOE Rule 3.16(b), which reflects an interpretation of the term "member of the [CBOT]" used in Article Fifth(b), to incorporate the definitions of "Eligible CBOE Full Member" and "Eligible CBOT Full

Member Delegate" found in the 2001 Agreement, as modified by the October 2004 Letter Agreement and the February 2005 Letter Agreement ("2001 Agreement, as amended"). As noted in the 2001 Agreement, as amended, the CBOT's restructuring divided the previous single interest of a CBOT member into Class B, Series B-1 memberships in CBOT (representing the trading rights of full members) and shares of Class A common stock of CBOT Holdings, Inc. (representing the ownership rights of full members). [14] Accordingly, the interpretation embodied in the 2001 Agreement, as amended, clarifies that, following the CBOT's restructuring, the Exercise Right remains available to persons who continue to hold all of the interests into which their CBOT full memberships were divided in the restructuring.

II. Discussion and Commission Findings

Section 19(b) of the Exchange Act requires the Commission to approve the CBOE's proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the CBOE.[15] The Commission has carefully reviewed the proposed rule change, the comment letters received and the attachments thereto, and the CBOE's response to the comments, and finds that the proposed rule change is consistent with the requirements of Act, and in particular Section 6 of the Exchange Act, [16] and the rules and regulations applicable to a national securities exchange. [17] More specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[18] which requires, among other things, that the rules of an exchange be designed

to promote just and equitable principles of trade, because it interprets the CBOE's rules fairly and reasonably with respect to the eligibility of a CBOT full member to become a member of the CBOE following the CBOT's restructuring. In addition, the Commission finds that the proposed rule change is consistent with Section 6(c)(3)(A) of the Exchange Act,[19] which permits, among other things, an exchange to examine and verify the qualifications of an applicant to become a member, in accordance with the procedures established by exchange rules, because it clarifies how the CBOE's rules regarding eligibility for membership pursuant to the Exercise Right in Article Fifth(b) apply following the CBOT's restructuring.

The Commission is approving the proposed rule change filed by the CBOE, which interprets the CBOE's rules. The Commission is not approving the 2001 Agreement, as amended. Further, in approving this proposal, the Commission is relying on the CBOE's representation that its interpretation is appropriate under Delaware state law, and CBOE's opinion of counsel[20] that it is within the general authority of the CBOE's Board of Directors to interpret Article Fifth(b) when questions arise as to its application under certain circumstances, so long as the interpretation adopted by the Exchange's Board of Directors is made in good faith, consistent with the terms of the governing documents themselves, and not for inequitable purposes.

The commenters assert that the CBOT's reorganization extinguished the Exercise Right as it pertains to Article Fifth(b) and CBOE Rule 3.16(b) because the CBOT is no longer a membership

corporation .[21] The Commission notes that the CBOE explains that following the CBOT's restructuring, "the CBOT maintains its existence as a Delaware non-stock, membership corporation and continues to be owned by its members, who have the same trading rights on the futures exchange operated by CBOT as they had prior to the restructuring.[22] Thus, the CBOE concludes that CBOT "full" memberships continue to represent under CBOT's rules the trading rights of full members of the CBOT as they existed prior to the restructuring. The Commission believes that the commenters' assertion that the Exercise Right has been extinguished by the CBOT's restructuring constitutes one possible interpretation of Article Fifth(b); the CBOE is not required to draw the same conclusion as the commenters regarding how to interpret Article Fifth(b) following the CBOT's restructuring in order for the Commission to find that the CBOE's proposed rule change is consistent with the Exchange Act.

A. The Commission Finds CBOE's Determination that the Proposal Is an Interpretation of Article Fifth(b) to Be Consistent with the Exchange Act

As noted above, the Commission received three comment letters on the CBOE's proposed rule change from several members of the CBOE. The commenters assert that the Commission should not approve the CBOE's proposed rule change because the proposed rule change does not constitute an interpretation of Article Fifth(b) as the CBOE claims, but rather constitutes an amendment to Article Fifth(b), which is subject to an 80% vote of CBOE membership pursuant to the Articles of Incorporation.[23] The Spiegel & Cleven

April 28th Letter references the CBOT demutualization that took effect on April 22, 2005 and concludes that 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 are no longer are any members of the CBOT.[24] In the Joint Letter, the commenters contend that the proposed rule change "substantively amends" Article Fifth(b) in that it "change[s] the words" of Article Fifth(b).[25] In particular, the commenters contend that the CBOT's demutualization effectively extinguished the exercise right such that "any action by the [CBOE] Board to amend Article Fifth(b) to create a new exercise right for CBOT stockholders contravenes [Article Fifth(b)'s] requirements of a 80% vote of the membership."[26] Accordingly, the commenters argue that the CBOE's Board of Directors acted beyond its powers and inconsistently with the CBOE's Certificate of Incorporation by failing to obtain the requisite approval of CBOE members with respect to the proposed rule change.[27]

The CBOE filed the current proposed rule change to adopt an interpretation of Article Fifth(b) by amending CBOE Rule 3.16. National securities exchanges are required under Section 6(b)(1) of the Exchange Act[2g] to comply with their own rules. The Commission has reviewed the record in this matter and believes that the CBOE provides 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 is an interpretation of, not an

amendment to, Article Fifth(b). The Commission is persuaded by the CBOE's analysis of the difference between "interpretations" and "amendments," and the letter of counsel that concludes that it is within the general authority of the CBOE's Board of Directors to interpret Article Fifth(b) and that the Board's interpretation of Article Fifth(b) contemplated by the 2001 Agreement, as amended, does not constitute an amendment to the CBOE's Certificate of Incorporation. 29 For these reasons, the Commission finds the CBOE's proposed rule change consistent with the Exchange Act.

