SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51463; File No. SR-CBOE-2005-19)

March 31, 2005

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)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on March 7, 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. ("CBOT") to become members of CBOE without having to purchase a CBOE membership (paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation is referred to as "Article Fifth(b)," and the right of CBOT Full Members to become

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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 3d to the filing, which consists of an opinion letter received by CBOE from its

members of CBOE as described therein is referred to as the "Exercise Right"). This interpretation of the Exercise Right is embodied in an Agreement dated August 7, 2001, ("2001 Agreement") between CBOE and the CBOT as modified by a Letter Agreement among CBOE, CBOT Holdings, Inc. ("CBOT Holdings") and CBOT dated October 7, 2004 (the "October 2004 Letter Agreement"), and it is reflected in a related amendment to CBOE Rule 3.16.

The 2001 Agreement as modified by the October 2004 Letter Agreement represents the agreement of the parties concerning the nature and scope of the Exercise Right following the consummation of a proposed restructuring of CBOT and in light of the expansion of the CBOT's electronic trading system. The 2001 Agreement as modified incorporates CBOE's interpretation concerning the operation of Article Fifth(b) in light of these changed circumstances at CBOT. That interpretation, together with a proposed amendment to Rule 3.16, constitutes the proposed rule change that is the subject of this filing.

In a Letter Agreement among CBOE, CBOT Holdings and CBOT dated February 14, 2005 (the "February 2005 Letter Agreement"), the parties confirmed that the proposed restructuring of the CBOT as described in Amendment 13 to the registration statement filed by CBOT Holdings and CBOT on Form S-4 under the Securities Act of 1933 as amended at that time, which was the last substantive amendment to the registration statement before it was declared effective by the Commission on that date, constitutes the CBOT restructuring for purposes of the 2001 Agreement and CBOE's interpretation of Article Fifth(b) embodied therein. The 2001 Agreement as modified and clarified by the October 2004 Letter Agreement and the February 2005 Letter Agreement is referred to herein as the "2001 Agreement as amended." The text of the 2001 Agreement is attached as Exhibit 3a to the CBOE's Form 19b-4, the text of the

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special Delaware counsel that pertains to the proposed rule change.

October 7, 2004 Letter Agreement is attached as Exhibit 3b to the CBOE's Form 19b-4, the text of the February 14, 2005 Letter Agreement is attached as Exhibit 3c to the CBOE's Form 19b-4, and the opinion letter of CBOE's special Delaware counsel is attached as Exhibit 3d 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 CBOE as set forth in paragraph (b) of Article Fifth(b) concerning the effect on the Exercise Right of a proposed restructuring of the CBOT and the expansion of electronic trading on the CBOT and the CBOE. 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 were not envisioned at the time Article Fifth(b) was adopted and therefore were not addressed in the language of that Article.

This is not the first time Article Fifth(b) had to be interpreted by CBOE in response to unanticipated changed circumstances at CBOT. CBOE previously interpreted that Article in accordance with an agreement between CBOE and CBOT dated September 1, 1992, (the "1992 Agreement"), parts of which are incorporated in CBOE Rule 3.16(b).[3] The interpretation embodied in the 1992 Agreement served to resolve a dispute between CBOE and CBOT concerning the effect on the Exercise Right of action taken or proposed to be taken by CBOT at that time to unbundle certain of the trading rights held by CBOT members, to issue transferable evening trading permits to its members, and to allow CBOT members to "delegate" (i.e., lease) the trading rights associated with their memberships. In CBOE's view, these actions had distorted and could further distort the traditional integration of access and ownership that was embodied in the concept of exchange membership as it existed when the Exercise Right was created.

To preserve what CBOE considered to be the original intent of the Exercise Right in light of these changed circumstances, Article Fifth(b) was interpreted in the 1992 Agreement so that only an individual who is an "Eligible CBOT Full Member" or an "Eligible CBOT Full Member Delegate" would be considered to be a member of the CBOT within the meaning of Article

[3] The interpretation of Article Fifth(b) embodied in the 1992 Agreement and an amendment to Rule 3.16 referring to the 1992 Agreement were approved by the Commission in Securities Exchange

