members are placing their own or a control entity's securities. They also point out that some limits are already in place via other rules or guidelines.

NTM 07–27 required additional disclosures beyond what was proposed by FINRA to the Commission, but FINRA requested specific comment as to whether those additional disclosures should be put back into the Rule.[53] Only one commenter addressed this question, but did support FINRA's decision to remove these additional disclosures.[54]

One commenter objected to limiting the requirement of filing the offering document with FINRA to FINRA members only.[55] FINRA responded that private offerings by members raise unique conflicts that necessitate the Rule. Further, that there is potential for abuse in private offerings by non-members is not a rationale for abandoning the proposal.

One commenter challenged FINRA's ability to keep the documents submitted to them confidential in spite of the promise of confidential treatment in proposed Rule 5122(d).[56] FINRA strongly disagreed with this assessment. This commenter also argued that there were insufficient occurrences of disconcerting behavior by members to warrant a rule, asserted that the Rule required a private placement memorandum and objected to a new requirement to do so, argued that the anti-fraud rules were sufficient to address the behavior FINRA was concerned with, objected to the filing requirement generally, objected to making the offering document available for the member examination process, argued that accredited investors should be excepted from the Rule, and argued that the Rule was an over-reaction to the findings cited by FINRA in the proposal.[57]

IV. Discussion and Findings

After careful review of the proposed rule change, the comments, and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[58] In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[59] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that FINRA is seeking to protect investors and the public interest as a result of numerous findings of disconcerting behavior by its members in connection with MPOs. The Commission also believes that FINRA has tailored the Rule to prohibit members or associated persons from offering or selling securities in certain MPOs in order to ensure that investors are protected from such abusive conduct with minimal disruption on capital formation. The Commission notes that, as explained in the supplementary material to the Rule, nothing in the Rule shall require a member to prepare a private placement memorandum that meets the additional requirements of Securities Act Rule 502.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[60] that the proposed rule change (File No. SR–FINRA–2008–020), as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[61]

Florence E. Harmon,

Deputy Secretary.

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[53] Exchange Act Release No. 59262 (January 16, 2009), 74 FR 4487 (January 26, 2009). *See also supra* Section II.C.

[54] IPA letter.

[55] 2009 ChoiceTrade letter.

[56] *Id.*

[57] *Id.*

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

[59] 15 U.S.C. 78o–3(b)(6).

[60] 15 U.S.C. 78s(b)(2).

[61] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59597; File No. SR–NYSEArca-2009–03]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Establish a Technical Original Listing Fee Specific to Derivative Securities Products and Structured Products

March 18, 2009.

I. Introduction

On January 23, 2009, NYSE Arca, Inc. (''NYSE Arca'' 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 its rules governing NYSE Arca, LLC, which is the equities trading facility of NYSE Arca Equities, to adopt a technical original listing fee applicable specifically to Derivative Securities Products and Structured Products. Additionally, the Exchange is removing from the NYSE Arca Schedule of Fees and Charges, a reference to a fee waiver that was applicable only in 2007. The proposed rule change was published in the **Federal Register** on February 11, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes adopting a technical original listing fee of $2,500 specifically for Derivative Securities Products and Structured Products.[4] Derivative Securities Products and Structured Products[5] are currently subject to the Exchange's existing technical original listing fee of $5,000, which is applicable to all listed securities, except for closed-end funds. A technical original listing would occur as a result of a change in state of incorporation, reincorporation under the laws of the same state, reverse split stocks, recapitalization, creation of a holding company or new company by operation of law or through an exchange offer, or similar events affecting the nature of a listed security. The fee applies if the change in the company's status is technical in nature and the shareholders of the original company receive or retain a share-for-share interest in the new company without any change in their position in the issuer's capital structure or rights.

The Exchange further proposes a non-substantive change by removing Footnote 8 to the NYSE Arca Schedule of Fees and Charges, waiving a fee that was applicable only in 2007 and thus no longer relevant.

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59364 (February 5, 2009), 74 FR 6941 (hereinafter referred to as ''Notice'').

[4] The $2,500 fee may include multiple issues of securities from the same issuer on the same application.

[5] Derivative Securities Products and Structured Products are defined in the NYSE Arca Schedule of Fees and Charges at notes 3 and 4. *See* also Notice, *supra* note 3. The definitions include all Derivative Securities Products and Structured Products traded on NYSE Arca Equities.

