accordance with the Act and will include all costs of doing business incurred by the Service Companies, including a reasonable return on capital which will reflect a capitalization of the Service Companies of no more than ten percent equity, and all associated taxes.

Applicant's state that each Service Company will maintain an accounting system for accumulating all costs on a project, activity or other appropriate basis. Expenses for the department will include salaries and wages of employees, materials, and supplies and all other expenses attributable to the department. Labor costs will be loaded for fringe benefits and payroll taxes. Time records of hours worked by all Service Company employees, including all officers of the company (*i.e.*, Chief Executive Officer, President and Vice Presidents) will be kept by project and activity.

Each client company will take agreed upon services and such additional, general, or special services as the client company may request and which the particular Service Company concludes it is able to perform. No amendment, alteration or rescission of an activity or project shall release a client company from liability for all costs already incurred by, or contracted for, the applicable Service Company pursuant to the project or activity regardless of whether the services associated with the costs have been completed.

Applicants state that each of the Service Companies' accounting and cost allocation methods and procedures have been structured so as to comply with the ''Uniform System of Accounts for Mutual Service Companies'' established by the Commission for holding company systems. Moreover, each of the Service Companies will file the annual report required by the Commission pursuant to rule 94 under the Act.

Applicants represent that no change in the organization of a Service Company, the type and character of the companies to be serviced, the methods of allocating cost to associate companies or the scope or character of the services to be rendered subject to section 13 of the Act, or any rule, regulation, or order thereunder, shall be made until the Service Company shall first have given the Commission notice of the proposed change not less than 60 days prior to the proposed effectiveness. If, upon the receipt of a notice, the Commission shall notify the Service Company within the 60 day period that a question exists as to whether the proposed change is consistent with the provisions of section 13 of the Act, or of any rule, regulation, or order thereunder, then the proposed change shall not become effective unless and until the Service Company shall have filed with the Commission an appropriate declaration regarding the proposed change and the Commission shall have permitted the declaration to become effective.

D. Reservation of Jurisdiction Over the Use of KCS and KUS as Separate Service Companies Pending Dissolution of KUS

Applicants state that in 1998, as a condition of the NYPSC's approval of the formation of KeySpan as utility holding company, the NYPSC required KeySpan to form KCS and KUS in order to provide the services noted above. Applicants now request that the Commission continue to reserve jurisdiction over the use of KCS and KUS as separate service companies pending and subject to approval by the NYPSC, upon KeySpan's petition, to eliminate the need to utilize KUS as a separate service company. KeySpan proposes to petition the NYPSC to allow Applicants to eliminate the need to utilize KUS as a separate service company. The petition will generally request authorization to utilize KCS as the single service company that would provide to the entire KeySpan system both corporate administrative services as well as gas marketing, gas supply, gas and electric distribution planning, meter repair operations, and all other services currently being provided by KUS and KCS. Key Span proposes to file this NYPSC petition on or before December 31, 2005 and anticipates that the NYPSC will act on this petition on or before December 31, 2006.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–2725 Filed 5–27–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51733; File No. SR–CBOE–2005–19]

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)

May 24, 2005.

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 Register**.[5] On April 20, 2005, the CBOE

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

[2] 17 CFR 240.19b–4.

[3] 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.

[4] *See* Securities Exchange Act Release No. 51463 (Mar. 31, 2005), 70 FR 17732 (Apr. 7, 2005).

[5] *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

Continued

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

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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).

[6] 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.

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

[8] 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.

[9] *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'').

[10] 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.

[11] *See* Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993).

[12] 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.

[13] *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).

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.

III. 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

[14] 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.

[15] 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.

[16] 15 U.S.C. 78f.

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

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(c)(3)(A).

[20] *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.

[21] *See supra* notes 5 and 9 (citing the comment letters).

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

[23] *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.

[24] Spiegel & Cleven April 28th Letter, *supra* note 5, at 1–2.

[25] Joint Letter, *supra* note 5, at 2.

[26] *Id.* at 6.

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 [28] 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 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

[27] *See* Spiegel & Cleven April 28th Letter, *supra* note 5, at 6; and Joint Letter, *supra* note 5, at 2.

