



State of Utah

DEPARTMENT OF COMMERCE DIVISION OF SECURITIES

Protecting Investors; Promoting Commerce

Michael O. Leavitt
Governor
Ted Boyer
Executive Director
S. Anthony Taggart
Division Director

160 East 300 South
P.O. Box 146760
Salt Lake City, Utah 84114-6760
(801) 530-6600 • FAX (801) 530-6980
e-mail: security@br.state.ut.us
<http://www.securities.state.ut.us>

December 12, 2001

Mr. William E. Tymm
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

Re: CBOT Holdings, Inc.
No-Action Letter
File # B00301028

Dear Mr. Tymm:

In response to your November 21, 2001 letter, the Utah Division of Securities ("Division") has reviewed your request for a no-action letter pursuant to the authority granted by § 61-1-25 (5) of the Utah Uniform Securities Act ("Act") and § R164-25-5 of the Utah Administrative Code ("UAC"). In your request, you describe the restructuring transactions of the Board of Trade of the City of Chicago, Inc.

Based upon the facts presented in your request, the Division will not recommend any enforcement or administrative action should the transaction proceed as outlined in your request. To avoid unnecessary restatement or summarization of the facts set forth in your request, the Division's response is attached to a photocopy of your request.

This response does not purport to express any legal conclusions regarding the applicability of statutory or regulatory provisions of federal or state securities laws to the questions presented. It merely expresses the opinion of the Division on enforcement or administrative actions.

Mr. William Tymm

December 17, 2001

Page 2

As this recommendation is based upon the representations made to the Division, any different facts or conditions of a material nature might require a different conclusion. Furthermore, this No-Action Letter relates only to the transaction described above and will have no value for future similar transactions and does not absolve any party involved from complying with the anti-fraud provisions contained in § 61-1-1 of the Act.

Sincerely,

A handwritten signature in cursive script that reads "Paula W. Faerber".

Paula W. Faerber
Staff Attorney

Enclosure

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

200 East Randolph Drive
Chicago, Illinois 60601

312 861-2000

Facsimile:
312 861-2200

William Tymn
To Call Writer Directly:
(312) 861-2062
william_tymn@chicago.kirkland.com

November 21, 2001

UPS NEXT DAY AIR

Mr. Mark Snyder
Department of Commerce
Division of Securities
160 East 300 South
2nd Floor
Salt Lake City, Utah 84111

Re: CBOT Holdings, Inc.
 Board of Trade of the City of Chicago, Inc.
 Request for No-Action

Dear Mr. Snyder:

In connection with proposed restructuring transactions (the "Restructuring Transactions") involving the Board of Trade of the City of Chicago, Inc. (the "CBOT"), it is contemplated that CBOT Holdings, Inc., a new stock, for-profit holding company ("CBOT Holdings"), would be created. It is also contemplated for the CBOT, which is currently a nonstock, not-for-profit corporation, to be reorganized into a for-profit, nonstock corporation and be a subsidiary of CBOT Holdings.

Pursuant to the Restructuring Transactions, each member of the CBOT would receive shares of common stock of CBOT Holdings in accordance with a specified allocation methodology and one of five series of Class B membership in the CBOT. Each full member of the CBOT would also receive a Class C membership in the CBOT. The common stock is the subject of a pending application for registration which has been filed with your office. The Class B and Class C memberships are the subject of this letter.

On behalf of CBOT Holdings and the CBOT, we hereby respectfully request that the staff of the Division of Securities (the "Division") of the Utah Department of Commerce confirm that the Division will not recommend enforcement action if CBOT Holdings and the CBOT carry out the Restructuring Transactions without registering the offer or sale of Class B and Class C memberships of the CBOT to the CBOT members in connection therewith in reliance upon the position that such memberships should not be deemed to be "securities" within the

KIRKLAND & ELLIS

Mr. Mark Snyder
November 21, 2001
Page 2

meaning of Section 61-1-13(24) of the Utah Uniform Securities Act (the "Utah Act") and, therefore, are not subject to the registration requirements of Section 61-1-7 thereof. A similar request under the Securities Act of 1933 (the "Securities Act") has been submitted to the staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC No-Action Request"). A copy of the SEC No-Action Request is attached to this request and is incorporated herein.

The SEC No-Action Request provides a description of the Restructuring Transactions as well as a discussion as to why exchange memberships should not be construed to be securities within the meaning of Section 2(a)(1) of the Securities Act. Since the definition of a security in Section 2(a)(1) of the Securities Act is very similar to the definition of a security set forth in Section 61-1-13(24) of the Utah Act, the same arguments set forth in the SEC No-Action Request are hereby made in connection with the Utah Act. For your information, as of October 25, 2001 there were two CBOT memberships (including one full membership) held by a person located in Utah.

This request has been directed to you since you are familiar with the Restructuring Transactions by virtue of your review of the application that is currently pending under the Utah Act for registration of the common stock to be issued by CBOT Holdings. If no-action requests under the Utah Act are handled by another person in your office, please forward this request to that person. If that person would like a copy of the Form S-4 Registration Statement that has been sent to you in connection with your review of the common stock offering, please let me know.

If any fee is required or if anyone has any questions or needs any additional information concerning this request, please contact the undersigned. Since the CBOT hopes to be able to send the proxy statement concerning the Restructuring Transactions to its members in approximately three weeks, your prompt attention to this request would be appreciated.

Very truly yours,


William E. Tymms

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

200 East Randolph Drive
Chicago, Illinois 60601

312 861-2000

Joseph P. Gromacki
To Call Writer Directly:
(312) 861-2424

Facsimile:
312 861-2200

**K&E DRAFT - 11/15/2001
PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT**

1933 Act/Sections 2(a)(1) and 5(a)

[Date], 2001

VIA SPECIAL COURIER

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: CBOT Holdings, Inc.;
Board of Trade of the City of Chicago, Inc.
Registration Statement on Form S-4
File No. 333-72184
Request for No-Action

Dear Ms. Dubberly:

On behalf of CBOT Holdings, Inc., currently a Delaware stock corporation ("CBOT Holdings") and a wholly owned subsidiary of Board of Trade of the City of Chicago, Inc., currently a Delaware nonstock corporation (the "CBOT"), and the CBOT, we hereby respectfully request that the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") confirm that the Commission will not recommend enforcement action if CBOT Holdings and the CBOT carry out the proposed Restructuring Transactions (as defined below) in the manner described below without registering the offer or sale of Class B and Class C memberships of the CBOT to the CBOT members in connection therewith in reliance upon our advice that such memberships should not be deemed to be "securities" within the meaning of

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 2

Section 2(a)(1) of the Securities Act of 1933 (as amended, the "Securities Act") and, therefore, are not subject to the registration requirements of Section 5 thereof.