Fifth(b). The 1992 Agreement defined an "Eligible CBOT Full Member" to mean "an individual who at the time is the holder of one of the One Thousand Four Hundred Two (1,402) existing CBOT Full Memberships ("CBOT Full Memberships") and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership." The term "Eligible CBOT Full Member Delegate" was defined in the 1992 Agreement to mean "the individual to whom a CBOT Full Membership is delegated (leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership." The 1992 Agreement also provided that in the event of any division of the trading rights and privileges appurtenant to a CBOT Full Membership or any division of the CBOT Full Membership itself, a CBOT member retained the right to exercise only if he held all of the parts into which his membership may have been divided and all of the trading rights and privileges appurtenant thereto. As a result of the 1992 Agreement, the number of potential "exerciser" members of CBOE has been limited to the 1,402 Full Members of CBOT or their delegates (lessees), but not both in respect of the same CBOT membership.

CBOE next interpreted Article Fifth(b) in response to amendments to CBOT's rules that purported to adopt abbreviated membership approval procedures applicable to persons who sought to become CBOT Full Members only in order to be able to utilize the Exercise Right to become members of CBOE. Since persons who attempted to become CBOT members pursuant to these abbreviated procedures would not have any trading rights at CBOT, they would fail to satisfy the requirement of Article Fifth(b) as interpreted in the 1992 Agreement that to become a member of CBOE pursuant to the Exercise Right, a Full Member of CBOT must be in

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Act Release No. 32430. See Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993) (File No. SR-CBOE-92-42).

possession of all trading rights and privileges appurtenant to a CBOT Full Membership. CBOE clarified that these new procedures would not satisfy the requirements of the Exercise Right in an interpretation of Article Fifth(b) that was filed with and approved by the Commission in SR-CBOE-2002-41.[4]

More recently, Article Fifth(b) again had to be interpreted by CBOE in response to changes to CBOT's rules that authorized CBOT to make available to its full members, upon their request, a separately transferable interest representing that component of CBOT full membership representing the Exercise Right. This interpretation was embodied in an Agreement between CBOE and CBOT dated December 17, 2003, ("2003 Agreement") and in related revisions to CBOE Rule 3.16. The interpretation of Article Fifth(b) embodied in the 2003 Agreement was filed with the Commission in SR-CBOE-2004-16, and was approved by the Commission by authority delegated to the Division of Market Regulation on July 15, 2004.[5] Upon receipt of a petition for review of the approval by delegated authority filed by a CBOE member, that approval was automatically stayed pending review by the full Commission.[6] On February 25, 2005, the prior approval of this proposed rule change by delegated authority was set aside, and instead this proposed rule change was approved by the Commission.[7]

Just as when CBOE had to interpret Article Fifth(b) in 1992 and in 2004 in response to changed circumstances at CBOT, CBOE believes CBOT's current proposal to implement a restructuring of that exchange again makes it necessary to interpret how Article Fifth(b) will

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4 See Securities Exchange Act Release No. 46719 (October 25, 2002), 67 FR 66689 (November 1, 2002).

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

6 The stay of that approval was announced in Securities Exchange Act Release No. 50464 dated September 29, 2004.

7 See Securities Exchange Act Release No. 51252 (February 25, 2005), 70 FR 10442 (March 3,

apply under these changed circumstances. The proposed restructuring of CBOT, which is subject to a vote of the CBOT membership, was originally described in a registration statement filed in 2001 by CBOT under the Securities Act of 1933 as a series of transactions that were designed to (1) demutualize CBOT by converting it from a not-for-profit membership corporation to a for-profit stock corporation and distributing shares of common stock of the for-profit CBOT to its members; (2) modernize the CBOT's corporate governance structure by substantially eliminating the membership petition process, streamlining its board of directors and making other changes to improve the efficiency of its corporate decision-making process; and (3) reorganize the CBOT's electronic trading business into a new wholly-owned subsidiary of CBOT that would trade electronically all of the products theretofore traded in CBOT's open-outcry market, including agricultural products not previously traded electronically.[8] In connection with the restructuring as then proposed, each member of CBOT would have received a predetermined number of shares of Class A common stock representing equity in the new for-profit corporation, and a single share of one of five series of Class B common stock representing an additional equity interest in the new corporation and, subject to satisfaction of applicable membership and eligibility requirements, trading rights and privileges corresponding to those associated with one of the five current classes of membership in the existing not-for-profit CBOT. When all of the steps of the restructuring of CBOT as originally proposed were fully implemented, CBOT would no longer have been a membership corporation but instead would have become a stock corporation with its former members as its stockholders. CBOT's

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[8] Registration Statement on Form S-4, Registration No. 333-54370, initially filed by CBOT on January 22, 2001.

electronic trading system, which was to have been operated as an open-access system by a wholly-owned subsidiary of CBOT, would have traded all CBOT products side-by-side with their being traded on the existing open-outcry trading floor (as long as that market continued to operate).