Additionally, the commenters suggested that the fact that CBOT full members will not be required to own 100% of the equity of the CBOT should preclude them from being entitled to the Exercise Right .[30] The CBOE has determined that there is no requirement for CBOT full members to own 100% of the equity of the CBOT in order to qualify for the Exercise Right, only a requirement that a CBOT full member hold whatever equity was issued to that individual, together with all of the other interests distributed to the CBOT full member in the restructuring, for that individual to be eligible to utilize the Exercise Right .[31] The Commission believes that this determination is reasonable.

Finally, commenters contend that the interpretation in the 2001 Agreement, as amended, "materially alters the respective rights, powers and interests of the different classes of CBOE equity holders..." by creating "...a whole new group of CBOE equity interest holders..." which "denigrates the rights and interests of CBOE treasury seat holders, by diluting their interests and power."[32] Commenters C

argue that changes to the Exercise Right are a "zero sum" game, in that 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."[33] Commenters argue that because the proposed rule change interpreting the term "member of the [CBOT]" in Article Fifth(b) alters the rights of the various and distinct classes of CBOE equity interest holders, it is an amendment within the meaning of Section 242 of the Delaware General Corporation Law. [34]

The Commission does not believe that the commenters' argument refutes CBOE's analysis of why its proposed rule change is an interpretation to Article Fifth(b), not an amendment. The actions identified in Section 242(a) are changes that a corporation may make to its certificate of incorporation by amendment. There is nothing in Section 242 that requires a corporation to amend its certificate of incorporation if it makes such changes. If a corporation does amend its certificate and such amendment is authorized under Section 242(a), paragraph (b) of Section 242 of the Delaware General Corporation Law then sets forth the procedures that a corporation must follow to effect such an amendment. Accordingly, the Commission is persuaded by the conclusion in the letter of counsel submitted by the CBOE that "...it is within the general authority of the [CBOE] Board to interpret Article Fifth(b) in good faith when questions arise as to its application," and that "the [CBOE] Board's determinations in approving the interpretations of Article Fifth(b) contemplated by the Agreements do not constitute amendments to the [CBOE] Certificate [of Incorporation] and need not

satisfy the voting requirements of Article Fifth(b) that would apply if the Article were being amended. [35]

B. The Commission Does Not Believe That the CBOE Unreasonably Relied on Its Opinion of Outside Counsel

Commenters contend that the opinion of CBOE's Delaware counsel is "logically flawed and consequently should not allow the CBOE's Board of Directors to interpret [Article Fifth(b)] in the CBOT's demutualization."[36] As stated above, the commenters contend that the CBOT's demutualization effectively extinguished the exercise right such that "any action by the [CBOE] Board to amend Article Fifth(b) to create a new exercise right for CBOT stockholders contravenes [Article Fifth(b)'s] requirements of a 80% vote of the membership."[37] Commenters further argue that the CBOE Board's good faith is "irrelevant when it acts without authority... [and] in contravention of the powers exclusively reposed in the membership by the Articles with respect to amendments to the Articles."[38] In addition, commenters argue, in so far as a corporation's board of directors may delegate certain authority, powers, and duties of management to a committee of the corporation, "that committee can easily be interpreted to be the membership in a membership corporation such as the CBOE..." such that the authority of the CBOE's Board of Directors has been delegated to the CBOE membership with respect to interpretations of Article Fifth(b), which by its terms provides for a vote of the membership in the case of an amendment to its terms.[39]

The CBOE represents that it has been advised by its Delaware counsel that, under Delaware state

law, it is within the general authority of CBOE's Board of Directors to interpret its governing documents when questions arise as to their application in these types of circumstances, so long as the interpretation adopted by the Exchange's Board of Directors is consistent with the terms of the governing documents themselves .[40] The CBOE represents that the interpretations contained in its proposed rule change do not constitute amendments to the governing documents, and thus are not subject to the procedures that would apply if they were actually being amended. Further, the CBOE notes that no delegation of power or authority was made to the CBOE membership in the case of the Board's power to interpret the Certificate of Incorporation .[41] The Commission is persuaded by the letter of CBOE's outside counsel and does not agree with the commenters' contention that the opinion letter is logically flawed. Accordingly, as stated above, the Commission finds that CBOE's interpretation of Article Fifth(b) is consistent with the Exchange Act.