THE RESTRUCTURING TRANSACTIONS

I. Background of the Restructuring Transactions

The CBOT was organized in 1848 as a voluntary, unincorporated association to serve as an open outcry marketplace for the growing agricultural market in Chicago. In 1859, the Illinois General Assembly, by legislative act, granted the CBOT a special charter that incorporated it. In August 2000, the CBOT reincorporated in Delaware, and the CBOT currently exists as a Delaware nonstock, not-for-profit corporation. Now in its 153rd year of operation, the CBOT is a leading provider of open outcry and electronic trading markets for listed futures and options on futures contracts.

As a result of rapidly evolving changes in the futures industry, principally the increasing importance of electronic trading, the CBOT has determined that it is necessary to restructure its organization in order to enhance its competitiveness. As described in the combined proxy statement and prospectus contained within that certain Registration Statement on Form S-4, Registration No. 333-72184, initially filed by CBOT Holdings on October 24, 2001 (as amended, the "Registration Statement"), the CBOT intends to propose for approval by its members a series of transactions (referred to herein as the "Restructuring Transactions") that are designed to:

- demutualize the CBOT by creating a stock, for-profit holding company, CBOT Holdings, and distributing shares of common stock of CBOT Holdings to the CBOT members, while maintaining the CBOT as a nonstock, for-profit subsidiary of CBOT Holdings (for purposes of this no-action request, following completion of the Reorganization Merger (as defined below), any reference to the CBOT in this capacity shall be to the "CBOT Subsidiary") in which the CBOT members would hold memberships entitling them to certain trading rights and privileges on the exchange operated by the CBOT Subsidiary;
- modernize the CBOT's corporate governance structure by substantially eliminating the current membership "petition process," adopting a more modern mechanism for

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 3

initiating and voting on stockholder proposals and making other changes designed to improve the CBOT's decision-making process; and

- reorganize and consolidate the CBOT's electronic trading business, part of which is currently operated by Ceres Trading Limited Partnership, a Delaware limited partnership ("Ceres"), into Electronic Chicago Board of Trade, Inc., a Delaware corporation and wholly owned subsidiary of the CBOT ("eCBOT"), which would initially be operated as a wholly owned corporate subsidiary of the CBOT Subsidiary after the Restructuring Transactions.

The CBOT believes that the completion of the Restructuring Transactions will enable it to enhance its competitiveness within the futures industry, including its competitiveness within both the open outcry and electronic trading markets.

II. Overview of the Current Organization of the CBOT

The CBOT's current certificate of incorporation provides that the CBOT is not-for-profit and has no authority to issue capital stock. There are currently five classes of members that comprise the membership of the CBOT: (i) Full Members, (ii) Associate Members, (iii) GIMs, (iv) IDEMs and (v) COMs. Full Members are entitled to execute trades in all futures and options contracts listed for trading on the CBOT. Associate Members, GIMs, IDEMs and COMs are entitled to execute trades in futures and options contracts assigned to one or more of the market categories known as the "Government Instrument Market," the "Index, Debt and Energy Market" and the "Commodity Options Market."

The Government Instrument Market currently includes contracts in certain U.S. government and agency securities, certain foreign government securities and certain domestic certificates of deposit. The Index, Debt and Energy Market includes contracts in certain stock and bond indices, certain money market instruments and certain energy (i.e., crude oil, gasoline, and heating oil) products. The Commodity Options Market includes contracts in U.S. Treasury Bond futures options and all other options contracts listed for trading by the CBOT. Associate Members are entitled to execute trades in each of the Government Instrument Market, the Index, Debt and Energy Market and the Commodity Options Market. GIMs, IDEMs and COMs are entitled to execute trades in the Government Instrument Market, the Index and Energy Market and the Commodity Options Market, respectively.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 4

Under the current certificate of incorporation and bylaws of the CBOT, in the event of a liquidation of the CBOT, the proceeds from the dissolution would be shared among the Full Members, Associate Members, GIMs, IDEMs and COMs in a 6.00 : 1.00 : 0.67 : 0.03 : 0.03 ratio, respectively. In addition, under the current certificate of incorporation and bylaws of the CBOT, Full Members and Associate Members have the right to vote on all matters submitted to a vote of the general membership. Each Full Member is entitled to one vote per Full Membership and each Associate Member is entitled one-sixth of one vote per Associate Membership on all such matters. GIMs, IDEMs and COMs do not have any voting rights under the current certificate of incorporation and bylaws of the CBOT.

III. Description of the Restructuring Transactions

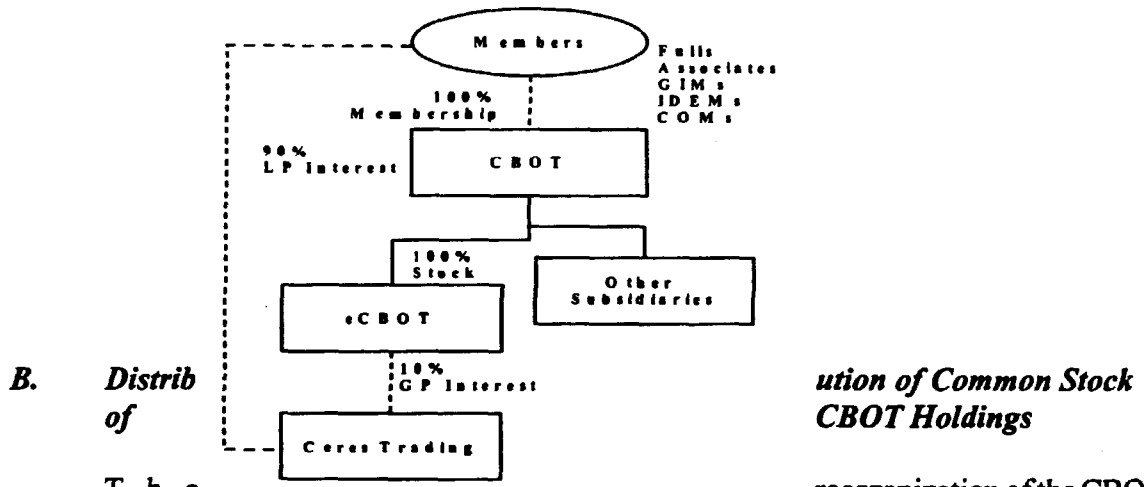
The Restructuring Transactions consist of a series of transactions designed to (1) demutualize the CBOT's organization by creating a stock, for-profit holding company, CBOT Holdings, and distributing shares of common stock of CBOT Holdings to the CBOT's members, while maintaining the CBOT as a nonstock for-profit subsidiary of CBOT Holdings in which the CBOT members would hold memberships entitling them to certain trading rights and privileges on the exchange operated by the CBOT Subsidiary; (2) modernize the CBOT's corporate governance structure by substantially eliminating the current membership "petition process" described in the Registration Statement, adopting a more modern mechanism for initiating and voting on stockholder proposals and making other changes designed to improve the CBOT's decision-making process; and (3) reorganize and consolidate the CBOT's electronic trading business, part of which is currently operated by Ceres, into eCBOT, its wholly owned subsidiary. The Restructuring Transactions are described in greater detail in the Registration Statement.

