SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51462; File No. SR–CBOE–2005–20]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of 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)

March 31, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on March 9, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. On March 28, 2005, the Exchange submitted Amendment No. 1 to the proposed rule change.[2] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of an interpretation of paragraph (b) of Article Fifth of the Certificate of Incorporation of the CBOE pertaining to the right of the 1,402 Full Members of the Board of Trade of the City of Chicago, Inc. (the ''CBOT'') to become members of the CBOE without having to purchase a CBOE membership (''Exercise Right''). This interpretation of the Exercise Right is embodied in an Agreement dated October 7, 2004 (''2004 Agreement'') between the CBOE and the CBOT and in a related proposed amendment to CBOE Rule 3.16. The 2004 Agreement reflects the agreement of the CBOE and the CBOT concerning the nature and scope of the Exercise Right in light of the expanded operation of the CBOT's electronic trading system. The text of the 2004 Agreement is attached as Exhibit 3 to the CBOE's Form 19b–4, and the opinion letter of CBOE's special Delaware counsel is attached as Exhibit 3b to the CBOE's Form 19b–4. The text of the proposed rule change, including the above-referenced Exhibits and Amendment No. 1, is available on CBOE's Web site [*http://www.cboe.org/Legal/SubmittedSECFilings.aspx*], at the CBOE's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to provide an interpretation of the rules of the CBOE as set forth in paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation (''Article Fifth(b)'') concerning the effect on the Exercise Right of the expansion of CBOT's electronic trading platform. The source of the Exercise Right is Article Fifth(b), which provides in part that ''every present and future member of [CBOT] 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 the necessity of acquiring such membership for consideration or value from the [CBOE], its members or elsewhere.'' This filing does not propose to amend Article Fifth(b), but only to interpret how it should apply in circumstances that CBOE believes were not envisioned at the time Article Fifth(b) was adopted and therefore were not addressed in the language of that Article.

Expanded electronic trading on CBOT carries with it with the potential for providing open access to the CBOT market over the electronic platform on substantially the same terms to members and nonmembers alike. This raises the possibility that CBOT members will no longer need the trading rights provided by their memberships in order to be able to trade CBOT products, in which event they would be free to sell or delegate their CBOT memberships to persons who would exercise them to become CBOE members, or to become CBOE exerciser members themselves, while still retaining the right to trade on CBOT's open access electronic platform. Accordingly, expanded electronic trading of CBOT products could facilitate the ability of CBOT members or their delegates to trade on CBOT as members and on CBOE as exercise members concurrently, since physical presence on the CBOT trading floor would not be required to trade CBOT products that are available in the electronic system.

For these reasons, CBOE believes expanded electronic trading on CBOT could result in a mass exercise by CBOT Full Members to an extent never contemplated at the time the Exercise Right was first established. When the Exercise Right was first established, the only way a CBOT Full Member who was also a member of CBOE could trade as a member of both exchanges was to physically move from one exchange's trading floor to another. Although the proximity of the two trading floors made this theoretically possible, few CBOT Full Members have ever attempted to trade on both floors in this way. CBOE believes a principal reason for this is because a CBOT member who is also a CBOE member would find it difficult to fulfill his obligations to both exchanges, as well as to manage the positions resulting from his trading, if he frequently had to be absent from one exchange's trading floor because of a need to be on the other exchange's floor. Therefore, although the Exercise Right has always been available to all 1,402 CBOT Full Members, it was inherent in the nature of exchange trading at the time Article Fifth(b) was adopted that only a fraction of CBOT Full Members would be expected to use that right to become members of CBOE. This is confirmed by the fact that during the entire time the Exercise Right has been in effect the percentage of CBOT Full Members who have exercised has averaged 33.12%, and has never exceeded 52.85%. During the year ended December 31, 2004, the percentage of CBOT Full Members who

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

[2] Due to a pending motion to reconsider the Commission's approval of SR–CBOE–2004–16, which was submitted on March 7, 2005, 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. Accordingly, Amendment No. 1 revised the proposed rule change to reflect the text of CBOE Rule 3.16 as currently in effect, without the language added to the Rule by SR–CBOE–2004–16, and as it is proposed to be modified by the current rule filing. Amendment No. 1 also adds Exhibit 3b to the filing, which consists of an opinion letter received by CBOE from its special Delaware counsel that pertains to the proposed rule change.

exercised ranged from a high of 29.24% to a low of 25.53%.

In order to permit the Exercise Right to remain available to CBOT Full Members in a manner consistent with what CBOE believes was its original intent, CBOE (with CBOT's concurrence) proposes to interpret Article Fifth(b) to take into account the development and expansion of electronic trading that were not anticipated at the time that Article was adopted, and thus are not addressed in the language of that Article.