C. The Commission Does Not Agree with the Commenters' Assertion of a Conflict of Interest on the Part of the CBOE Board With Respect to the Proposed Rule Change

The Spiegel & Cleven April 28th Letter argues that the interpretation in the 2001 Agreement, as amended, implicates a breach of fiduciary duty on the part of the CBOE Board of Directors in that the CBOE Board of Directors should be considered "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 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)."[42] The Joint Letter similarly argues that the Commission should not approve the CBOE's proposed rule change because the CBOE management and the CBOE Board of Directors are conflicted in their decision not to require a vote of the CBOE membership with respect to the proposed rule change.[43] The commenters note that the CBOE has announced that it is exploring demutualization[44] and assert that the CBOE's top management will directly benefit from fees and other incentives in any demutualization such that they are "indifferent as to the number of CBOE members" because any financial rewards accompanying a CBOE demutualization would be independent of the number of CBOE members.[45]

The Commission does not believe there is any support for the commenters' conclusions about an alleged conflict of interest on the part of the CBOE Board of Directors with respect to the current proposed rule change. The Commission agrees with the CBOE that the CBOE Board's consideration of whether changes to CBOE's own corporate structure may be in CBOE's and its members' best interests does not support the commenters' suggestion that the CBOE's directors or its management were conflicted in considering how to interpret Article Fifth(b).[46] Further, the Commission does not believe that because there may be conflicting interests among CBOE members, that the CBOE Board of Directors is conflicted.

D. Neither the CBOE's Offer to Purchase Exercise Rights Nor the 2001 Agreement, as Amended, Is the Subject of the Present Filing

The Spiegel & Cleven April 28th Letter contends that "the 2001 Agreement, as amended, and the interpretation it embodies cannot become effective prior to Commission approval of it…[47] Moreover, these commenters argue that the CBOE's "Offer to Purchase for Cash Exercise Right Privileges," through which the CBOE informed certain CBOT members of the CBOE's plans to conduct a purchase of Exercise Right Privileges for cash in a tender to be completed around May 25, 2005, violates Section 19 of the Exchange Act because it "effectuates, relies on and implements" the interpretation in the 2001 Agreement, as amended, prior to Commission approval of the applicable rule filing (SR-CBOE-2005-19).[48] The commenters argue that by employing the definition of CBOT Full Member contained in the 2001 Agreement, as amended, prior to Commission approval of the applicable filing, the CBOE engaged in a "willful violation" of Section 19 of the Exchange Act that constitutes a basis for the Commission not to approve the proposed rule change.[49]

The Commission notes that an agreement between an exchange and a third party is not, her se, a proposed rule change that must be filed with the Commission. Whether or not agreements proposed by or entered into by the CBOE are proposed rule changes is a judgment that, in the first instance, CBOE must make. To the extent, however, that any part of an agreement is a "policy, practice, or interpretation" of CBOE's rules and that "policy, practice, or

interpretation" has not been filed with, and under certain circumstances 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 is not requesting that the Commission approve its "Offer to Purchase for Cash Exercise Right Privileges" sent to certain CBOT members, nor is the CBOE seeking approval of the 2001 Agreement, as amended. The proposed rule change solely relates to the CBOE's interpretation of Article Fifth(b) as embodied in the 2001 Agreement, as amended, and it is the substance of this interpretation that the Commission finds consistent with the Exchange Act .[50] The Commission does not believe it needs to determine whether the CBOE has complied with Section 19 of the Exchange Act in taking actions it is not being asked to approve in order to find the proposed rule change consistent with the Exchange Act. The Commission makes no finding as to the offer to certain CBOT members.

Additionally, commenters argue that the provision in the 2001 Agreement relating to arbitration of certain issues that may arise under that agreement constitutes an amendment of Article Fifth(b) in that decisions "that should be made by the CBOE membership in an [Article Fifth(b)] vote [are] being decided by an arbitration panel ."[51] The Commission reiterates that it is not approving the 2001 Agreement.[52]

III. Conclusion

The Commission received two requests for the Commission to extend the comment period for this

proposed rule change. The reasons for these requests were for "additional time to study and comment on the April 18th release as it pertains to these rule filings ,"[53] and to permit the public time to submit comments in response to the CBOE's May 6, 2005 letter filed in response to the two earlier comment letters.[54] The proposed rule change was publicly available on March 7, 2005 when the CBOE filed it. On April 7, 2005, the proposal was published in the Federal Register along with Amendment No. 1, which included a technical amendment and the opinion letter from CBOE's Delaware counsel .[55] The Commission sees no reason to delay action on the CBOE's current proposed rule change to accommodate commenters' review of the Commission's order denying reconsideration of a separate filing. In addition, the Commission believes that the public has had sufficient time to review the substance of the CBOE's proposed rule change and provide the Commission with comments.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.[56]

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act, 57 that the proposed rule change (SR-CBOE-2005-19), as amended, be, and it hereby is, approved.

By the Commission.
Margaret H. McFarland
Deputy Secretary

Footnotes

Fn1 15 U.S.C. 78s(b)(1).

Fn2 17 CFR 240.19b-4.