A. Formation of CBOT Holdings and CBOT Merger Sub

In connection with the Restructuring Transactions, the CBOT has formed two merger subsidiaries, CBOT Holdings, Inc. and CBOT Merger Sub, Inc., for the purpose of effecting the demutualization. CBOT Holdings, a Delaware stock, for-profit corporation, is currently a direct and wholly owned subsidiary of the CBOT. CBOT Merger Sub, a Delaware nonstock, for-profit membership corporation, is currently a direct and wholly owned subsidiary of CBOT Holdings. The following chart generally depicts the organizational structure of the CBOT as it will exist immediately prior to the consummation of the Reorganization Merger:

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
 Office of Chief Counsel
 Division of Corporation Finance
 Securities and Exchange Commission
 [Date], 2001
 Page 5



The reorganization of the CBOT into a holding company structure will be accomplished by means of the Reorganization Merger, which, as described below, will result in the CBOT becoming a subsidiary of CBOT Holdings. The Reorganization Merger will not, however, result in the distribution of shares of common stock of CBOT Holdings to the members. Consequently, a separate mechanism will be utilized to effect the distribution of common stock of CBOT Holdings to the members.

Prior to consummating the Reorganization Merger, the CBOT's board of directors will declare a dividend of shares of the common stock of CBOT Holdings that will be payable to each CBOT member as of a specified record date upon the effectiveness of the Reorganization Merger. The number of shares of common stock of CBOT Holdings to be paid to each CBOT member as a result of this dividend will be as follows:

**Shares of Common Stock of CBOT Holdings
 to Be Received Per CBOT Membership**

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 6

<u>Membership</u>	<u>Shares of Common Stock</u>
Full	25,000
Associate	5,000
GIM	2,500
IDEM	300
COM	350

This allocation is based on the allocation methodology developed and recommended by the Independent Allocation Committee, a committee of the CBOT's board of directors, and adopted by the CBOT's board of directors, as further described in the Registration Statement.

The common stock of CBOT Holdings will generally have traditional features of common stock, including dividend, voting and liquidation rights. In particular, the common stock of CBOT Holdings will provide the holder with the right to receive dividends as determined by the board of directors of CBOT Holdings and the right to share in the proceeds of liquidation, in each case ratably on the basis of the number of shares held and subject to the rights of any preferred stock that could be issued in the future. In addition, holders of common stock of CBOT Holdings will have the right to vote on all matters upon which stockholders of CBOT Holdings will be entitled to vote generally, including, among other things, the election of directors to the board of directors of CBOT Holdings.

C. *Reorganization Merger*

Pursuant to an agreement and plan of merger, the CBOT will merge with CBOT Merger Sub, with the CBOT being the surviving entity (the "Reorganization Merger"). Upon completion and as a result of the Reorganization Merger, the CBOT will become a nonstock, for-profit membership corporation and a subsidiary of CBOT Holdings. In connection with the Reorganization Merger, the CBOT Subsidiary will create three new classes of membership: Class A, Class B and Class C memberships.

- 1. *Class A Membership.*** CBOT Holdings will hold the sole Class A membership in the CBOT Subsidiary, which will entitle CBOT Holdings to the exclusive right to vote on most matters requiring a vote of the members of the CBOT Subsidiary, as well as the exclusive right to receive all

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 7

distributions, dividends and proceeds upon liquidation from the CBOT Subsidiary.

2. ***Class B Memberships.*** The Class B memberships will consist of five separate series: Series B-1, Series B-2, Series B-3, Series B-4 and Series B-5, with each series having associated with it trading rights and privileges that correspond to one of the current five classes of membership of the CBOT. Class B memberships will not be entitled to the right to receive any distributions, dividends or proceeds upon liquidation of the CBOT Subsidiary and will generally not have voting rights with respect to matters requiring a vote of the members of the CBOT Subsidiary, except that the holders of Series B-1 and Series B-2 Class B memberships will have limited voting rights to approve changes to the certificate of incorporation, bylaws and rules and regulations of the CBOT Subsidiary that would adversely affect certain "core rights" relating to the trading rights and privileges associated with Class B memberships.

The "core rights" with respect to which the holders of Series B-1 and Series B-2 Class B memberships will have special voting rights will include: (i) the allocation of products that a holder of a specific series of Class B membership is permitted to trade on the exchange facilities of the CBOT Subsidiary; (ii) the requirement that Class B members will be charged transaction fees for trades of the CBOT subsidiary's products for their accounts that are lower than the transaction fees charged to any participant who is not a Class B member for the same products; (iii) the authorized number of memberships of any class or series of memberships in the CBOT Subsidiary; (iv) the membership and eligibility requirements to become a Class B member or to exercise the associated trading rights and privileges; and (v) the commitment to maintain current open outcry markets so long as each such market is deemed liquid under the terms of the certificate of incorporation of the CBOT Subsidiary. As set forth in the table below, in connection with the Restructuring Transactions, each CBOT member will receive one of the five series of Class B memberships in the CBOT Subsidiary in respect of each membership held by such member.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 8

3. **Class C Memberships.** Each Full Member of the CBOT will also receive a Class C membership in the CBOT Subsidiary, which will, subject to satisfaction of certain requirements, entitle the holder to exercise a right to become a member of the Chicago Board Options Exchange (the "CBOE") without having to purchase a membership on such exchange. Class C memberships will not be entitled to the right to receive any distributions, dividends and proceeds upon liquidation of the CBOT Subsidiary and will have no voting rights with respect to matters requiring a vote of the members of the CBOT Subsidiary. Following completion of the Restructuring Transactions, the Class C membership of the CBOT Subsidiary will represent the so-called "exercise right" of Full Members to become members of the CBOE without having to purchase a membership in such exchange, as described more fully in the Registration Statement. This exercise right is set forth in the certificate of incorporation of the CBOE and is currently held by each Full Member of the CBOT.

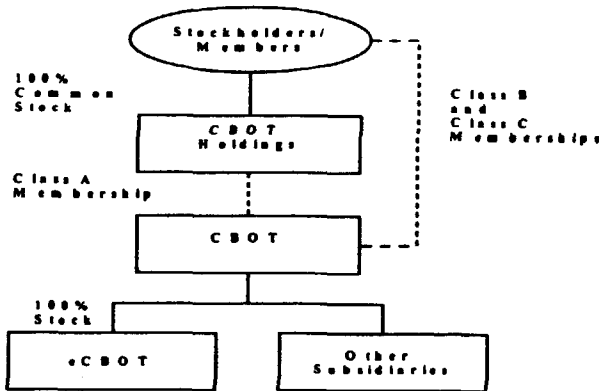
The following chart sets forth the number and series of Class B and Class C memberships in the CBOT Subsidiary to be received by each CBOT member as a result of the Restructuring Transactions:

Membership in the CBOT Subsidiary to be Received Per CBOT Membership		
<u>Class of CBOT Membership</u>	<u>Number and Series of CBOT Subsidiary Class B Memberships</u>	<u>Number of CBOT Subsidiary Class C Memberships</u>
Full	1 Series B-1	1 Class C
Associate	1 Series B-2	—
GIM	1 Series B-3	—
IDEM	1 Series B-4	—
COM	1 Series B-5	—

Following completion of the Reorganization Merger, the structure of the CBOT will be as set forth in the following chart:

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 9



In addition, in connection with the demutualization, the CBOT intends to modernize its corporate governance structure by substantially eliminating the membership petition process, adopting a more modern mechanism for initiating and voting on stockholder proposals and making certain other changes designed to improve its corporate decision-making process. Also, as part of the Restructuring Transactions, the CBOT intends to reorganize and consolidate its electronic trading business into its wholly owned corporate subsidiary, eCBOT. These aspects of the Restructuring Transactions are described in greater detail in the Registration Statement.