In 2001, concurrently with announcing the planned expansion of electronic trading in its market, CBOT also announced a proposed strategic restructuring of that exchange that would have changed CBOT from a non-profit membership corporation to a for-profit stock corporation to be owned by its former members as stockholders (subsequently revised to make CBOT a for-profit subsidiary of a for-profit holding company to be owned by the former members). CBOE believed that the proposal to restructure CBOT was also not anticipated when Article Fifth(b) was adopted, and that it created a separate need for CBOE to interpret how Article Fifth(b) would apply when former members of CBOT became stockholders of a new holding company.

For these reasons, in early 2001 CBOE entered into discussions with CBOT in an effort to reach agreement regarding how CBOE would interpret Article Fifth(b) in response to both of these developments at CBOT. These discussions resulted in an agreement between CBOE and CBOT, entered into as of August 1, 2001 (the ''2001 Agreement''), that embodied CBOE's interpretation of Article Fifth(b) in response to both developments. That interpretation, as subsequently modified to reflect several revisions to CBOT's proposed restructuring, was filed by CBOE as a proposed rule change under Rule 19b–4 of the Act in SR–CBOE–2002–01.

Prior to and during the time SR–CBOE–2002–01 was on file at the Commission, CBOT's proposed restructuring was the subject of litigation between CBOT and certain of its members. Although this litigation did not involve CBOE and was not related to the Exercise Right, CBOT's proposed restructuring was delayed while the litigation was pending. For this reason, at CBOE's request, the Commission deferred acting on SR–CBOE–2002–01, and on April 6, 2004, when it remained uncertain when CBOT would be able to go forward with its restructuring, CBOE formally withdrew that filing. Recently, following the settlement on September 20, 2004, of the litigation that had delayed the CBOT's proposed restructuring and the effectiveness on February 14, 2005, of the registration statement of CBOT Holdings, Inc. needed to permit the members of the CBOT to vote on the proposed restructuring, on March 7, 2005, CBOE refiled the interpretation of Article Fifth(b) embodied in the 2001 Agreement.[3]

Although the interpretation embodied in the 2001 Agreement addresses the expansion of electronic trading as well as the proposed restructuring of the CBOT, that interpretation can become effective, subject to Commission approval, only upon the effectiveness of the CBOT's restructuring. Because expanded electronic trading may have an impact on the Exercise Right as described above independent of whether the restructuring of the CBOT becomes effective, CBOE believes it must interpret Article Fifth(b) to address the expansion of electronic trading at CBOT in a way that is not conditioned on the effectiveness of the proposed restructuring of CBOT. For this reason, in late 2004 CBOE and CBOT entered into discussions in an attempt to reach agreement on an interpretation of Article Fifth(b) by CBOE that would be solely in response to expanded electronic trading and would be completely independent of the restructuring of CBOT. As a result of these discussions, CBOE and CBOT entered into the 2004 Agreement. The interpretation of Article Fifth(b) embodied in the 2004 Agreement, together with a related amendment to CBOE Rule 3.16(b), constitutes the proposed rule change that is the subject of this filing.

The interpretation of Article Fifth(b) embodied in the 2004 Agreement mirrors that aspect of the interpretation embodied in the 2001 Agreement that addressed the expansion of electronic trading to the effect that the Exercise Right would continue to be available to CBOT Full Members notwithstanding the development of electronic trading and related changes to trading hours and access policies that may be made by either exchange, if certain conditions are satisfied. Included among these conditions is the agreement of CBOT to take various measures to promote the value of CBOT membership while at the same time to limit the ability of CBOT members and their delegates to trade as members on CBOT and CBOE concurrently, in order to reduce the likelihood of a mass exercise under circumstances that CBOE believes were not contemplated when the Exercise Right was established. These measures include restricting the ability of exercising CBOT members to have preferred member access to the CBOT's electronic trading platform while they are present on the CBOE trading floor or are logged on to the CBOE electronic platform. If either of these circumstances applies, the exercising members may access CBOT's electronic platform only in the capacity of nonmember customers. Similarly, CBOT agreed that any CBOT Full Member Delegates who have exercised may trade on CBOT's electronic platform only as customers. Finally, the 2004 Agreement provides that if a CBOT Full Member delegates his only CBOT Full Membership to a delegate who exercises, the CBOT Full Member has no right to exercise and may trade on CBOE only as a customer.