Fn3 Due to a motion to reconsider the Commission's approval of SR-CBOE-2004-16, which was pending at the time the notice was published for comment in the Federal Register, Amendment No. 1 removed certain language from the text of CBOE Rule 3.16(b) that was included with the original filing to reflect the stay of effectiveness of the text added by SR-CBOE-2004-16 pending a final Commission determination of the motion to reconsider. Amendment No. 1 also added Exhibit 3d to the filing, consisting of an opinion letter from the CBOE's special Delaware counsel pertaining to the proposed rule change.

fn4 See Securities Exchange Act Release No. 51463 (Mar. 31, 2005), 70 FR 17732 (Apr. 7, 2005).

fn5 See Letter from Marshall Spiegel and Donald Cleven to Jonathan G. Katz, Secretary, Commission, dated April 28, 2005 ("Spiegel & Cleven April 28th Letter"); Letter from Thomas A. Bond, Norman Friedland, Gary P. Lahey, Anthony Arciero, and Marshall Spiegel to Jonathan G. Katz, Secretary, Commission, dated April 27, 2005 ("Joint Letter"); and Letter from Marshall Spiegel to William Brodsky, Chairman, CBOE, dated April 26, 2005 (this letter was also provided to the Commission as an exhibit to the Spiegel & Cleven April 28th Letter; while the Commission has separately considered this letter as a comment to the proposed rule change, the Commission

notes that the substantive arguments set forth in this letter are also reflected in the April 28th Letter).

fn6 In Amendment No. 2, the CBOE modified the text of CBOE Rule 3.16(b) to include the language added by SR-CBOE-2004-16. That language had been removed from the proposed rule change by Amendment No. 1 to account for a pending motion to reconsider the Commission's approval of SR-CBOE-2004-16. On April 18, 2005, the Commission denied the motion for reconsideration. See Securities Exchange Act Release No. 51568 (Apr. 18, 2005), 70 FR 20953 (Apr. 22, 2005) (order denying motion for reconsideration). Accordingly, the CBOE submitted Amendment No. 2 to the filing to incorporate the text of CBOE Rule 3.16(b) as currently in effect, including the language added to the Rule by SR-CBOE-2004-16. As such, this is a technical amendment and is not subject to notice and comment.

fn7See Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005.

fn8 In Amendment No. 3, the CBOE filed with the Commission a copy of the letter sent from Marshall Spiegel to William Brodsky, Chairman of the CBOE, dated April 26, 2005. This letter also was attached as an appendix to the Spiegel & Cleven April 28th Letter. See Spiegel & Cleven April 28th Letter, supra note 5. As such, the amendment providing the Commission with the Spiegel & Cleven April 28th Letter is a technical amendment and is not subject to notice and comment.

fn9 See Letter from Marshall Spiegel and Donald Cleven to Jonathan G. Katz, Secretary, Commission, dated May 20, 2005 ("Spiegel & Cleven May 20th Letter"); Letter from Marshall Spiegel to Jonathan G. Katz, Secretary, Commission, dated May 20, 2005 ("Spiegel May 20th Letter"); Letter from Joanne Moffic-Silver to Jonathan G. Katz, Secretary, Commission, dated May 20, 2005; and Letter from Charles R. Mills to Jonathan G. Katz, Secretary, Commission, dated May 18, 2005 (letter sent on behalf of Marshall Spiegel) ("Mills Letter").

fn10 There is no basis to support any implication in the Mills Letter that the Commission provided any assurance to the CBOE, prior to its actions today, that it would approve the proposed rule change or that any such approval would occur by a certain date.

fn11See Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993).

fn12 In the 1992 Agreement, an "Eligible CBOT Full Member" is defined as an individual who at the time is the holder of one of 1,402 existing CBOT full memberships ("CBOT Full Memberships"), and who is in possession of all trading rights and privileges of such CBOT Full Memberships. An "Eligible CBOT Full Member Delegate" is defined as the individual to whom a CBOT Full Membership is delegated (i.e., leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership.

fn13 See Securities Exchange Act Release Nos. 51252 (Feb. 25, 2005), 70 FR 10442 (Mar. 3, 2005) (order setting aside earlier order issued by delegated

authority for File No. SR-CBOE-2004-16); and 51568 (Apr. 18, 2005), 70 FR 20953 (Apr. 22, 2005) (order denying motion for reconsideration).

fn14 As specified in the 2001 Agreement, as amended, an individual is deemed to be an "Eligible CBOT Full Member" if the individual: (1) is the owner of the requisite number of Class A Common Stock of CBOT Holdings, Inc., the requisite number of Series B-1 memberships of the CBOT, and the Exercise Right Privilege; (2) has not delegated any of the rights or privileges appurtenant to such ownership; and (3) meets applicable membership and eligibility requirements of the CBOT. An individual is deemed to be a "Eligible CBOT Full Member Delegate" if the individual: (1) is in possession of the requisite number of Class A Common Stock of CBOT Holdings, Inc., the requisite number of Series B-1 memberships of the CBOT, and the Exercise Right Privilege; (2) holds one or more of the items listed in (1) by means of delegation rather than ownership; and (3) meets applicable membership and eligibility requirements of the CBOT.

fn15 15 U.S.C. 78s(b). Section 19(b) requires the Commission to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved "[w]ithin thirty-five days of the date of publication of notice of the filing of a proposed rule change . . . , or within such longer period as the Commission may designate up to ninety days of such date ... or as to which the self regulatory organization consents." Id. On May 18, 2005, the CBOE consented to an extension of time until June 10, 2005, for the Commission to consider this filing.

fn16 15 U.S.C. 78f.

fn17 In approving this rule, the Commission has considered the impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

fn18 15 U.S.C. 78f(b)(5).

