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.

[FR Doc. E5–1884 Filed 4–21–05; 8:45 am]

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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.*

membership under Article Fifth(b).'' [16] Petitioner argued that ''[t]his fundamental change and augmentation in the economic and legal rights of CBOT members and the structure of CBOT membership materially and profoundly affect the economics and legal rights of CBOE membership and governance.'' [17] In response to this argument, we noted that neither the 2003 Agreement nor the proposed rule change alter CBOT membership rights or permit the CBOT to divide membership rights by issuing Exercise Right Privileges.[18] Petitioner also argued previously that the CBOT actions alter the economic and corporate relationships among current CBOE members and, thus, constitute an amendment to Article Fifth(b).[19] The Petitioner did not, however, make an argument—as he does now—that the interpretation by the CBOE Board diminishes the rights of CBOE equity holders and, therefore, is an amendment under Delaware law. Because Petitioner cannot raise an argument for the first time on a Motion for Reconsideration, the Commission is not addressing the merits of this new argument.[20]

B. Petitioner's Assertion That the Commission Did Not Consider the CBOE Board's Conflict of Interest Is a New Argument

Petitioner contends, in another new argument first raised in his motion to reconsider, that the Commission ''does not even deign to address—and appears oblivious to—the material conflicts of interests of the Board of Directors of [CBOE] in attempting to 'interpret' the Certificate of Incorporation* * *.'' [21] Petitioner elaborates on his position by arguing that ''the CBOE Board, which owes fiduciary duties of honesty, loyalty and good faith to all equity holders, is conflicted with respect to the interpretation it has made* * *.'' [22] Petitioner is not permitted to raise an argument for the first time on a Motion for Reconsideration and, for this reason, the Commission is not addressing the merits of this new argument.[23]

C. Petitioner's Assertion That the Commission Erred in Accepting the CBOE Board's Authority To Determine the Question of What It Means To Be a CBOT Member Is Without Merit

The Petitioner argues that the Commission's Order ''manifestly errs in concluding that the CBOE Board has independent, unilateral, and final authority to determine the answer* * *'' to the question of what it means to be a ''member of the [CBOT]'' under Article Fifth(b).[24] Petitioner asserts that Delaware law does not permit the CBOE Board to make such an interpretation, and that the fiduciary obligations on the CBOE Board under Delaware and federal law preclude the Board from doing so.[25]

First, Petitioner mischaracterizes our conclusion. Nowhere in our Order did we conclude that the CBOE Board has independent, unilateral, and final authority to determine what it means to be a ''member of the [CBOT]'' under Article Fifth(b). The CBOE cannot interpret the term ''member of the [CBOT]'' under Article Fifth(b) in a manner the Commission does not find consistent with the Exchange Act. Instead, we stated that we found ''persuasive CBOE's analysis of the difference between 'interpretations' and 'amendments,' and the letter of counsel that concludes that it is within the general authority of the CBOE's Board to interpret Article Fifth(b) and that the 'Board's interpretation of Article Fifth(b) contemplated by the [2003 Agreement] does not constitute an amendment to the Certificate and need not satisfy the voting requirements of Article Fifth(b) that would apply if the Article were being amended.''' [26] The letter of CBOE's legal counsel also stated that in interpreting Article Fifth(b), the CBOE Board must make such determination in good faith, consistent with the terms of Article Fifth(b) and not for inequitable purposes.

Further, we do not find persuasive Petitioner's assertion that fiduciary obligations on the CBOE Board under Delaware law and federal law preclude the Board from interpreting its Certificate of Incorporation. We have previously found that the CBOE submitted sufficient support for its position that its proposed rule change involved an interpretation of Article Fifth(b) of its Certificate of Incorporation.[27] Accordingly, we do not believe that fiduciary duties preclude the CBOE Board from interpreting its Certificate of Incorporation in an attempt to address potential interpretive ambiguities that the CBOE and CBOT have identified in advance of the CBOT's restructuring. Accordingly, Petitioner's contention regarding the authority of the CBOE Board is without merit.

D. Petitioner Erroneously Asserts a Manifest Error in the Commission's Application of Contract Interpretation

The Petitioner asserts that the Commission's application of principles of contract interpretation to uphold the CBOE Board's interpretation is manifestly erroneous, arguing that the Order ''errs in its conclusion incorporated from the CBOE's Statement in Support of Approval that principles of contract interpretation support the Commission's ruling.'' [28] We did not, contrary to the Petitioner's assertion, apply principles of contract interpretation in our Order in the manner suggested by Petitioner, nor did we incorporate by reference any principles of contract interpretation included in the CBOE's Statement in Support of Approval. Rather, we found that the CBOE provided a ''sufficient basis on which the Commission can find that, as a federal matter under the Exchange Act, the CBOE complied with its own Certificate of Incorporation in determining that the proposed rule change is an interpretation of, not an amendment to, Article Fifth(b).'' [29] Further, we found persuasive CBOE's analysis of the difference between ''interpretations'' and ''amendments'' and the letter of CBOE's counsel concluding that it is within the general authority of the CBOE's Board to interpret Article Fifth(b)* * *.'' [30] Finally, we did ''not believe that Petitioner's argument refuted, to any degree, CBOE's analysis of why its proposed rule change is an interpretation of Article Fifth(b), not an amendment.'' [31] Accordingly, we find Petitioner's assertion of error in the Commission's purported application of contract principles to be without merit.

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[16] Legal Memorandum of Points and Authorities in Support of the Statement of Petitioner Marshall Spiegel in Opposition to Staff Action, Oct. 26, 2004, at 4 (''Legal Memorandum'').