Like the 2001 Agreement, the 2004 Agreement includes the agreement of CBOT to modify its rules effective not later than December 1, 2004, to preclude any Full Member or Full Member Delegate of CBOT who is also an exercise member of CBOE from trading as a member on the trading floor of CBOT at any time when the member is logged on to CBOE's electronic trading platform. (The CBOE represents that the CBOT has adopted such a rule.) This latter restriction does not apply to a CBOT Full Member who owns more than one CBOT membership, at least one of which has not been delegated or, in the case of a CBOT Full Membership, used to acquire a CBOE membership by exercise. Finally, the 2004 Agreement provides that if a CBOT Full Member delegates his only CBOT Full Membership to a delegate who exercises, the CBOT Full Member has no right to exercise and may trade on CBOE only as a customer.

In order to make these restrictions on exercising members and delegates effective for their intended purpose, the 2004 Agreement, like the 2001 Agreement, provides that the application of CBOE's interpretation of the exercise right embodied therein is conditioned on CBOT's maintaining meaningful fee preferences for the members and delegates of CBOT as compared with the fees payable by nonmember customers, and maintaining other incentives to support the value of CBOT Full Membership. The 2004 Agreement provides that if disagreements arise between CBOE and CBOT as to whether meaningful fee preferences and other incentives are being maintained, the matter will be

[3] *See* Securities Exchange Act Release No. 51463 (March 31, 2005) providing notice of File No. SR–CBOE–2005–19.

referred to arbitration. The arbitrators are authorized to determine whether meaningful member and delegate fee preferences are being maintained, and if not, to specify a remedy for CBOT's failure to maintain them and to specify how they must be restored. The arbitrators are also authorized to prescribe the consequences of any failure by the CBOT to take any action required under the remedy specified by the arbitrators within 30 days of the arbitrators' decision. The CBOE represents that the CBOT has agreed to amend its rules to implement the provisions of the 2004 Agreement.

This interpretation of Article Fifth(b) does not displace other interpretations of Article Fifth(b) previously adopted by CBOE and approved by the Commission to address other unanticipated changed circumstances. These consist of the interpretation embodied in an agreement between CBOE and CBOT dated as of September 1, 1992, filed in SR–CBOE–92–42, an interpretation filed in SR–CBOE–2002–41, and an interpretation embodied in an agreement between CBOE and CBOT dated as of December 17, 2003, filed in SR–CBOE–2004–16.[4] Because existing CBOE Rule 3.16 refers to all of the interpretations of Article Fifth(b), the proposed rule change also includes an amendment to that Rule to add a reference to this latest interpretation.

2. Statutory Basis

The CBOE represents that the interpretation of the Exercise Right embodied in the 2004 Agreement and the conforming amendment to CBOE Rule 3.16 that together constitute the proposed rule change are consistent with and further the objectives of the Act, as amended, and Section 6(b)(5) of the Act[5] in particular, in that they constitute an interpretation of and an amendment to the rules of the Exchange that are designed to promote just and equitable principles of trade, to perfect the mechanisms of a free and open market, and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change. Comments were received from some members in respect of the prior filing of the interpretation of Article Fifth(b) embodied in the 2001 Agreement, and on August 30, 2001, ten members of the CBOE filed suit in the Circuit Court of Cook County, Illinois seeking a temporary restraining order and preliminary injunction against the CBOE and the CBOT that would prevent CBOE from implementing the 2001 Agreement.[6] The allegations made by these commenters and by the plaintiffs in the dismissed lawsuit raised essentially the same procedural issue, which involved characterizing the 2001 Agreement not as an interpretation of Article Fifth(b), but as an amendment to that Article. Since, by its terms, Article Fifth(b) may be amended only with the approval of 80% of the exerciser members of CBOE and 80% of the non-exerciser members of CBOE, these commenters and the plaintiffs in the lawsuit took the position that the 2001 Agreement was invalid.[7]

Although none of these allegations was directed toward the 2004 Agreement and the interpretation of Article Fifth(b) embodied therein that is the subject of this proposed rule change, the same procedural issue could be raised in response to the proposed rule change. Accordingly, CBOE will repeat here the substance of what it said when this issue was previously raised.

CBOE believes any allegation that the 2004 Agreement reflects an amendment of Article Fifth(b), and not an interpretation of that Article, is entirely without merit. The 2004 Agreement does not change either the language or intended meaning of Article Fifth(b), but instead provides an interpretation of that Article to deal with circumstances brought about by the expansion of electronic trading on CBOT that were not contemplated or addressed in the language of that Article or in any of CBOE's prior interpretations of that Article.