CBOE believes these changes in the structure of CBOT would have had the potential to impact the Exercise Right in ways that were not contemplated when that right came into existence. Just as in 1992 when other changes at CBOT not anticipated at the time the Exercise Right was created raised questions concerning their effect on the Exercise Right, CBOT's proposed restructuring once again made it necessary for CBOE to interpret Article Fifth(b) in response to the changes that were now being proposed. To this end, over a period of several months in 2001 the CBOE and CBOT engaged in a series of discussions to see whether agreement could be reached concerning the nature and scope of the Exercise right following the proposed restructuring of CBOT, and how this might be reflected in an interpretation by CBOE of Article Fifth(b). The 2001 Agreement was the result of those discussions, and embodied an interpretation of the Exercise Right by CBOE that, subject to the terms and conditions of that Agreement, would allow CBOT Full Members and Full Member Delegates to be able to exercise following the effectiveness of the proposed restructuring of CBOT as described by CBOT at the time the 2001 Agreement was entered into on August 7, 2001. The 2001 Agreement made this interpretation of the Exercise Right by CBOE contingent upon certain obligations imposed on CBOT, including the obligation to take steps to preserve the value of CBOT memberships and thereby prevent the restructuring from having a dilutive effect on the value of CBOE memberships by encouraging mass exercise or by making it easier for CBOT members or their delegates to trade concurrently as CBOT members and as exerciser members of CBOE.

Later in 2001, following the signing of the 2001 Agreement, CBOT informed CBOE that it wished to make certain revisions to its proposed restructuring. Among these were to make CBOT a wholly-owned for-profit subsidiary of a new holding company, CBOT Holdings, Inc., a Delaware stock, for-profit corporation ("CBOT Holdings"). CBOT Holdings would be owned by its common stockholders, who would have all voting rights and equity ownership rights in the corporation. In the revised restructuring, each member of CBOT would have received a predetermined number of shares of common stock of CBOT Holdings, with each of the 1,402 CBOT Full Members receiving 25,000 shares of CBOT Holdings common stock. In addition, Class B memberships, representing trading rights on the CBOT subsidiary, would have been issued in five different series to the five different categories of current members of CBOT, with each of the 1,402 CBOT Full Members receiving one Series B-1 membership in CBOT representing the trading rights of a Full Member in the CBOT market. In addition, 1,402 Class C memberships, representing the Exercise Right (when held together with the other interests issued to CBOT Full Members in the restructuring), would have been issued to the 1,402 current CBOT Full Members. As then proposed, Series B-1 memberships and Class C memberships would have been freely transferable. To be consistent with the provision of Article Fifth(b) as interpreted in the 1992 Agreement that the Exercise Right itself could not be transferred separate and apart from a transfer of the related CBOT Full Membership, although Class C memberships would have been freely transferable, the holder of a Class C membership would not have been entitled to utilize the Exercise Right unless the holder also held all of the other rights and privileges of a CBOT Full Member (namely, the shares of CBOT Holdings common stock and the Series B-1 membership issued to CBOT Full Members in the restructuring).

In addition, under the restructuring of CBOT as then revised, Class B members of CBOT

would have had limited voting rights to approve changes that could adversely affect certain specified "core" trading rights of such members. Also, in the restructuring as then revised, the electronic trading business of CBOT would continue to have been operated by a wholly-owned subsidiary of CBOT (a second-tier subsidiary of CBOT Holdings) in much the same manner as was contemplated in the restructuring as originally proposed.