[17] *Id.*

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

[19] Legal Memorandum, *supra* note 16, at 5.

[20] *See supra* note 10 (discussing the standard of review for a motion to reconsider).

[21] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 1.

[22] *Id.* at 2.

[23] *See supra* note 10 (discussing the standard of review for a motion to reconsider).

[24] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 3.

[25] *Id.*

[26] Order, *supra* note 2, at 10444 (quoting Letter from Michael D. Allen, Richard, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, CBOE (June 29, 2004), at 5).

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

[28] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 10.

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

[30] *Id.*

[31] *Id.*

E. Petitioner's Assertion That the Commission Improperly Relied on the Letter of CBOE's Outside Counsel Is Without Merit

Petitioner further contends that the Commission's ''reliance'' on the opinion of CBOE's outside counsel is manifestly erroneous.[32] Petitioner claims that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale to support its characterization of the CBOE's action as an ''interpretation'' of Article Fifth(b) and accordingly should be given less weight.[33] Petitioner decried the opinion letter's elevation of ''form over substance,'' its failure to ''address the circumstances when an 'interpretation' must also be deemed in substance an amendment,'' and its failure to discuss ''the CBOE Board's conflict of interest in making and enforcing the interpretation at issue here.'' [34]

Petitioner's assertion that the opinion letter of CBOE's outside counsel failed to cite any relevant authority or provide any rationale is incorrect. Further, we did not solely rely on the opinion of CBOE's outside counsel. We found the opinion letter, along with the CBOE's Statement in Support of Approval, to be ''persuasive,'' and we found that those materials provided a ''sufficient basis'' to support a finding that, ''as a federal matter under the Exchange Act, the CBOE complied with its own Certificate of Incorporation in determining that the proposed rule change is an interpretation of, not an amendment to, Article Fifth(b).'' [35] Further, and most importantly, we specifically noted that we did ''not believe that Petitioner's argument refutes, to any degree, CBOE's analysis of why its proposed rule change is an interpretation of Article Fifth(b), not an amendment.'' [36] Accordingly, we find Petitioner's allegation of error based on the letter of CBOE's outside counsel to be without merit.

F. Petitioner's Allegation That the Commission Made a Finding Suggesting That Not Approving CBOE's Interpretation Would Paralyze the Exchange Is Factually Baseless

Petitioner concludes his brief by arguing that ''[t]he Commission's Order finding (incorporated from page 6 of the CBOE's Statement in Support of Approval) that failing to approve the CBOE Board's 'interpretation' would 'paralyze' the Exchange is without basis in fact.'' [37] As stated above, while we cited to the CBOE's Statement in Support of Approval, we did not incorporate by reference the substance of that document into our Order. Nor did we make any finding in our Order that failing to approve the CBOE's rule change would paralyze the CBOE. Accordingly, Petitioner's argument is unsupported and will not be considered as grounds for reconsideration.

III

In the alternative, Petitioner suggests that ''the CBOT's recent formal actions to demutualize have the capacity to render the proposed rule change moot'' since the proposed rule change, the Petitioner argues, is only relevant if the CBOT is structured as a member organization.[38] Accordingly, the Petitioner suggests that the Commission should consider holding final determination of the validity of the proposed rule change in abeyance until the CBOT members' vote on whether to demutualize is complete.[39] We disagree. Self-regulatory organizations are not required to delay making changes to their rules in order to account for future contingencies that may or may not impact such rule in the future. Rather, to the extent that changed circumstances warrant further revisions to the CBOE's rules, the CBOE would need to submit a subsequent rule change pursuant to Section 19(b)(1) of the Act [40] and Rule 19b–4 thereunder.[41] Accordingly, we see no reason to hold final determination of this motion to reconsider in abeyance as suggested by Petitioner.

Accordingly, we find that Petitioner's motion does not present the exceptional circumstances required for us to reconsider our earlier Order.

It is therefore ordered, that the motion for reconsideration filed by Marshall Spiegel be, and it hereby is, *denied.*

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–1912 Filed 4–21–05; 8:45 am]

BILLING CODE 8010–01–P

[32] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 12. *See also* Statement of Chicago Board of Options Exchange in Support of Approval of Rule Under Delegated Authority, October 26, 2004.

[33] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 12–13.

[34] *Id.* at 12.

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

[36] *Id.*

[37] Petitioner's Brief in Support of Motion to Reconsider, *supra* note 11, at 13.

[38] *Id.* at 3.

[39] *Id.*

[40] 15 U.S.C. 78s(b)(1).

[41] 17 CFR 240.19b–4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51522; File No. SR—NASD–2005–050]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Nasdaq Opening Process for Nasdaq-Listed Stocks

April 11, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 11, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I are II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq is filing a proposed rule change to begin the pre-market trading session on a voluntary basis at 8 a.m. rather than 9:25 a.m. The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].[5]

* * * * *

4701. Definitions

(a)—(rr) No Change.

(ss) The term ''Total Day'' or ''X Order'' shall mean, (a) For orders in *ITS Securities* so designated, that if after entry into the Nasdaq Market Center, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display between 7:30 a.m. and 6:30 p.m. and for potential execution between market open *(9:30 a.m.)* and 6:30 p.m., after

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

[2] 17 CFR 240.19b–4.

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

[4] 17 CFR 240.19b–4(f)(6).

[5] The proposed rule change is marked to show changes from the rule tet appearing in the NASD Manual available at *http://www.nasd.com.*