Exactly the same kind of interpretation of Article Fifth(b) was embodied in the 1992 Agreement and the 2003 Agreement and was the subject of SR–CBOE–2002–41. Each of these three prior interpretations addressed circumstances that were not contemplated when Article Fifth(b) was adopted, and were not addressed in the terms of that Article. Because CBOE had no choice but to interpret Article Fifth(b) in response to these changed circumstances, and because these interpretations did not amend the terms of that Article, none of these prior interpretations was submitted to an 80% class vote of the CBOE membership as would have had to be done if they had been treated as amendments to that Article. They were, however, filed by CBOE and approved by the Commission as interpretations of an existing rule constituting a rule change under Section 19(b) of the Act and Rule 19b–4 thereunder.[8]

CBOE believes the expansion of electronic trading on CBOT, absent appropriate safeguards, raises the potential for a mass exercise by most or all of the 1,402 Full Members of CBOT in a manner that would be inconsistent with how the Exercise Right was expected to operate at the time it was adopted. To prevent this from happening, CBOE believes it is again necessary for it to interpret how Article Fifth(b) will apply in light of this unanticipated changed circumstance as it has done before when faced with different changed circumstances at CBOT. Such an interpretation of the Exercise Right by CBOE is embodied in the 2004 Agreement, and it, together with a conforming amendment to Rule 3.16, constitutes the proposed rule change filed hereby. CBOE represents that neither this interpretation of Article Fifth(b) nor the proposed change to Rule 3.16 makes any changes to the text of Article Fifth(b), nor are they in any way inconsistent with the language of that Article. Instead, they simply interpret Article Fifth(b) so it may operate as intended in circumstances that CBOE believes were not contemplated at the time that Article was drafted or was previously interpreted.

CBOE represents that if it is not able to interpret Article Fifth(b) under unanticipated changed circumstances without satisfying the 80% class vote requirements that apply in the case of an amendment to that Article, CBOE would be placed on the horns of a

[4] *See* Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993) (File No. SR–CBOE–1992–42); Securities Exchange Act Release No. 46719 (October 25, 2002), 67 FR 66689 (November 1, 2002) (File No. SR–CBOE–2002–41); and Securities Exchange Act Release No. 51252 (February 25, 2005), 70 FR 10442 (File No. SR–CBOE–2004–16). A motion for reconsideration of the Commission's order approving SR–CBOE–2004–16 was filed on March 7, 2005 and is currently pending before the Commission.

[5] 15 U.S.C. 78f(b)(5).

[6] On September 17, 2001, the Court granted CBOE's and CBOT's motions to dismiss this lawsuit.

[7] Similar allegations were made in the petition for Commission review of the approval by delegated authority of SR–CBOE–2004–16. *See supra* note 4.

[8] *See supra* note 4.

dilemma. If an interpretation did not achieve the 80% approval of each class of voting members, the interpretation could not be enforced. However, CBOE would still need to know how the Exercise Right should apply under the changed circumstances. But under the view that any interpretation CBOE might adopt in such circumstances must be treated as an amendment to Article Fifth(b), CBOE could be paralyzed because conceivably no interpretation would receive the necessary vote. In other words, where CBOE has no choice but to interpret Article Fifth(b) in response to changed circumstances and where its interpretation is entirely consistent with the language of Article Fifth(b), CBOE must be able to make such an interpretation without having to satisfy the requirements that would apply if Article Fifth(b) were being amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2005–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2005–20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2005–20 and should be submitted on or before April 28, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51468; File No. SR–CBOE–2005–18]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Relating to a Fee Cap for Options Dividend Spread Transactions

April 1, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 2, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by CBOE. On March 17, 2005, CBOE filed Amendment No. 1 to the proposed rule change.[3] CBOE designated the proposed rule change, as amended, as establishing or changing a due, fee, or other charge imposed by CBOE under section 19(b)(3)(A)(ii) of the Act,[4] and Rule 19b–4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule to modify its fee cap on dividend spread transactions and to update the symbol for the Nasdaq-100 Index Tracking Stock. The text of the proposed rule change is available on CBOE's Web site *(http://www.cboe.com),* at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In July 2004, the Exchange implemented a program under which market-maker, firm and broker-dealer transaction fees associated with ''dividend spread'' transactions are

[9] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the proposed rule change in its entirety. Telephone conversation between Jaime Galvan, Assistant Secretary, CBOE, and Steve L. Kuan, Attorney, Division of Market Regulation, Commission, on March 30, 2005. In Amendment No. 1, CBOE clarified that the effective date of the Fee Schedule is March 2, 2005, the date CBOE initially filed the proposed rule change. Further, CBOE proposed that the fee cap on dividend spread transactions operate on a pilot basis until September 1, 2005.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).