DISCUSSION

The Securities Act generally requires that, unless otherwise exempt from the registration requirements of the Securities Act, any offer or sale of securities in interstate commerce or through the use of the mails must be registered in accordance with the provisions of Section 5 of the Securities Act. Section 2(a)(1) of the Securities Act defines a security as "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights . . . or, in general, any interest or instrument commonly known as a 'security'"

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 10

If an instrument or document does not fall within one of the categories delineated in this definition, it is not subject to the registration requirements of Section 5 of the Securities Act and, therefore, does not need to be registered before it is sold or offered for sale. Based on the legal analysis contained herein, we have advised CBOT Holdings and the CBOT that the conversion of current CBOT memberships into Class B and/or Class C memberships in connection with the Reorganization Merger should not be deemed to be an offering or sale of securities that would require registration under the Securities Act because such Class B and Class C memberships do not constitute "securities" within the meaning of Section 2(a)(1) of the Securities Act.

I. Exchange Memberships Are Not Securities Within the Meaning of Section 2(a)(1) of the Securities Act

To our knowledge, exchange memberships have never been considered to be securities subject to the registration requirements of the Securities Act. Indeed, in the three most recent no-action letters that address the status of an exchange membership as a security, the Staff has granted no-action relief on the basis of the facts presented in connection with each exchange's view that memberships on the American Stock Exchange¹ ("AMEX"), the European Mercantile Exchange² ("EME") and the International Petroleum Freight Exchange³ ("IPF"), as applicable, did not constitute "securities" within the meaning of Section 2(a)(1) of the Securities Act. In addition, in what we believe to be the only published case to address this specific issue, the United States District Court for the Eastern District of Pennsylvania concluded that a membership on the Philadelphia Stock Exchange ("PHLX") did not constitute a "security" within the meaning of Section 2(a)(1) of the Securities Act.⁴

The characteristics of the memberships in the IDF, EME, AMEX and the PHLX described in the no-action letters and case referred to above are substantially similar in all material

¹ See American Stock Exchange, No-Action Letter, 1998 WL 388485 (July 10, 1998) (the "AMEX No-Action Letter").

² See European Mercantile Exchange, No-Action Letter, 1988 WL 234954 (October 11, 1988) (the "EME No-Action Letter").

³ See International Petroleum Freight Exchange, Incorporated, No-Action Letter, 1973 WL 20442 (March 12, 1973) (the "IPF No-Action Letter").

⁴ See *Ferreri v. Goldberg*, 1989 WL 11073 (E.D. Pa. 1989).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 11

respects to the characteristics of the Class B and Class C memberships in the CBOT Subsidiary that will be issued to the CBOT members in connection with the Restructuring Transactions.⁵ Specifically, each of the memberships in the IDF, EME, AMEX and PHLX grants to the holder of such membership certain trading rights and privileges with respect to the applicable exchange. In addition, such trading rights and privileges may be exercised by the holder of a membership, or such trading rights and privileges may be leased by the owner to a third party, who may then exercise such trading rights and privileges. Like the holders of Class B and Class C memberships in the CBOT Subsidiary, none of the holders of memberships in the IDF, EME, AMEX and PHLX are entitled to receive regular dividends or distributions of the profits of such exchange.⁶

A. The *Howey* Test

An exchange membership does not constitute a security because it does not constitute any of the specific types of instruments or documents identified in the definition and is "not commonly known as a 'security.'"⁷ The only type of instrument set forth in Section 2(a)(1) of the Securities Act with characteristics remotely resembling an exchange membership is that of an "investment contract." Indeed, in each of the no-action letters referred to above, the Staff granted no-action relief on the basis of the facts presented in connection with each exchange's view that the exchange memberships at issue did not constitute a security and thus were not subject to the registration requirements of the Securities Act because the various memberships did not fall within the definition of an "investment contract" established by the Supreme Court in *Securities and Exchange Commission v. Howey Co.*⁸ Additionally, in the case referred to above, the court concluded, based on an analysis of exchange memberships as investment contracts under the *Howey*

⁵ In addition, we note that NYMEX Holdings, Inc. initially filed a registration statement on Form S-4, Registration No. 333-30332 (as amended, the "NYMEX Registration Statement"), on February 14, 2000, which was declared effective by the Commission on May 19, 2000, that related to certain restructuring transactions substantially similar to the Restructuring Transactions described herein. In particular, the restructuring transactions described in the NYMEX Registration Statement include the creation of a stock, for-profit holding company and the issuance of memberships in the non-stock, for-profit subsidiary of such holding company.

⁶ See AMEX No-Action Letter, 1998 WL388485 at * 6; EME No-Action Letter, 1988 WL 234954 at *7 ; IPF No-Action Letter, 1973 WL 20442 at *2; *Ferreri*, 1989 WL 11072 at *3.

⁷ Securities Act of 1933, Section 2(a)(i).

⁸ 328 U.S. 293 (1946).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 12

test, that seats on the PHLX did not constitute securities subject to the registration requirements of the Securities Act.

In *Howey*, the Supreme Court defined an "investment contract" as "a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promoter or a third party"⁹ In order to constitute an investment contract and, therefore, a security within the meaning of Section 2(a)(1) of the Securities Act, an instrument must satisfy all four parts of the *Howey* test. For the reasons set forth below, the Class B and Class C memberships of the CBOT Subsidiary do not satisfy all four elements of the *Howey* test and therefore do not constitute "investment contracts." Consequently, we believe that the Class B and Class C memberships of the CBOT Subsidiary should not be deemed to be "securities" within the meaning of Section 2(a)(1) of the Securities Act and, accordingly, are not subject to the registration requirements of the Securities Act.

1. Investment of Money in a Common Enterprise

The CBOT acknowledges that the CBOT Subsidiary's Class B and Class C memberships may satisfy the first two elements of the *Howey* test in that a purchaser of such memberships could be viewed as investing money in a common enterprise. Nevertheless, even if the purchase of a CBOT Subsidiary Class B or Class C membership would satisfy the first two elements of the *Howey* test, it fails to satisfy the last two elements of the *Howey* test because the purchaser of a membership clearly does not expect a profit solely from the efforts of others.