fn19 15 U.S.C. 78f(c)(3)(A).

fn20 See Letter from Wendell Fenton, Richards, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE, dated March 28, 2005. The Commission has not independently evaluated the CBOE's interpretation under Delaware state law.

fn21 See supra notes 5 and 9 (citing the comment letters).

fn22 Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005, at 2.

fn23 See Spiegel & Cleven April 28th Letter, supra note 5, at 5; and Joint Letter, supra note 5, at 2. By its terms, Article Fifth(b) may be amended only with the approval of 80% of CBOE's members admitted by exercise, and 80% of CBOE's members admitted other than by exercise, each voting as a separate class.

fn24 Spiegel & Cleven April 28th Letter, supra note 5, at 1-2.

fn25 Joint Letter, supra note 5, at 2.

fn26 Id. at 6.

fn27 See Spiegel & Cleven April 28th Letter, supra note 5, at 6; and Joint Letter, supra note 5, at 2.

fn28 15 U.S.C. 78f(b)(1).

fn29 See Letter from Wendell Fenton, Richards, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE, dated March 28, 2005, at 4.

fn30 See Joint Letter, supra note 5, at 1. Commenters noted that CBOT members initially will receive approximately 77% of the CBOT's equity, which could be diluted further in the event of an initial public offering. See id.

fn31 See Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005, at 3.

fn32 Spiegel & Cleven April 28th Letter, supra note 5, at 5-6.

fn33 Id. at 6.

fn34 See id.

fn35 Letter from Wendell Fenton, Richards, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE, dated March 28, 2005, at 4.

fn36 Joint Letter, supra note 5, at 5. See also Spiegel & Cleven April 28th Letter, supra note 5, at 7 (n. 3).

fn37 Joint Letter, supra note 5, at 6.

fn38 Id. at 6.

fn39 Id. at 5-6.

fn40 See Letter from Wendell Fenton, Richards, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE, dated March 28, 2005 (providing a legal opinion from Delaware counsel in connection with SR-CBOE-2005-19).

fn41 See Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005, at 7.

fn42 Spiegel & Cleven April 28th Letter, supra note 5, at 7-8.

fn43 See Joint Letter, supra note 5, at 4.

fn44 See id.

fn45 See id.

fn46 See Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005, at 7. Later comment letters assert that members of the CBOE who are members because they exercised their rights as "members of [the CBOT]" under Article

Fifth(b) were on the CBOE's board of directors during the time when the CBOE entered into various agreements with the CBOT regarding the CBOE's interpretation of Article Fifth(b). Without evidence to the contrary, these commenters do not accept the CBOE's assertion that no conflicts existed. See Spiegel & Cleven May 20th Letter, supra note 9, at 4, and Spiegel May 20th Letter, supra note 9, at 4-5. The Commission does not believe that commenters provide any support for their allegations of a conflict of interest on the part of certain CBOE board members.

fn47 Spiegel & Cleven April 28th Letter, supra note 5, at 2.

fn48 Id. at 3.

fn49 Id. at 4. See also Spiegel & Cleven May 20th Letter, supra note 9, at 5-8, and Spiegel May 20th Letter, supra note 9, at 5-8.

fn50 The Commission notes that the CBOE membership approved the proposed purchase offer initiative in a vote on April 19, 2004, and that the CBOE represents that it has not yet accepted or paid for any Exercise Right privileges that may be tendered pursuant to its "Offer to Purchase for Cash Exercise Right Privileges." See Letter from Joanne Moffic-Silver, Executive Vice President and General Counsel, CBOE, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2005, at 8-9.

fn51 Joint Letter, supra note 5, at 1-2.

fn52 If the CBOE comes to believe that any of the conditions in the 2001 Agreement, as amended, are no longer satisfied by the CBOT or CBOT Holdings, Inc. such that the interpretation the Commission is today approving is no longer proper, the CBOE would be required to file with the Commission any subsequent interpretation of Article Fifth(b).

fn53 Joint Letter, supra note 5, at 7. See also Securities Exchange Act Release No. 51568 (Apr. 18, 2005), 70 FR 20953 (Apr. 22, 2005) (order denying motion for reconsideration of the Commission's order approving SR-CBOE-2004-16).

fn54 See Mills Letter, supra note 9.

fn55 See supra note 3.

fn56 15 U.S.C. 78f(b)(5).

fn57 15 U.S.C. 78s(b)(2).

May 28, 2006

Deafened by the S.E.C.'s Silence, He Sued

By GRETCHEN MORGENSON

ON May 18, Caremark Rx Inc., a pharmaceuticals services concern, surprised many investors when it disclosed that a day earlier federal prosecutors and the Securities and Exchange Commission had notified the company that they were scrutinizing how it awarded stock options to company insiders. Caremark's shares tumbled 6.8 percent on the news.

Some investors, however, found the regulators' interest in Caremark not so surprising. As early as last January, SEC Insight, an independent research firm, warned its clients that regulatory risks might be brewing at the company — noting that federal authorities had refused to release records on Caremark because doing so could interfere with enforcement activities. SEC Insight reiterated its warning on March 20.

The stock of Caremark, which is based in Nashville, has been a top performer in recent years. But shareholders who heeded SEC Insight's warnings and sold their stock dodged a significant loss.

