SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51543; File No. SR–CBOE–2005–23]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Accelerated Approval to a Proposed Rule Change To Amend CBOE Rule 8.4 To Remove the Physical Trading Crowd Appointment Alternative for Remote Market-Makers and To Create an ''A+'' Tier Consisting of the Two Most Actively-Traded Products on the Exchange

April 14, 2005.

On March 15, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend CBOE Rule 8.4(d) to remove the Physical Trading Crowd (''PTC'') appointment alternative for Remote Market-Makers (''RMMs'') and to create an ''A+'' Tier consisting of the two most actively-traded products on the Exchange.

The proposed rule change was published for comment in the **Federal Register** on March 21, 2005.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of section 6 of the Act[5] and the rules and regulations thereunder. The Commission specifically finds that the proposed rule change is consistent with section 6(b)(5) of the Act[6] in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the proposal is published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Act.[7] The Commission believes that accelerating approval of the proposal is necessary to accommodate the rollout of CBOE's RMM program. In particular, the Commission notes that the proposal would enable CBOE to commence its RMM program with two of the most actively-traded products included, options on Standard & Poor's Depositary Receipts (Spiders) and options on the Nasdaq-100 Index Tracking Stock (QQQQs), under a new ''A+'' Tier designation. Furthermore, the Commission notes that the proposal would eliminate the PTC appointment option for RMMs and would require them to have a Virtual Trading Crowd appointment, which should allow them greater flexibility to choose their own appointments. The Commission therefore believes that accelerated approval of the proposed rule change is appropriate and finds that it is consistent with the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[8] that the proposed rule change (SR–CBOE–2005–23) be approved.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51542; File No. SR-CBOE–2005–22]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Accelerated Approval to a Proposed Rule Change To Adopt an Inactivity Fee To Be Charged Against Remote Market-Makers That Fail To Commence Quoting in Their Appointed Classes

April 14, 2005.

On March 15, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt an inactivity fee to be charged against Remote Market-Makers (''RMMs'') that fail to commence quoting in their appointed classes.

The proposed rule change was published for comment in the **Federal Register** on March 21, 2005.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of Section 6 of the Act[5] and the rules and regulations thereunder. The Commission specifically finds that the proposed rule change is consistent with section 6(b)(4) of the Act[6] in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the proposal is published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Act.[7] The Commission believes that accelerating approval of the proposal is necessary to accommodate the rollout of CBOE's RMM program. In particular, the Commission notes that accelerated approval of the proposal would enable CBOE to commence its RMM program with the inactivity fee in place, which should help to ensure that RMMs are aware that they will be subject to fees if they fail to submit quotations in their appointed classes. The Commission further notes that the proposal should help to prevent an RMM that obtains an electronic appointment in a product from not initiating quoting in that product. In addition, the Commission notes that the proposed inactivity fee is similar to a fee imposed by the International Securities Exchange (''ISE'').[8] The Commission therefore believes that accelerated approval of the proposed rule change is appropriate and finds that it is consistent with the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51371 (March 15, 2005), 70 FR 13557.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51370 (March 15, 2005), 70 FR 13559.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(2).

[8] *See* Securities Exchange Act Release 46272 (July 26, 2002), 67 FR 50497 (August 2, 2002); *see also* ISE Regulatory Information Circulars 2002–04 and 2002–09.

[9] 15 U.S.C. 78s(b)(2).

proposed rule change (SR-CBOE–2005–22) be approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51568; File No. SR–CBOE–2004–16]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Denying Motion for Reconsideration of Order Setting Aside Earlier Order Issued by Delegated Authority and Granting Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)

April 18, 2005.

I

On February 25, 2005, we issued an order (''Order'') setting aside a July 15, 2004 order [1] that approved by authority delegated to the Division of Market Regulation a proposed rule change (SR–CBOE–2004–16) submitted by the Chicago Board Options Exchange, Incorporated (''CBOE''), and approving the proposed rule change as amended.[2] Our Order was in response to a petition for review submitted by Marshall Spiegel (''Petitioner'') on August 23, 2004.[3] The CBOE's proposed rule change interprets certain terms used in Article Fifth(b) of CBOE's Certificate of Incorporation (''Article Fifth(b)''). Article Fifth(b) relates, in part, to the ability of a Board of Trade of the City of Chicago, Inc. (''CBOT'') member to become a member of the CBOE without purchasing a CBOE membership (''Exercise Right''). CBOE's stated purpose behind its proposed rule change is the interpretation of Article Fifth(b) in accordance with the original intent of the Article to clarify which individuals will be entitled to the Exercise Right upon distribution by the CBOT of a separately transferable interest (''Exercise Right Privilege'') representing the Exercise Right component of a CBOT membership.