2. Expectation of Profits

The third element of the *Howey* test requires that the investor have an expectation of profits from the investment in the common enterprise. Holders of Class B and Class C memberships in the CBOT Subsidiary will be unlikely to have any expectation of direct profits in the form of dividends or distributions from the CBOT Subsidiary, because the holders of Class B and Class C memberships in the CBOT Subsidiary will not be entitled to dividends or any other distributions of the CBOT Subsidiary's profits, including proceeds upon liquidation of the CBOT Subsidiary. CBOT Holdings, as the holder of the sole Class A membership in the CBOT Subsidiary, will be entitled to the exclusive right to receive any and all distributions, dividends and proceeds upon liquidation from the CBOT Subsidiary.

⁹ *Id.* at 299.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 13

The fact that the AMEX, IPF and EME members were not entitled to dividends or distributions of profits was relied upon significantly in the facts and legal analysis presented by each such exchange in the no-action letters referenced above. Indeed, each of the AMEX, the IPF and the EME demonstrated that their respective memberships did not entitle holders to dividends or any other distributions of the profits in order to show that the members did not earn profits from the efforts of the exchange management or any third party.¹⁰ On the basis of the arguments presented by each exchange, the Staff granted no-action relief on the basis of the facts presented in connection with each exchange's view that the exchange memberships at issue did not constitute investment contracts under *Howey*.

The CBOT acknowledges that, similar to the AMEX, IPF and EME members, the Class B and Class C memberships in the CBOT Subsidiary may provide the holder thereof with an expectation of profits from four sources that would not otherwise be available to a person without a CBOT Subsidiary membership. First, a holder of a Class B or Class C membership in the CBOT Subsidiary will have the opportunity to earn profits through the exercise by such holder of the trading rights and privileges associated with the applicable class of membership, which profits by their very nature result from the personal efforts of the member rather than the management of the CBOT Subsidiary or any other third party. Second, a holder of a Class B or Class C membership in the CBOT Subsidiary may also earn profits by leasing the trading rights and privileges associated with the applicable class of membership to an individual approved of by the CBOT Subsidiary and receiving a payment from the lessee in consideration of such lease. Third, a holder of a Class B or Class C membership in the CBOT Subsidiary may earn profits by selling the membership after it has appreciated over the course of time. Fourth, a holder of a Class B or Class C membership in the CBOT Subsidiary may indirectly receive the benefit of profits generated by transaction fees, rent or other revenues received by the CBOT Subsidiary as a result of the operation of the exchange in the form of reduced transaction or other fees charged by the exchange to the member.

Arguably, these opportunities to earn a profit may satisfy the third element of the *Howey* test in that they could lead a purchaser of a CBOT Subsidiary membership to expect to receive the benefit of profits generated at the CBOT Subsidiary. Nevertheless, as explained in greater detail below, the profits associated with these activities clearly fail the fourth element of the *Howey* test because such profits would not result solely from the efforts of a third party.

¹⁰ See AMEX No-Action Letter, 1998 WL388485 at *6; EME No-Action Letter, 1988 WL 234954 at *7; IPF No-Action Letter, 1973 WL 20442 at *2.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 14

3. Profits Available to CBOT Subsidiary Members Will Not Derive Solely From the Efforts of Others

As discussed above, it is well established that the expectation of profits alone is not sufficient in and of itself to satisfy both the third and the fourth elements of the *Howey* test. Rather, "[t]he touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."¹¹ In making the distinction between an "investment contract" subject to the federal securities laws and an investment not subject to the federal securities laws, the Supreme Court in *Forman* noted that, with an "investment contract," "the investor is 'attracted solely by the prospects of a return' on his investment. . . . [b]y contrast, when a purchaser is motivated by a desire to use or consume the item purchased—to occupy or consume the land or to develop it themselves,' . . . the [federal] securities laws do not apply."¹² The Supreme Court further emphasized the distinction between an "investment contract" and the purchase of an item or instrument for use by the investor: "What distinguishes a security transaction—and what is absent here—is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use."¹³

Accordingly, the expectation of profits relating to ownership of a Class B or Class C membership in the CBOT Subsidiary must result solely from the entrepreneurial or management efforts of the management of the CBOT Subsidiary or another third party in order to satisfy the fourth element of the *Howey* test. As discussed more fully below, although a member may earn profits by successfully using the membership and taking advantage of the opportunities associated with a CBOT Subsidiary membership by exercising the associated trading rights and privileges, these profits do not result solely, substantially or primarily from the efforts of the management of the CBOT Subsidiary or other third parties. We discuss below each of the four aspects of the Class B and Class C memberships in the CBOT Subsidiary which could be viewed as leading to an expectation of profits.

a. Profits from Exercising Trading Privileges

¹¹ *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975).

¹² *Forman*, 421 U.S. at 853 (quoting *Howey*, 328 U.S. at 300).

¹³ *Id.* at 858.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 15

Holders of Class B and Class C memberships may have an expectation of profits through the successful exercise of the trading rights and privileges associated with such memberships. By their very nature, these profits will not derive solely from the efforts of the CBOT management or any other third party. In sharp contrast, these profits will be attributable primarily to the effort, skill and authority of the individual member in exercising such trading rights and privileges at the exchange operated by the CBOT Subsidiary. Indeed, if a member chooses not to exercise the trading rights and privileges associated with a membership, he or she will realize no profits by virtue of membership ownership, regardless of the amount of effort and energy exerted by the management of the CBOT Subsidiary in operating the exchange or the efforts of any third party.

In establishing a test for determining whether investment profits result solely from the efforts of others under the *Howey* test, the United States Court of Appeals for the Ninth Circuit has held that the question turns on "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."¹⁴ In the case of profits resulting from efforts relating to the exercise of the trading rights and privileges associated with a CBOT Subsidiary membership, the "undeniably significant ones" are those of the membership holder, utilizing his or her personal skill and effort to generate profits from the exercise of trading rights and privileges associated with the membership on the exchange operated by the CBOT Subsidiary. This characteristic, along with the fact that exchange memberships did not generally entitle holders thereof to dividends or other distributions, led the Staff to grant no-action relief on the basis of the facts presented in connection with each exchange's position in each of the no-action letters discussed above that the exchange memberships at issue did not constitute an "investment contract" under the *Howey* test.

In the earliest consideration of this issue by the Staff, the IPF requested no-action relief from the Staff with respect to the IPF's position that memberships on the IPF did not constitute securities and, thus, an offer or sale thereof did not require registration, or an exemption therefrom, under the Securities Act. To support this position, the IPF noted that its memberships did not satisfy the elements of an "investment contract" under *Howey* because "the members of the Exchange will be using their own individual efforts, skills and authority to achieve profit, rather than depending

¹⁴ *Securities and Exchange Commission v. Turner Enterprise, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 16

upon the efforts of a promoter or third party as is the case in an investment."¹⁵ In the IPF's no-action letter, the IPF represented that it did not distribute any of its profits to its members. On the basis of this representation, as well as other representations made in the request, the Staff granted no-action relief in connection with the offer or sale of memberships of in the IPF without registration or any exemption therefrom under the Securities Act.

