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 change.[5] On

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

2 17 CFR 240.19b-4.

3 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. 1").

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

5 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 This comment letter includes comments on another CBOE proposed rule change, SR-CBOE-2002-01, that was withdrawn on April 7, 2004.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

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.[8]

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]

4, 2004 ("November 2004 Letter") and December 22, 2004 ("December 2004 Letter").

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

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

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

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

10 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").

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

12 See July 15th Order, supra note 8.

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 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] . . . "[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

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13 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.

14 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.

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,

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

16 See Petition for Review, supra note 10.

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

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
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> (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

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18 15 U.S.C. 77c(a)(27).

19 17 CFR 240.19b-4.

20 15 U.S.C. 78s(b)(1).

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

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]

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

23 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.

24 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").

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

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25 15 U.S.C. 78s(b).

26 15 U.S.C. 77(f)(b)(1).

27 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").

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

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

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

30 See id. at 7.

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 Order[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]

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31 See July 15th Order, supra note 8.

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

33 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,

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

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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.

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

35 See id.

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

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36 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).

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

38 Id.

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,

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39 See id.

40 See id.

41 Legal Memorandum, supra note 24, at 4.

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

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]

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

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

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

46 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.

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.

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47 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.

48 See November 2004 Letter, supra note 5.

49 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.

50 See December 2004 Letter, supra note 5.

The Commission also notes that agreements between SROs and third parties are not, per 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

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

52 See 1992 Agreement, Section 3(a).

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

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.

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

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

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

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

57 15 U.S.C. 78c(f).

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

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

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[59] See id. at 14-15.

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

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60 See id. at 7.

61 15 U.S.C. 78f(b)(5).

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

63 15 U.S.C. 78f(c)(3)(A).

64 15 U.S.C. 78f(c)(4).

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

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65 July 15th Order, supra note 8.

66 15 U.S.C. 78s(b)(2).