[28] 15 U.S.C. 78f(b)(1).

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

[30] *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.*

[31] *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.

[32] Spiegel & Cleven April 28th Letter, *supra* note 5, at 5–6.

[33] *Id.* at 6.

[34] *See id.*

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

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

[37] Joint Letter, *supra* note 5, at 6.

[38] *Id.* at 6.

[39] *Id.* at 5–6.

[40] *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

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, *per 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

Delaware counsel in connection with SR–CBOE–2005–19).

[41] *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.

[42] Spiegel & Cleven April 28th Letter, *supra* note 5, at 7–8.

[43] *See* Joint Letter, *supra* note 5, at 4.

[44] *See id.*

[45] *See id.*

[46] *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.

[47] Spiegel & Cleven April 28th Letter, *supra* note 5, at 2.

[48] *Id.* at 3.

[49] *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.

[50] 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.

decided by an arbitration panel.'' [51] The Commission reiterates that it is not approving the 2001 Agreement.[52]

IV. 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.

Jill M. Peterson,

Assistant Secretary.

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[51] Joint Letter, *supra* note 5, at 1–2.

[52] 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).

[53] 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).

[54] *See* Mills Letter, *supra* note 9.

[55] *See supra* note 3.

[56] 15 U.S.C. 78f(b)(5).

[57] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51729; File No. SR–NYSE–2004–57]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto Relating to Member Organization Increases in Arbitration Filing Fees and Member Organization Surcharges in Arbitration Claims Filed by Customers

May 24, 2005.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Exchange Act''), and Rule 19b–4 [2] thereunder, notice is hereby given that on October 12, 2004 and on April 4, 2005 (Amendment No. 1) and on April 11, 2005 (Amendment No. 2), the New York Stock Exchange, Inc. (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. For the purposes of Section 19(b)(3)(A)(ii) of the Exchange Act [3] and Rule 19b–4(f)(2) thereunder,[4] NYSE has designated the proposed rule change as one establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on its members, 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 persons.

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

The proposed rule change consists of amendments to Rule 629 concerning arbitration filing fees and hearing deposits, and the imposition of member organization surcharges pertaining to arbitration claims. Below is the text of the proposed rule change to Rule 629. Proposed new language is in italics; proposed deletions are in brackets.

Rule 629 Schedule of Fees

* * * * *

(c)*(1)* The arbitrators, in their award, may determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Forum fees chargeable to the parties shall be assessed on a per hearing session basis and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party. [,e] *E*xcept *that* in a case where claims have been joined subsequent to filing [in which cases hearing session], *forum* fees *for any party other than a customer* shall be computed as provided in paragraph (d)*, and forum fees for a customer in connection with any industry claim shall be computed as provided in this paragraph (c)(1).* [The arbitrators may determine in the award that a party shall reimburse to another party any non-refundable filing fee it has paid.]

If a customer is assessed forum fees in connection with an industry claim, [forum fees assessed against] the customer*'s forum fees* shall be based on the [hearing deposit required under the industry claims schedule for the] *total* amount awarded to industry parties to be paid by the customer and not based on the size of the industry claim. *The maximum fee per session for purposes of calculating any forum fees that may be assessed against the customer in connection with an industry claim shall be:*

Amount of award (excluding interest expenses)	*Maximum per-session customer fee amount*
$25,001 to $100,000	*$600*
$100,001 to $500,000	*750*
$500,001 to $5,000,000	*1,000*
Over $5,000,000	*1,500*

(c)(2) The arbitrators, in their award, may determine that a party shall reimburse to another party any non-refundable filing fee it has paid; any such filing fee assessed against a customer in connection with an industry claim shall not exceed $500.00.

No fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim under the procedure set out above. Amounts deposited by a party as hearing deposits shall be applied against forum fees, if any.

In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Rules 617, 619 and 623 and, unless applicable law directs otherwise, other costs and expenses of the parties. The arbitrator(s) shall determine by whom such costs shall be borne[.], *provided that the following schedule of hearing deposits shall be used to calculate any*

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

[2] 17 CFR 240.19b–4.

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

[4] 17 CFR 240.19b–4(f)(2).