Similarly, the EME requested no-action relief from the Staff in connection with the EME's position that EME memberships did not constitute a "security" or "investment contract" under Section 2 of the Securities Act. The EME emphasized the fact that "the ownership of a seat produces absolutely no income in and of itself," although noting that a member could obtain a profit from exercising trading rights and privileges or leasing the seat.¹⁶ The EME sought to demonstrate that exchange memberships did not constitute an "investment contract" under *Howey*. The EME identified several factors supporting the conclusion that memberships did not allow the holders thereof to reap profits solely from the efforts of others. First, "a seat holder will not have any significant expectation of profits or dividends or other economic yield from the operation of the Exchange."¹⁷ Second, any profits obtained by a member of the EME exchange would require the member's own efforts and skill rather than those of a third party or promoter. Finally, "memberships or seats on futures exchanges have traditionally been regarded as privileges as distinguished from investments. Although the sophisticated futures trader takes into account the money value of his seat, he acquires the seat in order to trade actively *rather than in order to reap passive profits*."¹⁸ Based on these factors, the Staff granted no-action relief on the basis of the facts presented in connection with the EME's view that a membership on the EME exchange did not constitute a "security" because "a member's economic yield will be primarily attributable to active trading efforts separate from EME's activities"¹⁹

More recently, in 1998 the AMEX effected a restructuring in which it transferred substantially all of its assets to a for-profit subsidiary organized as a limited liability company (the

¹⁵ IPF No-Action Letter at *1.

¹⁶ EME No-Action Letter at *5.

¹⁷ *Id.*

¹⁸ *Id.* at *7 (emphasis added).

¹⁹ *Id.* at *9.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 17

"AMEX LLC"). Upon completion of this restructuring, the AMEX members retained all trading rights and privileges on the exchange. Subsequent to the transaction, the AMEX LLC operated the exchange, and the AMEX acted as a holding company. In connection with this restructuring, the AMEX sought no-action relief from the Staff of the Commission in connection with the AMEX's conclusion that memberships on the exchange did not fall within the definition of "securities" under the Securities Act, and any offer or sale thereof did not need to be registered. Like the EME and the IPF, the AMEX supported this position on the basis that memberships did not qualify as "investment contracts" under the test set forth in *Howey*.

While acknowledging that an exchange membership satisfied the first two elements of the *Howey* test (i.e., an investment in a common enterprise), the AMEX maintained that the AMEX exchange memberships did not satisfy the last two elements of the *Howey* test; that is, the purchaser of a membership on the AMEX exchange did not "expect profits . . . solely from the efforts of the promoter or a third party."²⁰ The AMEX emphasized the fact that the memberships did not entitle the holders thereof to receipt of dividends. In addition, the AMEX maintained that any profits to be realized would result from the individual efforts and skills of each seat owner in exercising his or her trading rights rather than by virtue of his or her status as a member of the exchange. In short, the AMEX underscored the fact that "if the trading privileges are not exercised, a Seat Owner would receive no revenues at all in respect of his or her seat."²¹ The Staff concurred with this analysis and granted no-action relief on the basis of the facts presented in connection with the AMEX's conclusion that the memberships did not constitute securities.

Like the exchange memberships in the AMEX, the EME and the IPF, the characteristics of the CBOT Subsidiary's Class B and Class C memberships will not lead a purchaser to expect to earn profits solely from the efforts of others. The "undeniably significant" efforts necessary for a holder of Class B or Class C memberships in the CBOT Subsidiary to earn a profit pursuant to ownership of this membership are those related to the exercise by the individual holder of the trading rights and privileges associated with such membership. The Class B and Class C memberships in the CBOT Subsidiary will not entitle the holders thereof to any distributions, dividends or proceeds upon liquidation from the CBOT Subsidiary. In order to obtain any profit from the purchase of a Class B or Class C membership, a member will rely upon his or her own personal effort and skill in exercising his or her trading rights and privileges (whether on the

²⁰ *Howey*, 328 U.S. at 299.

²¹ Amex No-Action Letter at *7.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 18

exchange operated by the CBOT Subsidiary or the exchange operated by the CBOE), rather than relying solely on the management or entrepreneurial efforts of CBOT Subsidiary management or any other third party.

b. Profits from Leasing Memberships

Although the holders of Class B and Class C memberships in the CBOT Subsidiary will have the ability to earn profits by leasing the trading rights and privileges associated with their memberships to certain qualified third parties and receiving a payment therefor, several factors suggest that such profits are not the type of profits that would transform an exchange membership into a "security" within the meaning of Section 2(a)(1) of the Securities Act.

The fact that exchange members have the potential to earn profits through leasing the trading rights and privileges associated with exchange memberships has never persuaded the Commission or the courts to conclude that a membership in an exchange constitutes an "investment contract" under the *Howey* test or any other type of security under the Securities Act. Indeed, despite the fact that the AMEX and the EME each described the ability of their respective members to earn profits by leasing the trading rights and privileges associated with their memberships, the Staff granted no-action relief on the basis of the facts presented in connection with each such exchange's view that the ability to lease or rent the trading rights and privileges associated with a membership did not render such a membership a "security" within the meaning of Section 2(a)(1) of the Securities Act.

In *Ferreri v. Goldberg Securities, Inc.*, the United States District Court for the Eastern District of Pennsylvania considered whether seats on the PHLX constituted "securities" under the Securities Act.²² In *Ferreri*, the plaintiff, the owner of two seats on the PHLX, leased the seats to customers of the defendant securities firm. After the plaintiff failed to sell the seats to a third party, the plaintiff alleged that the defendant had committed securities fraud under Section 10(b) of the Securities Exchange Act of 1934 (as amended, the "Exchange Act"). The court addressed the issue of whether seats on the exchange constituted securities in order to determine whether the antifraud provisions of the Exchange Act would have applied to the sale of the seats. In addressing this issue, the court applied the *Howey* test and concluded that a membership on the

²² 1989 WL 11073 at *3.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 19

PHLX did not constitute an investment contract, notwithstanding the fact that the plaintiff/member realized profits from the lessees' occupancy of the seats.²³

Accordingly, we do not believe that the fact that Class B and Class C memberships in the CBOT Subsidiary may be leased to other parties, and the lessors of such memberships would receive payment therefor, cause such memberships to constitute securities within the meaning of Section 2(a)(1) of the Securities Act.

c. Profits from Selling a Membership

As previously noted, a holder of a Class B or Class C membership in the CBOT Subsidiary may also earn a profit from selling such membership to the extent it appreciates in value over the course of time. Like the profits associated with leasing a membership, the profits associated with selling a membership do not transform a membership into an investment contract or any other form of security. First, in order to satisfy the fourth element of the *Howey* test, the profits received from selling a Class B or Class C membership must result solely from the efforts of others. Any profits associated with the sale of a Class B or Class C membership in the CBOT Subsidiary will depend upon the market value of such membership at the time of the sale. The value of a Class B or Class C membership and, accordingly, the amount of profits to be realized upon the sale of any such membership, will depend in large part on the attractiveness of the financial markets generally at the time of the sale, and other exogenous factors that are generally independent of the CBOT Subsidiary management.