In issuing the Order, we found that the CBOE provided a sufficient basis for finding that, as a federal matter under the Securities Exchange Act of 1934 (''Exchange Act''), the CBOE complied with its Certificate of Incorporation, as required by Section 6(b)(1) of the Exchange Act,[4] in determining that its proposed rule change was an interpretation of, not an amendment to, Article Fifth(b).[5] Further, we found that the proposed rule change was consistent with the Exchange Act, including Section 6(b)(5) thereunder.[6]

II

A motion to reconsider is governed by Rule 470 of the Commission's Rules of Practice.[7] Rule 470 permits us to reconsider our decisions in exceptional cases.[8] The remedy is intended to correct manifest errors of law or fact or to permit the presentation of newly discovered evidence.[9] We find that Petitioner's motion for reconsideration does not present the exceptional circumstances required to compel us to reconsider our earlier Order in that it does not present any newly discovered evidence [10] and does not support any findings of manifest errors of law or fact underlying our Order.

A. Petitioner's Assertion That the CBOE Board's Proposed Rule Change Is an Amendment Because the Change Affects Equity Holder Rights Is a New Argument

Petitioner's brief in support of his motion to reconsider contends that the CBOE's action of interpreting Article Fifth(b) alters the rights of CBOE equity holders. Petitioner states that ''[p]reviously, exercise rights were inalienable from full CBOT membership,'' and that ''[h]ere, the CBOT unilaterally has sought to change the exercise rights into separate securities.'' [11] Petitioner continues by noting that the way in which these changes by the CBOT are treated by the CBOE under Article Fifth(b) will affect the legal and economic rights of the CBOT exercise right.[12] Because the CBOE honors the changes being made by the CBOT, Petitioner claims it diminishes the rights and interests of CBOE treasury seat holders by recognizing a new class of persons who have economic influence over the CBOE.[13] There would be a different result, Petitioner argues, if CBOE determined that the Exercise Right under Article Fifth(b) would be extinguished if ever transferred apart from the sale or rental of a full CBOT membership.[14] Because the Petitioner believes that the interpretation by the CBOE ''alters the rights of various and distinct classes of CBOE equity interest holders,'' he contends that such interpretation is an amendment under Delaware Law.[15]

This appears to us to be a new argument presented by Petitioner. Petitioner previously argued that the December 17, 2003 agreement between the CBOE and the CBOT (''2003 Agreement'') and the CBOE's proposed rule change amended Article Fifth(b) by redefining the term CBOT member ''by permitting CBOT members to carve up membership rights and sell them separately to third parties without extinguishing their rights to CBOE

[10] 17 CFR 200.30–3(a)(12).

[1] Securities Exchange Act Release No. 50028 (July 15, 2004), 69 FR 43644 (July 21, 2004).

[2] Securities Exchange Act Release No. 51252 (Feb. 25, 2005), 70 FR 10442 (Mar. 3, 2005) (hereinafter ''Order'').

[3] Letter from Marshall Spiegel, CBOE Equity Member, to Margaret H. McFarland, Deputy Secretary, Office of the Secretary, Commission, dated September 13, 2004.

[4] 15 U.S.C. 78f(b)(1).

[5] Order, *supra* note 2, at 10444.

[6] *Id.* at 10447.

[7] 17 CFR 201.470.

[8] *See In the Matter of the Application of Reuben D. Peters, et al.*, Securities Exchange Act Release No. 51237 (Feb. 22, 2005), at text accompanying n. 6 (Admin. Proc. File No. 3–11277) (addressing the application of Rule 470).

[9] *See In the Matter of KPMG Peat Marwick LLP,* Securities Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, 1352–53 n.7 (Admin. Proc. File No. 3–9500) (specifying that efficiency and fairness concerns embodied in federal court practice of rejecting motions for reconsideration unless correction of manifest errors of law or fact or presentation of newly discovered evidence is sought ''likewise inform our review of motions for reconsideration under Rule 470'').

[10] Petitioner's brief does, however, appear to present new arguments in support of his position. We note that settled principles of federal court practice establish that a party may not seek rehearing of an appellate decision in order to advance an argument that it could have made previously but elected not to. *See, e.g., Anderson v. Beatrice Foods Co.,* 900 F.2d 388, 397 (1st Cir. 1990). In considering motions for reconsideration of federal district court rulings, courts have likewise cautioned that ''[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence'' and that a ''motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made. * * * *. *Z.K. Marine, Inc.* v. *M/V Archigetis,* 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (quoting *Harsco Corp.* v. *Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985)). The efficiency and fairness concerns that underlie these settled principles of federal court practice likewise inform our review of motions for reconsideration under Rule 470. *See KPMG Peat Marwick LLP,* Order Denying Request for Reconsideration, Securities Exchange Act Release No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351.

[11] Brief in Support of Motion of Marshall Spiegel for Reconsideration of the Commission's February 25, 2005 Order, dated March 7, 2005, at 7 (''Petitioner's Brief in Support of Motion to Reconsider'').

[12] *Id.* at 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*