On October 24, 2001, CBOE, CBOT Holdings and CBOT entered into a letter agreement (the "October 2001 Letter Agreement") that modified the 2001 Agreement to take into account these revisions to CBOT's proposed restructuring. The October 2001 Letter Agreement reflected a further interpretation of the Exercise Right by CBOE intended to make it clear that, subject to the terms and conditions of the October 2001 Letter Agreement as well as of the 2001 Agreement, the Exercise Right would continue to be available to CBOT's Full Members and Full Member Delegates following the revised restructuring. The October 2001 Letter Agreement also made it clear that under the proposed holding company structure, CBOT and CBOT Holdings would remain bound by the obligations of CBOT under the 2001 Agreement.

Some time after the execution of the October 2001 Letter Agreement, CBOT again informed CBOE that it intended to make some additional revisions and refinements to its proposed restructuring. Among other things, CBOT intended to eliminate the free transferability of Series B-1 memberships that were to be issued to its Full Members in the restructuring. Instead, CBOT proposed to impose a complete restriction on the transfer of Series B-1 memberships, except that a Series B-1 membership could be transferred together with a transfer of all of the 25,000 shares of CBOT Holdings common stock associated with the Series B-1 membership, and except that the CBOT Board of Directors would be authorized to remove or reduce the restriction on the transferability of Series B-1 memberships if it determined such

action to be appropriate. In response, CBOE, CBOT Holdings and CBOT entered into a letter agreement dated September 13, 2002 (the "September 2002 Letter Agreement") as a further addendum to the 2001 Agreement. The September 2002 Letter Agreement reflected a further interpretation of the Exercise Right by CBOE to make it clear that, subject to the terms and conditions of the September 2002 Letter Agreement as well as of the October 2001 Letter Agreement and the 2001 Agreement, the Exercise Right would continue to be available to CBOT's Full Members and Full Member Delegates notwithstanding the restriction on transferability of Series B-1 memberships. The September 2002 Letter Agreement also clarified the intent of the parties to the effect that in order to be an "Eligible CBOT Full Member" or an "Eligible CBOT Full Member Delegate" eligible to exercise pursuant to the interpretation embodied in the 2001 Agreement, a person must be in possession of "all trading rights and privileges appurtenant to such CBOT Full Membership" as that phrase is defined in the 1992 Agreement.

More recently, CBOT further revised its proposed restructuring to reflect, among other things, the settlement of the litigation brought by certain members of CBOT that had challenged the proposed allocation of equity in a restructured CBOT. Consistent with the settlement, in the restructuring as now proposed, each Full Member of CBOT will receive 27,338 shares of Class A common stock of CBOT Holdings in three different series, together with one Class B, Series B-1 membership in the CBOT subsidiary. The issuance of a transferable Class C membership in the CBOT subsidiary representing the Exercise Right has been eliminated, because, as described above, in 2004 CBOT amended its rules to provide for the issuance of a transferable "Exercise Right Privilege" to any of its Full Members requesting the same.[9] Since these Exercise Right

[9] As was previously the case for Class C memberships as described in the text above, in order to be

Privileges are intended to serve the same purpose that was to have been served by Class C memberships, and since the rules of CBOT governing the issuance and transfer of Exercise Right Privileges will remain in effect following the effectiveness of the proposed restructuring, there is no longer any need for CBOT to provide for the issuance of Class C memberships in the restructuring.[10]

Other recent changes in the proposed restructuring of CBOT are intended to permit CBOT Holdings to facilitate the creation of public markets in its equity securities and to engage in capital-raising transactions and other securities issuances. Before it can authorize any such transactions, however, the CBOT Holdings board of directors must seek and obtain the approval of a majority of the stockholders of CBOT Holdings to do so (referred to as the "second approval"), which would follow the initial approval of the CBOT membership to implement the steps of the CBOT restructuring up to the point where the second approval is needed. Still other changes concern the transfer restrictions that will apply to CBOT Holdings common stock issued to CBOT members. The transfer of these shares separate from a transfer of the associated Series B-1 CBOT membership will continue to be restricted, as will the transfer of the Series B-1 memberships separate from the transfer of all of the 27,338 shares of Class A common stock associated with them. It is now provided that the transfer restrictions on shares of Class A common stock will be lifted in stages following any underwritten public offering of these shares.

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consistent with the nontransferability of the Exercise Right itself separate from a transfer of the related CBOT Full Membership, the holder of an Exercise Right Privilege may not utilize the Exercise Right it represents unless the holder also holds all of the other rights and privileges of a CBOT Full Member (which, following the restructuring of CBOT, will include the 27,338 shares of Class A common stock and the Class B, Series B-1 membership issued to each CBOT Full Member in the restructuring).