In a world where truly independent stock research is a valuable and rare commodity, SEC Insight is even more unusual. The firm makes its calls after poring through correspondence and other internal S.E.C. documents it secures by filing requests under the Freedom of Information Act. Ever since John P. Gavin, a former money manager and chartered financial analyst, founded SEC Insight six years ago in Plymouth, Minn., he has prided himself on its ability to sniff out regulatory trails like a corporate bloodhound.

During the last two years, however, Mr. Gavin says, his snooping and his ability to send early warning signals to clients have been stymied by an unlikely adversary: the S.E.C. itself. The agency, overshadowed by aggressive prosecutors like Eliot Spitzer, the New York attorney general, has gone to great lengths recently to reassert itself as Wall Street's top cop. But the S.E.C. has made it nearly impossible for Mr. Gavin to round up documents it once routinely provided to his firm. Mr. Gavin's experience, he says, suggests that the agency, which bills itself as the investor's advocate, is less than forthcoming about what it actually finds at the companies it polices.

"In this post-Enron era, as the S.E.C. demands record levels of disclosure from public companies, it's a shame that the agency itself has become disclosure-challenged," Mr. Gavin said.

It is a troubling paradox, Mr. Gavin says. The S.E.C., which requires public companies to make full disclosure of all meaningful facts, has stopped granting most of Mr. Gavin's requests for regulatory correspondence. For his part, Mr. Gavin has sued the agency in federal district court in Minnesota, seeking to compel compliance with federal disclosure laws.

The suit aims to force the S.E.C. to turn over records to Mr. Gavin on 12 companies, which the S.E.C. has so far flatly refused to do. The judge overseeing the case has given the S.E.C. a deadline of Thursday to prove that it has reviewed the documents that Mr. Gavin requested on six of those companies. The agency has appealed that ruling, arguing that the task is too onerous.

"We are defending the action to protect our ability to complete these law enforcement investigations, and to protect investors by enabling us to get relief where appropriate, including disgorgement of ill-gotten gains," said Richard M. Humes, associate general counsel at the S.E.C. He declined to comment further.

Mr. Gavin, 44, is not the only one complaining that the S.E.C. is keeping investors in the dark. An analysis by 10k Wizard, an online search engine for S.E.C. filings, indicates that the agency's two-year-old pledge — to publish all correspondence between it and public companies and mutual funds about their accounting and other practices — remains puzzlingly unfulfilled. As a result, SEC Insight says, shareholders everywhere are missing out on information that could help them make astute investment decisions.

Even as the S.E.C. plays hardball with Mr. Gavin, costing his three-person firm more than $100,000 in legal fees, Christopher Cox, the S.E.C. chairman, recently noted his agency's crucial role in providing investors with that most basic of needs: information. Testifying on May 3 before the financial services committee of the House of Representatives, Mr. Cox said: "When it comes to giving investors the protection they need, information is the single most powerful tool we have. It's what separates investing from roulette."

YET since August 2004, the commission has failed to provide documents relating to 1,700 of SEC Insight's requests under the Freedom of Information Act. Under the law, such requests are supposed to be answered in 20 days, but in most cases the S.E.C. says it is still looking for documents more than a year after SEC Insight requested them.

Lucy A. Dalglish, executive director of the Reporters Committee for Freedom of the Press, said she was dubious that the S.E.C. found it too onerous to carry out its responsibilities. "I'm sure it is very expensive and it is a burden and they are trying to draw a line in the sand because they don't like to do this," she said. "But so what? The law is the law and the Freedom of Information Act says that they have to comply with this. It is inconceivable that all the information about some of these companies is off-limits. That just flat-out doesn't pass the smell test.

"Probably an undercurrent here is that the S.E.C.'s internal documents are earning this guy a living. But if they are truly upset about this guy making money off their records — and they are not their records, they are public records — then they can do a better job of posting them on their Web site."

At least, Mr. Gavin says, the S.E.C.'s enforcement division provides bare-bones responses to some of his requests. The agency typically sends him letters saying that there are no investigative materials, or, when it denies requests, citing a need for investigative secrecy. It was just such a denial that caused Mr. Gavin to conclude in March that Caremark Rx might face regulatory risk.

A Caremark official declined to comment beyond saying that the company is cooperating with the government inquiries.

Mr. Gavin's firm acknowledges in each report it publishes that it does not know what an investigation might involve and cannot predict whether it will lead to an enforcement action. Moreover, he tells his clients

that S.E.C. investigations are fact-finding exercises and do not mean that a company or individual has done anything wrong. But any question about a company's practices, especially when the S.E.C. is the one raising it, can be an important data point for investors. And it is the S.E.C.'s flat-out refusal to supply correspondence with public companies that Mr. Gavin said he finds disturbing. These communications, known as comment letters, have been enormously useful in revealing potential problems at companies in the past, he says. The letters have pointed to aggressive accounting practices and pension problems, for example, long before those problems hit the headlines.

In October 2001, the S.E.C. wrote to Computer Associates, the Long Island-based software company now known as CA Inc., inquiring about potential accounting problems. Sanjay Kumar, the former CA chief executive, and other top managers have pleaded guilty to an accounting fraud that inflated the company's results in 1999 and 2000 and cost investors hundreds of millions in stock losses.