In *Grenader v. Spitz*, the United States Court of Appeals for the Second Circuit addressed the issue of whether stock in a New York City apartment house cooperative constituted an investment contract under the *Howey* test. In addressing the fourth element of the *Howey* test and whether the cooperative's management had any influence on the amount of appreciation a stockholder would realize upon a sale, the court recognized the efforts of the cooperative management but concluded that such efforts did not satisfy the *Howey* test:

While efficient management of the cooperative will enhance its desirability as a place of residence, it is hardly a factor which would result in the in the appreciation of value of the shares of the Corporation Realistically, that will depend upon the general

²³ *Id.* at *3 (emphasis added).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 20

housing market, the status of the neighborhood and the availability of credit.²⁴

The same can be said for the activities of the CBOT Subsidiary management vis-à-vis the value of the Class B and Class C memberships in the CBOT Subsidiary. While their activities, efforts and policies may enhance the status of the exchange as a forum for the trading of financial instruments, as the court concluded in *Ferreri*, the market value of a membership will, in large part, be determined by the state of the economy and the attractiveness of the securities market and other similar factors.²⁵

Second, although it has been held that profits from capital appreciation can satisfy the fourth element of the *Howey* test under certain circumstances,²⁶ the availability of profits upon the sale of a membership has not generally convinced courts that the underlying memberships satisfy the fourth element of the *Howey* test. For example, in *United Housing Foundation, Inc. v. Forman*, the Supreme Court considered whether or not stock in a non-profit housing cooperative constituted an investment contract under the *Howey* test. While recognizing that in some cases capital appreciation can satisfy the fourth element of the *Howey* test, the court made a distinction between investment contracts subject to the federal securities laws and investments not subject to the federal securities laws and concluded that, with an investment contract, "the investor is 'attracted solely by the prospects of a return' on his investment. . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased—to occupy or consume the land or to develop it themselves,' . . . the securities laws do not apply."²⁷ Under this analysis, a Class B or Class C membership in the CBOT Subsidiary would not be an investment contract even if, over time, the value of such membership may appreciate because an individual that purchases a CBOT Subsidiary membership does so not for the prospect of earning a profit from the capital appreciation upon the sale of the membership but, instead, to have the opportunity to exercise the trading rights and privileges associated with the membership and, if successful, earn a living thereby.

²⁴ *Grenader v. Spitz*, 537 F.2d 612, 629 (2nd Cir. 1976).

²⁵ *Ferreri*, 1989 WL 11072 at *3.

²⁶ *See Forman*, 421 U.S. at 852.

²⁷ *Id.* at 853 (quoting *Howey*, 328 U.S. at 300).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 21

Finally, the fact that exchange members have been able to make a profit from the sale of memberships has never previously persuaded the Commission that such memberships constitute "investment contracts" or any other type of security. Indeed, in each of the no-action letters discussed above, the members of the AMEX, the EME and the IPF all had the ability to enjoy a profit upon the sale of the applicable membership, depending upon the state of the market at the time of the sale. Nevertheless, the Staff granted no-action relief on the basis of the facts presented in connection with each exchange's view that the applicable memberships did not constitute "securities" within the meaning of Section 2(a)(1) of the Securities Act.

d. Indirect Benefits Based Upon Fees, Rent and Other Revenues Received by the CBOT Subsidiary

Holders of Class B and Class C memberships in the CBOT Subsidiary will also arguably have the opportunity to indirectly benefit from profits generated by the CBOT Subsidiary based upon revenues from fees charged to recipients of its market data and rents from tenants in real estate properties that it owns as well as other revenues that it may generate in the future. Based on the current practices of the CBOT, we expect that this income will be used to discount or reduce charges to members of the CBOT Subsidiary that would otherwise be assessed in order to maintain and operate the exchange as a forum for trading by and among the members upon the exercise of their trading rights and privileges. However, the indirect benefit of such income of the CBOT Subsidiary will be insignificant by comparison to the profits that a member may earn from his or her own efforts in trading on the exchange and thus should not transform a membership into an investment contract for purposes of the federal securities laws. Indeed as the court noted in *Grenader*, it can hardly be said that an individual would be motivated to purchase a membership or other interest in an entity solely based upon the indirect expectation of profit that he or she would receive from the discounts available as a result of income received by the an entity.²⁸ Moreover, a holder of a membership in the CBOT Subsidiary must actually exercise the trading rights and privileges associated with the membership in order to receive indirectly such profits. In short, any profits in which a Class B or Class C member of the CBOT Subsidiary will participate by virtue of owning a membership will not be primarily attributable to the fees, rent or other revenues received by the CBOT Subsidiary.

²⁸ 612 F.2d at 617.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 22

The fact that exchange members have historically been able to indirectly benefit from the profits generated by the income received by exchanges as a result of fee, rent or other income has never previously persuaded the Commission that such memberships constitute "investment contracts" or any other type of security. Indeed, in both the AMEX no-action letter discussed above and the *Forman* case, the members of the AMEX and the residents of the housing cooperative, respectively, each had the ability to receive profits from the exchange or the cooperative, as applicable, as a result of reduced fees assessed due to income received from third parties.²⁹ Nevertheless, the Staff granted no-action relief on the basis of the facts presented in connection with AMEX's view that the applicable memberships did not constitute "securities" within the meaning of Section 2(a)(1) of the Securities Act, and the Supreme Court in *Forman* found that "stock" purchased in the housing cooperative did not constitute a "security" within the meaning of Section 2(a)(1) of the Securities Act.

B. The For-Profit Status of the CBOT Subsidiary Has No Bearing on the Conclusion that the Class B and Class C Memberships Are Not Securities Because the For-Profit Status Is Irrelevant Under the *Howey* Test

The *Howey* test does not depend on the status of the company issuing the instruments, whether it be for-profit or not-for-profit, in determining whether the instrument is an investment contract. Instead, the critical question under *Howey* is whether the purchaser of the exchange membership expects to receive profits from the efforts of others, including, in this case, the management of the CBOT Subsidiary, which will operate the exchange.

If an exchange operates as a for-profit entity, certain circumstances could compel the conclusion that exchange members might have the right to receive profits from the efforts of others through the payments of dividends or other distributions of the profits of the exchange. However, this conclusion would be compelled only in the event that the holders of the exchange memberships are entitled to receive dividends or distributions of any profits generated by such exchange. The real issue under *Howey* is not whether the exchange operates as a not-for-profit entity, but instead whether the members expect to receive profits from the efforts of others.