[10] CBOE has interpreted Article Fifth(b) in response to CBOT's recent rule change providing for the issuance of transferable Exercise Right Privileges in accordance with an agreement between CBOE and CBOT dated December 17, 2003. See supra note 5 and accompanying text.

In addition, following the second approval certain additional permitted transfers will be allowed as exceptions to these transfer restrictions. Restrictions on the transfer of Series B-1 memberships and on certain limited transfers of shares of Class A common stock will also be lifted following the "second approval." Finally, the proposed restructuring reflects certain changes to the governance of CBOT Holdings and its CBOT subsidiary, including changes to the size and composition of the boards of directors of both corporations in connection with any underwritten public offering of CBOT Holdings Class A common stock, as well as changes to the voting rights of CBOT members.

On October 7, 2004, CBOE, CBOT Holdings and CBOT entered into the October 2004 Letter Agreement as a further amendment to the 2001 Agreement in order to incorporate in that Agreement and in CBOE's interpretation of the Exercise Right embodied therein the recent changes made by CBOT to its proposed restructuring. The October 2004 Letter Agreement also incorporates the terms of the October 2001 and September 2002 Letter Agreements and provides that it supersedes those two agreements. Finally, in a Letter Agreement among CBOE, CBOT Holdings and CBOT dated February 14, 2005 (the "February 2005 Letter Agreement"), the parties confirmed that the proposed restructuring of the CBOT as described in the registration statement filed by CBOT Holdings and CBOT on Form S-4 under the Securities Act of 1933 as amended at that time, which was shortly before it was declared effective by the Commission, constitutes the CBOT restructuring for purposes of the 2001 Agreement and CBOE's interpretation of Article Fifth(b) embodied therein. The interpretation of Article Fifth(b) embodied in the 2001 Agreement as modified and clarified by the October 2004 Letter Agreement and the February 2005 Letter Agreement (referred to herein as the "2001 Agreement as amended") is intended to confirm to the CBOT and its Full Members that if CBOT is

restructured as proposed, the 1,402 Full Members of the CBOT following the restructuring will continue to be able to utilize the Exercise Right to become members of CBOE in accordance with and subject to the terms and conditions of that interpretation.

The interpretation by CBOE of the Exercise Right embodied in the 2001 Agreement as amended does not displace the interpretation reflected in the 1992 Agreement, except where there are inconsistencies between the interpretation embodied in the modified 2001 Agreement and the interpretation embodied in the 1992 Agreement, the interpretation embodied in the modified 2001 Agreement controls. Neither does it displace CBOE's interpretation of the Exercise Right concerning abbreviated membership approval procedures at CBOT that was filed with and approved by the Commission in SR-CBOE-2002-41, or CBOE's interpretation concerning the effect on the Exercise Right of CBOT rule changes pertaining to the issuance of Exercise Right Privileges that was filed with and approved by the Commission in SR-CBOE-2004-16.[11] Because existing CBOE Rule 3.16 refers to certain terms that were previously defined in the 1992 Agreement and are now further defined in the modified 2001 Agreement, the proposed rule change also includes an amendment to that Rule to make it conform to the definitions in both the 1992 Agreement and the modified 2001 Agreement.

A principal feature of the interpretation embodied in the modified 2001 Agreement is to define who will be an "Eligible CBOT Full Member" and "Eligible CBOT Full Member Delegate" entitled to exercise after CBOT has completed its proposed restructuring. These definitions are intended to apply upon consummation of the proposed CBOT restructuring as specifically described in Amendment No. 13 to CBOT Holdings' Registration Statement on form

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[11] See supra notes 4-7 and accompanying text.

S-4 (Registration No. 333-72184), and any subsequent amendments to that registration statement consented to by CBOE, and in the absence of any other material changes to the structure or ownership of CBOT or to the trading rights and privileges appurtenant to a CBOT Full Membership not contemplated in the restructuring as so described.