The S.E.C. addressed its letter to Ira Zar, the company's chief financial officer, and provided it to Mr. Gavin's firm in March 2002, less than a month after Mr. Gavin made his document request. Mr. Zar pleaded guilty to fraud at CA in 2004.

The S.E.C. made 15 points in the letter, mostly about CA's accounting. One-third of the issues raised by the S.E.C. involved CA's revenue recognition practices; these became central to the government's subsequent case against CA executives.

CA's shares traded around $33 when the letter was written. The stock rose to around $38 in January 2002, but news media reports about possible accounting irregularities and investigations at the company pushed the shares down to around $16 in February of that year. In March, when CA's stock was at $18.50, SEC Insight issued an alert to its clients about the company. By July, CA's share price had fallen to under $8 as the company's troubles mounted.

The speedy S.E.C. response to Mr. Gavin's CA request contrasted sharply with a request he made in 2004 related to the Andrew Corporation, a maker of communications equipment. Although the S.E.C. has twice told Mr. Gavin that there are no investigative records pertaining to the company, he has waited almost two years for other correspondence he has requested. Last September, the S.E.C. said its contractor would send the correspondence to Mr. Gavin's firm; those documents have not yet arrived.

The S.E.C. has not posted any comment letters regarding Andrew on its Web site, even though Andrew noted in a regulatory filing last December that it had paid its auditor $68,300 during 2005 to respond to a comment letter from the S.E.C.

When the S.E.C. announced in June 2004 that it would post all comment letters, it said the change would give investors access to the information in them. If a company asked for confidential treatment, the S.E.C. said, it could exclude only that information from publicly posted letters.

Alan Beller, former director of the S.E.C.'s division of corporation finance, said a year ago that the agency

believed " it is appropriate to expand the transparency of our comment process by making this information available, free of charge, to an unlimited audience."

Last week, the S.E.C. had posted on its Web site 2,224 letters it had sent to companies. Most were from 2004 and 2005, but there were also a few from this year. Even so, there are some 23,000 public companies and roughly 8,000 mutual funds in the United States, and watchdogs like Mr. Gavin say that the Web site's postings do not reflect that reality. Many of the postings are different letters written to the same company.

AN analysis by 10k Wizard raises questions about the S.E.C.'s progress. Combing through regulatory filings back to May 2005, 10k Wizard found that 212 companies had voluntarily disclosed receipt of an S.E.C. comment letter. (Such disclosures are not required under securities laws.) Matching those companies with the S.E.C.-posted correspondence showed only 21 companies' letters on the agency Web site.

"We were very excited when the S.E.C. announced that they were going to make these comment letters available," said Martin X. Zacarias, chief executive of 10k Wizard. "We'd gotten requests from all of our clients for that information."

But Mr. Zacarias said his excitement faded soon after the program began. "We were disappointed with the initial batch and with subsequent letters," he said. "We started to suspect that we weren't getting a complete availability of letters." After his firm conducted an analysis of comment letters for this article, Mr. Zacarias said the study "confirmed what we suspected."

Many letters that appear on the S.E.C. Web site relate to small, obscure companies of little interest to investors. Among the letters written in 2005, for example, about 20 percent went to companies whose shares either trade on the OTC Bulletin Board or no longer trade in any organized market. Of the roughly 470 companies whose communications with the S.E.C. were posted on its Web site from April 2005 to April 2006, 46 percent have market values of less than $100 million. Only 20 percent have market values over $1 billion.

John W. White, director of the S.E.C.'s division of corporation finance, said: "A few years ago in response to a deluge of F.O.I.A. requests for S.E.C. review and correspondence from several commercial providers that planned to resell the information, we adopted a plan to instead publicly post that information on Edgar so that it would be readily available to all investors free of charge. We have now resolved the technical hurdles of posting the information on Edgar, and we have committed our resources to getting correspondence arising since August 2004 posted as soon as possible so that it will be readily available to all investors free of charge. We expect a significant number of new postings in the coming months."

Mr. Gavin first saw the value of S.E.C. documents when he was an analyst at American Express in the late 1990's. In 1999, Arthur Levitt, then the S.E.C. chairman, announced that the agency was sending letters to 150 companies that it suspected were using aggressive accounting practices. That led to Mr. Gavin's first Freedom of Information Act request, for the names of the 150 companies. The agency denied it.

Mr. Gavin then requested information about Network Associates, a technology company whose shares American Express owned on behalf of its clients. The request generated a 12-page comment letter from the previous year. "The letter was comprehensive," he said. "It challenged them on dates when they reclassified things, challenged them on an acquisition, questioned them about restructuring costs."

Days later, Network Associates warned that it would miss its earnings forecast. "I said, 'Hey, we can get this cool stuff from the S.E.C.,' " Mr. Gavin recalled. "We started doing it inside Amex and I left about a year later and started SEC Insight."

The firm's success was anything but immediate. By July 2001, a year after it opened shop, SEC Insight had only one customer. Then Mr. Gavin made a few good calls, including one about a company named Enron and its chief executive, Kenneth L. Lay. A report from SEC Insight dated Oct 23, 2001, a month before Enron collapsed, began: "We believe Enron's S.E.C. troubles are far less welcome and potentially far more serious than Ken Lay and the company lets on."