²⁹ See AMEX No-Action Letter at *10 (receipt of fees for information by AMEX); *Forman*, 421 U.S. at 856 (receipt of income from commercial tenants leasing cooperative units).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 23

The holders of Class B and Class C memberships of the CBOT Subsidiary will not be entitled to receive any distributions, dividends or proceeds upon liquidation from the CBOT Subsidiary with regard to these memberships. Rather, only CBOT Holdings, as the holder of the sole Class A membership in the CBOT Subsidiary, will be entitled to receive the profits of CBOT Subsidiary. Except to the limited extent described above, purchasers of Class B or Class C memberships will have no ability to share in any profits generated by the exchange operated by the CBOT Subsidiary. Thus, notwithstanding the fact that the CBOT Subsidiary will operate as a for-profit entity, the Class B and Class C memberships will not constitute investment contracts because the holders thereof will not have the ability to receive profits solely from the efforts of a third party (nor would it be reasonable for such holders to have any expectation of profits).³⁰

In each of the no-action letters discussed above, the exchanges cited their not-for-profit status in support of their position that their members would not receive profits solely from the efforts of the management of the exchange. In so doing, the exchanges underscored the fact that their members would not receive any of the profits generated by the exchanges through dividends or other types of distributions. The exchanges did this not because *Howey* requires this in order to demonstrate the absence of an investment contract, but because traditionally the not-for-profit status of the applicable entity prevented it from paying dividends to its members or stockholders.

As a corporation organized under the Delaware General Corporation Law, however, the status of the CBOT Subsidiary does not affect the exchange's ability to pay dividends to its stockholders or members. Indeed, as a result of certain recent changes to the Delaware General Corporation Law, it has become clear that a Delaware corporation may pay dividends out of its surplus to its members or stockholders, whether it is a for-profit or not-for-profit entity.³¹ Thus, even if the CBOT Subsidiary conducted its business as a Delaware, not-for-profit corporation, this fact

³⁰ In this regard, we note that the Restructuring Transactions have been specifically structured so that the sole mechanism for the distribution of any profits earned by the CBOT Subsidiary (or any other part of CBOT Holdings) to the CBOT members will be the declaration and payment of dividends or other distributions in respect of the common stock of CBOT Holdings, shares of which the CBOT members will also receive in connection with the Restructuring Transactions. We believe that the common stock of CBOT Holdings are "securities" within the meaning of Section 2(a)(1) of the Securities Act and, accordingly, the offer and sale of such securities in connection with the Restructuring Transactions are being registered in accordance with the provisions of Section 5 of the Securities Act pursuant to the Registration Statement. This is substantially similar to the approach taken by NYMEX pursuant to the NYMEX Registration Statement in connection with its restructuring and demutualization.

³¹ See Delaware General Corporation Law, tit. 8, § 170 (2001).

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 24

alone would not be enough to lead to the conclusion that its members could not expect to receive profits from the efforts of others. Consequently, because the status of the CBOT Subsidiary as a for-profit corporation has no impact on its ability to declare and pay dividends to its members, the critical question in demonstrating the absence of the fourth element under *Howey* becomes whether the Class B and Class C members will be entitled to dividends or other distributions from the profits of the CBOT Subsidiary. As discussed above, the Class B and Class C members of the CBOT Subsidiary will not be entitled to any such distributions, dividends or proceeds upon liquidation from the CBOT Subsidiary.

Accordingly, because the holders of Class B and Class C memberships in the CBOT Subsidiary cannot expect to receive profits solely from the efforts of others, the fourth element of the *Howey* test cannot be satisfied even if the CBOT Subsidiary will operate as a for-profit entity.

II. The Securities Laws Should Not Apply to the Memberships Issued by the CBOT Subsidiary Because the CBOT Subsidiary Will Be Governed by Alternative Regulatory Schemes

Where an alternative regulatory scheme exists to protect investors, the Supreme Court has been reluctant to extend the application of the federal securities laws to perform the same function.³² For example, in *International Brotherhood of Teamsters v. Daniel*, the Supreme Court held that the federal securities laws did not apply to interests in a pension plan for two reasons. First, the interests in the pension plan did not constitute an investment contract under the *Howey* test. Second, the fact that the Employment Retirement Income Security Act of 1974³³ provided an extensive regulatory scheme for employee pension plans "severely undercut[s] all arguments for extending the Securities Acts to [the] pension plan."³⁴ In so holding, the Supreme Court reasoned that "whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA."³⁵

³² See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979).

³³ 29 U.S.C. § 1001 et seq.

³⁴ *Id.* at 569-70.

³⁵ *Id.* at 570.

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 25

Similarly, the federal securities laws should not apply to the distribution of Class B and Class C memberships by the CBOT Subsidiary to the CBOT members because the members will be adequately protected by at least two alternative regulatory schemes applicable to such transaction. First, the operations of the CBOT are currently (and the operations of the CBOT Subsidiary will be) subject to oversight, and the activities of the members are subject to extensive regulation, by the Commodity Futures Trading Commission under the Commodities Exchange Act. Second, following completion of the Restructuring Transactions, CBOT Holdings, the parent company of the CBOT Subsidiary, will be subject to the reporting requirements of the Exchange Act and will be required to comply with the reporting standards thereunder that are designed to protect investors who purchase shares of common stock in CBOT Holdings. Because the CBOT members receiving Class B and Class C memberships in the CBOT Subsidiary will be adequately protected by these two regulatory schemes, there is no need for the application of the Securities Act to the conversion of existing memberships in the CBOT into Class B and Class C memberships in the CBOT Subsidiary pursuant to the Restructuring Transactions.

CONCLUSION

Based on the foregoing analysis and discussion, we believe that Class B and Class C memberships in the CBOT Subsidiary do not constitute "securities" within the meaning of Section 2(a)(1) of the Securities Act, and therefore the CBOT Subsidiary is not required to register any offer or sale thereof in accordance with the provisions of Section 5 of the Securities Act, including in connection with the conversion of the existing memberships in the CBOT into Class B or Class C memberships in the CBOT Subsidiary in connection with the proposed Restructuring Transactions.

Please direct any and all notices, orders and inquiries related to this request to: CBOT Holdings, Inc. and the CBOT Subsidiary, c/o Board of Trade of the City of Chicago, Inc., 141 West Jackson Boulevard, Chicago, Illinois 60604, attn: Carol A. Burke, Executive Vice President and General Counsel, (312) 435-3726, with a copy to: Kirkland & Ellis, 200 East Randolph Drive, Chicago, Illinois 60601, attn: Joseph P. Gromacki, (312) 861-2424, counsel to the CBOT and CBOT Holdings.

* * * * *

KIRKLAND & ELLIS

Ms. Paula Dubberly, Esq.
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
[Date], 2001
Page 26

In connection with this request, we would be pleased to provide the Staff with any additional information that the Staff may desire and which may facilitate its review of this request for no-action relief.

Please do not hesitate to contact Carol A. Burke at (312) 435-3726, Executive Vice President and General Counsel of the CBOT and CBOT Holdings, or Joseph P. Gromacki at (312) 861-2424 or Michael T. Wolf, at (312) 861-3267, each of Kirkland & Ellis, counsel to the CBOT and CBOT Holdings, with questions or requests for additional information.

Very truly yours,

Joseph P. Gromacki

Enclosures

cc: Todd K. Schiffman , Securities and Exchange Commission
Carol A. Burke, Board of Trade of the City of Chicago, Inc.
Robert S. Osborne, P.C., Kirkland & Ellis
John H. Stassen, P.C., Kirkland & Ellis
Michael T. Wolf, Kirkland & Ellis