III. Discussion and Commission's Findings

After careful review, 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. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,[6] which requires, among other things, that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,[7] that an exchange have rules that are designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and are not designed to permit unfair discrimination between issuers.

According to the Exchange, the existing $5,000 fee is unsuitable for Derivative Securities Products and Structured Products, because it is disproportionate in relation to the initial and continued listing fees for those securities.[8] According to the Exchange, a $2,500 fee is more consistent with the pricing expectations of issuers for those securities. Accordingly, the Commission believes that the Exchange's proposed fee is reasonable, given that it will be applied consistently to all listed securities in those classes and is consistent with the Exchange's overall approach to pricing for Derivative Securities Products and Structured Products.

Moreover, the Commission believes that charging a one time $2,500 application fee for multiple issues of securities on a single application is appropriate in light of the general fee structure for such products. The Commission notes that the single fee for multiple issues of securities applies equally to all Derivative Securities Products and Structured Products. Finally, the Commission also believes that it is appropriate to delete an obsolete reference to a fee waiver that expired in 2007.

For the foregoing reasons, the Commission agrees that the proposed rule change does not constitute an inequitable allocation of reasonable dues, fees and other charges and does not permit unfair discrimination between issuers, and is generally consistent with the Act.[9]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSEArca-2009–03) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

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

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Notice, *supra* note 3.

[9] 15 U.S.C. 78f(b)(4). In approving the proposed rule change, the Commission has considered the proposed rule's impact in efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59598; File No. SR–NYSEArca–2009–05]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Establish Fees for NYSE Arca Trades

March 18, 2009.

I. Introduction

On January 21, 2009, NYSE Arca, Inc. (''NYSE Arca'' 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 introduce its NYSE Arca Trades service, a NYSE Arca-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that NYSE Arca reports to the Consolidated Tape Association (''CTA'') for inclusion in the CTA's consolidated data stream and certain other related data elements (''NYSE Arca Last Sale Information''), and to establish fees for that service. The proposed rule change was published for comment in the **Federal Register** on February 3, 2009.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to introduce NYSE Arca Trades, a new service pursuant to which it will allow vendors, broker-dealers, and others (''NYSE Arca-Only Vendors'') to make available NYSE Arca Last Sale Information on a real-time basis. NYSE Arca Last Sale Information would include last sale information for all securities that are traded on the Exchange. The Exchange will make NYSE Arca Last Sale Information available through its new NYSE Arca Trades service at the same time as it provides last sale information to the processor under the CTA Plan. In addition to the information that the Exchange provides to CTA, NYSE Arca Last Sale Information will also include a unique sequence number that the Exchange assigns to each trade and that allows an investor to track the context of the trade through such other Exchange market data products as ArcaBook®.

The Exchange proposes to charge $750 per month for access to each of the NYSE Arca Last Sale Information datafeeds that NYSE Arca makes available. The Exchange proposes to charge each subscriber to an NYSE Arca-Only Vendor's NYSE Arca Trades service: $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to Network A and Network B Eligible Securities (as the CTA Plan uses those terms); and $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to securities listed on Nasdaq.[4] The access fee applies equally to all NYSE Arca-Only Vendors that receive the NYSE Arca Trades datafeed and the device fee applies equally to all subscribers that receive an NYSE Arca-Only Vendor's NYSE Arca Trades service. The Exchange does not propose to impose any program classification charges for the use of NYSE Arca Trades.

NYSE Arca represents that no investors or broker-dealers are required to subscribe to the product, as they can find the same NYSE Arca last sale prices either in the Exchange's NYSE Arca Realtime Reference Prices service,[5] or integrated with the prices that other markets make available under the CTA Plan. NYSE Arca anticipates that, even though NYSE Arca Trades' Last Sale Information provides a less expensive alternative to the consolidated price information that investors and broker-dealers receive from CTA, the information that NYSE Arca contributes to the CTA consolidated datafeed and

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59308 (January 28, 2009), 74 FR 5955 (February 3, 2009).

[4] The Exchange does not currently perceive a demand for a nonprofessional subscriber fee for NYSE Arca Trades, but will monitor customer response.

[5] *See* Securities Exchange Act Release No. 58444 (August 29, 2008), 73 FR 51872 (September 5, 2008) (SR–NYSEArca–2008–96).