As noted above, in the currently proposed restructuring of CBOT, each of the 1,402 CBOT Full Members, who are the only persons currently entitled to the Exercise Right, will receive 27,338 shares of Class A Common Stock of CBOT Holdings representing equity ownership in that corporation and one Series B-1 membership in CBOT representing the trading rights of a CBOT Full Member and specified voting rights in respect of CBOT. Consistent with the interpretation of the Exercise Right embodied in the 1992 Agreement to the effect that in the event of any split or other division of CBOT Full Membership into two or more parts, a CBOT Full Member must hold all of the parts into which his membership may have been divided and all trading rights and privileges appurtenant thereto in order to be able to exercise, the interpretation of the Exercise Right embodied in the modified 2001 Agreement conditions the right of an individual to become a CBOE member by exercise upon that individual's being the owner or delegate of all of the parts distributed in respect of his membership in the restructuring (i.e., the 27,338 Class A shares of common stock of CBOT Holdings and the Series B-1 membership), as well as an Exercise Right Privilege. These interests may be separately bought and sold and bundled and rebundled for purposes of qualifying the owner as eligible to exercise, subject to the restriction on transferability of Class A Common Stock and Series B-1 memberships referred to above. Antidilution adjustments are provided for in the case of certain issuances of additional shares of Class A Common Stock of CBOT Holdings, and the CBOT has

agreed that no Series B-1 Memberships beyond the 1,402 issued in the restructuring will ever be issued.

CBOE's interpretation of the Exercise Right embodied in the 2001 Agreement as amended also addresses CBOE's concerns regarding the expansion of electronic trading of CBOT products. CBOE believes that 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 utilize CBOT memberships only to obtain the Exercise Right, or they would themselves utilize their CBOT membership to become exerciser members, while retaining the right to trade on CBOT on the same terms as members of that exchange. Likewise, CBOE believes that 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 no longer be required to trade CBOT products that are available on the electronic system.

For these reasons, CBOE believes that 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 at least theoretically possible, few CBOT Full Members have ever attempted to trade on both floors in this way. In CBOE's view, 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. For this reason, although the Exercise Right has always been available to all 1,402 CBOT Full Members, CBOE believes 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. Confirming this, during the entire time the Exercise Right has been in effect the percentage of CBOT Full Members who 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 exercised ranged from a high of 29.24% to a low of 25.53%.

Neither the restructuring and demutualization of CBOT nor the development of electronic trading was contemplated at the time the Exercise Right was first established, nor were they addressed in the 1992 Agreement. On the other hand, CBOE believes both have the potential to increase the number of exercise members of CBOE by changing the nature of CBOT full membership in ways different than were intended when the Exercise Right was established. In order to permit the Exercise Right to remain available to CBOT Full Members and Full Member Delegates following the proposed restructuring of CBOT in a manner consistent with what CBOE believes was its original intent, CBOE (with CBOT's concurrence) proposes to interpret its rules governing the Exercise Right (i.e., Article Fifth(b) and the interpretation thereof embodied in the 1992 Agreement) that takes these unforeseen circumstances into account.

CBOE's interpretation of the Exercise Right embodied in the 2001 Agreement as amended is based upon specified agreements made by CBOT Holdings and CBOT. These

include the agreement of CBOT and CBOT Holdings 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.

The 2001 Agreement as amended also reflects the agreement of CBOT to modify its rules effective not later than December 1, 2004, to preclude any Full Member of CBOT who is also an exerciser member of CBOE from trading on the trading floor of CBOT as a member of CBOT at any time when the member is logged on to CBOE's electronic trading platform.[12] 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 2001 Agreement as amended 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.

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[12] CBOE represents that the CBOT has already implemented this modification of its rules.

The revised terms of the proposed restructuring of CBOT increase the likelihood that following the restructuring of CBOT, subject to the "second approval" of the stockholders of CBOT Holdings referred to above, there may be additional issuances of shares of CBOT Holdings Class A Common Stock. In order to prevent the value of the 27,338 shares of CBOT Holdings Class A common stock issued to CBOT Full Members in the restructuring from being diluted as a result of certain below-market issuances to CBOT Full Members, CBOT has agreed that, subject to limited exceptions, no such shares will be issued to CBOT Full Members unless a recognized, independent investment bank or valuation firm has rendered an opinion that the consideration to be received by CBOT Holdings in connection with any such additional issuance is fair to the issuer from a financial point of view, or unless the shares are issued for a consideration that is not less than the consideration received by CBOT Holdings in connection with any concurrent or related issuance for a bona fide business purpose to a person who is not a CBOT Full Member, or unless the consideration is not less that the average of the closing prices of CBOT Holdings Class A Common Stock as reported in the Consolidated Quotation System.