Mr. Gavin's clients consist of mutual funds and hedge funds. He charges upward of $50,000 a year for his service and keeps a "focus list" of companies that reflects the information he receives from his requests.

Two types of companies are on the list. The first, which the firm calls "troubled," are those where it has found signs of "compelling S.E.C. or other investigative activity" that may not have been disclosed to investors. Less problematic are those companies that SEC Insight

advises investors to "monitor," because of possible regulatory risk.

SEC Insight put The New York Times Company on its "monitor" list in April after the S.E.C. partially blocked the firm's request late last year for information about the company. Mr. Gavin speculated that the response could relate to the S.E.C.'s examination of newspaper industry circulation practices that began in 2004. Mr. Gavin currently tracks 32 "troubled" companies as well as 160 on his "monitor" list, which also includes the Tribune Company, Dow Jones & Company and the Gannett Corporation.

Spokeswomen for The New York Times Company and Gannett said that the companies had given the S.E.C. all the information it requested two years ago and had since heard nothing from the agency. A spokesman for the Tribune Company said that it did not comment on speculation. Dow Jones did not return a call seeking comment.

Mr. Gavin said he first encountered problems with the S.E.C. in 2002. The agency, he said, gradually stopped providing information on company investigations, refusing even to state that an inquiry prevented it from responding. So Mr. Gavin sued the commission in 2004. As a result, he said, the S.E.C. started providing investigation letters again but stopped turning over comment letters, which the agency had been freely issuing before the suit.

Rachel Rosen, a lawyer at Cundy & Paul in Bloomington, Minn., who represents Mr. Gavin, described the S.E.C.'s actions as counterproductive. "By not releasing this information they are asserting

that it is going to interfere with their investigations," she said, "but we think their actions are going to do more harm for investors than good."

RELEVANT PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . " U.S. CONST. Amend. XIV, Sec. 1.

The Equal Protection Clause of the Fourteenth Amendment provides in part, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, Sec.1.

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. Amend. X.

The General Jurisdiction Clause to the Federal Courts of Article III provides in relevant part, "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . ; to controversies to which the United States shall be a party;" U.S. CONST. Article III, Sec. 2, Paragraph 1.

Section 28(a) of the Securities Exchange Act of 1934 makes clear in relevant part that Congress intended for state common law remedies to coexist with federal securities law: "the rights and remedies provided by this chapter shall be in addition to any and

all other rights and remedies that may exist at law or in equity." 15 U.S.C., Sec. 78bb(a)

Section 19(b) of the Exchange Act requires the Commission to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved "[w]ithin thirty-five days of the date of publication of notice of the filing of a proposed rule change . . . , or within such longer period as the Commission may designate up to ninety days of such date . . . or as to which the self-regulatory organization consents." 15 U.S.C., Sec. 78s(b)

SEC Rule 430(b)(2)Appeal of Actions Made Pursuant to Delegated Authority

Petition for Review. Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (b)(1) of this rule, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons why review is appropriate. The petition shall include exceptions to any finding of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as my exist. These reasons may be stated in summary form.

Article FIFTH (b) of the Chicago Board Options Exchange (hereinafter "CBOE") Certificate of Incorporation as part of its Constitution under Delaware Law executed February 4, 1972 contains two provisions relevant to the present dispute:

[E]very present and future member of said Board of Trade who applies for membership in the [CBOE] and who otherwise qualifies shall, so long as he remains a member of said Board of Trade, be entitled to be a member of the [CBOE], notwithstanding any such limitation on the number of members and without necessity of acquiring such membership for consideration or value from the [CBOE], its members or elsewhere.

No amendment may be made with respect to this paragraph (b) of Article FIFTH without the prior approval of not less than 80% of (i) the members of the Corporation admitted pursuant to this paragraph(b) and (ii) the members of the Corporation admitted other than pursuant to this paragraph(b), each such category of members voting as a separate class; provided, however, that any amendment to this paragraph (b) which is required under a final order of any court or regulatory agency having jurisdiction in the matter may be made in accordance with the provisions of Article TWELFTH covering amendments to this Certificate of Incorporation generally, without regard to the above provisions concerning such 80% vote by classes.

CBOE Rule 6.7A - Legal Proceedings Against the Exchange and its Directors, Officers, Employees, Contractors or Agents, "No member or person associated with a member shall institute a lawsuit or other legal proceeding against the Exchange or any director, officer, employee, contractor, agent or other official of the Exchange or any subsidiary of the Exchange, for actions taken or omitted to be taken in connection with the official business of the Exchange or

any subsidiary, except to the extent such actions or omissions, constitute violations of federal securities laws for which a private right of action exists." SR-CBOE-2002-20, SEC Release No. 45837, 67 FR 22142 (May 2, 2002)

CBOE Rule 2.24 – Exchange Costs of Defending Legal Proceedings, "Any member or person associated with a member who fails to prevail in a lawsuit or other legal proceeding instituted by such person against the Exchange or any of its directors, officers, committee members, employees or agents, and related to the business of the Exchange, shall pay to the Exchange all reasonable expenses, but only in the event that such expenses exceed Fifty Thousand Dollars ($50,000.00)." 61 FR 37513(July 18, 1996)