In order to make these restrictions on exercising members and delegates effective for their intended purpose, the 2001 Agreement as amended provides that the application of CBOE's interpretation of the exercise right to the CBOT's holding company structure is conditioned on CBOT and CBOT Holdings meeting obligations to maintain meaningful fee preferences for the members and delegates of CBOT as compared with the fees payable by nonmember customers, and to maintain other incentives to support the value of CBOT Full Membership. In the original 2001 Agreement, these were the direct obligations of CBOT. In the 2001 Agreement as amended, CBOT Holdings is obligated to cause CBOT, as its subsidiary, to comply fully with its obligations under the 2001 Agreement, and not to take any action, directly or indirectly, that if

taken by CBOT itself would amount to a violation of the terms of the 2001 Agreement, or that would cause the various incentives to promote the continued value of CBOT membership, including member and delegate fee preferences and pit closing provisions and seat ownership requirements for CBOT clearing firms as described in the 2001 Agreement, to no longer be meaningful for the purpose stated in the 2001 Agreement.

The 2001 Agreement as amended provides that if disagreements arise between CBOE and CBOT or CBOT Holdings as to whether meaningful fee preferences and other incentives are being maintained, the matter will be referred to arbitration. The arbitrators are authorized to determine whether meaningful member and delegate fee preferences remain in effect, and if not, to specify a remedy for CBOT's or CBOT Holdings' 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 or by CBOT Holdings to take any action required under the remedy specified by the arbitrators within 30 days of the arbitrators' decision.

To facilitate administration of the 2001 Agreement as amended, each party has agreed to provide to the other information regarding the status of members, including exercisers, on a current and continuing basis. CBOE represents that the CBOT has also agreed to amend its rules to implement the provisions of the 2001 Agreement as amended.

2. Statutory Basis

CBOE represents that the interpretation of the Exercise Right embodied in the 2001 Agreement as amended 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[13] in particular, in that they constitute an interpretation of

[13] 15 U.S.C. 78f(b)(5).

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

Although no written comments were solicited or received with respect to the proposed rule change in its present form, comments were received from some members in respect of the prior filing of the interpretation of Article Fifth(b) embodied in the 2001 Agreement that has since been withdrawn, and on August 30, 2001, 10 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.[14] 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.

Since this same procedural issue may again be raised in comments on the proposed rule

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

change, CBOE will repeat here the substance of what it previously said when this issue was raised in the context of the prior filing of the interpretation of Article Fifth(b) embodied in the 2001 Agreement.

CBOE believes any allegation that the 2001 Agreement or the interpretation of Article Fifth(b) embodied therein reflects an amendment of Article Fifth(b), and not an interpretation of that Article, is entirely without merit. The interpretation embodied in the 2001 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 involving the proposed restructuring of CBOT that were not contemplated or addressed in that Article or in any prior interpretations of that Article.

Exactly the same kind of interpretation of Article Fifth(b) was embodied in the 1992 Agreement and in the 2003 Agreement and was the subject of SR-CBOE-2002-41. Each of these 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 an amendment 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.[15]

Just as issues resulting from unanticipated changes at CBOT were addressed in 1992, CBOE believes the proposed restructuring of CBOT, in which the existing rights of CBOT Full

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[15] See supra notes 3-7.

Members will be changed into rights of stockholders in a new holding company and into trading and limited voting rights in a reorganized for profit subsidiary of the holding company, raises unanticipated issues concerning who if anyone should be viewed as a Full Member of CBOT entitled to the Exercise Right following the restructuring. CBOE believes these issues can be resolved only by CBOE's interpreting how Article Fifth(b) will apply under these changed circumstance. Such an interpretation is embodied in the 2001 Agreement as amended, and it, together with a conforming amendment to Rule 3.16, constitutes the proposed rule change filed hereby. 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 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.

If CBOE were 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 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 unanticipated changed circumstances and where its interpretation is entirely consistent with that Article, 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-2005-19 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-2005-19. 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-2005-19 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland
Deputy Secretary

[16] 17 CFR 200.30-3(a)(12).