transfer and the value of the vesting shares is deemed to be compensation for a Participant.[3] As discussed more fully in the application, certain exercises of options result in a Participant being deemed to have received compensation in the amount by which the fair market value of the shares of the Company's common stock, determined as of the date of exercise, exceeds the exercise price. Applicants state that any compensation income recognized by a Participant generally is subject to federal withholding for income and employment tax purposes. Accordingly, arrangements must be made to satisfy the necessary withholding tax obligations.

3. The Company's stockholders approved the terms and provisions of the Plan on June 17, 2008. The Plan explicitly permits the Company to withhold shares of the Company's common stock or purchase shares of the Company's common stock from the Participants to satisfy tax withholding obligations related to the vesting of Restricted Stock or the exercise of options granted pursuant to the Plan. The Plan further provides that Participants may pay the exercise price of options to purchase shares of the Company's stock with shares of the Company's stock already held by such Participants or pursuant to net share settlement.

Applicants' Legal Analysis

1. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market, pursuant to tender offers or under other circumstances as the Commission may permit to ensure that the purchase is made on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicants state that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of a stock option might be deemed to be purchases by the Company of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

2. Section 23(c)(3) provides that the Commission may issue an order that would permit a BDC to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicants believe that the requested relief meets the standards of section 23(c)(3).

3. Applicants state that these purchases will be made on a basis which does not unfairly discriminate against the stockholders of the Company because all purchases of the Company's stock will be at the closing price of the common stock on the NASDAQ Global Select Market (or any primary exchange on which the shares are traded) on the relevant date (*i.e.,* the public market price on the date the Restricted Stock vests or the date of the exercise of any options). Applicants further state that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving the Company's shares. Applicants submit that because all transactions would take place at the public market price for the Company's common stock, the transactions would not be significantly different than could be achieved by any stockholder selling in a market transaction.

4. Applicants submit that the proposed purchases do not raise concerns about preferential treatment of the Company's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. Further, the vesting schedule is determined at the time of the initial grant of the Restricted Stock while the option exercise price is determined at the time of the initial grant of the options. Applicants represent that all purchases will be made only as permitted by the Plan, which was approved by the Company's stockholders. Applicants argue that granting the requested relief would be consistent with precedent and the Commission's recognition of the important role that equity compensation can play in attracting and retaining qualified personnel with respect to certain types of investment companies, including BDCs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–12219 Filed 5–26–09; 8:45 am]

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[3] During the restriction period (*i.e.,* prior to the lapse of the forfeiture restrictions), the Restricted Stock may not be sold, transferred, hypothecated, margined, or otherwise encumbered by the Participant.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59937; File No. SR–NYSEArca–2009–24]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Adopt a Policy With Respect to the Treatment of Aberrant Trades

May 18, 2009.

I. Introduction

On March 18, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''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 a policy relating to its treatment of trade reports that it determines to be inconsistent with the prevailing market and to make such policy retroactive to January 1, 2008. The proposed rule change was published for comment in the **Federal Register** on April 6, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Trades in listed securities occasionally occur at prices that deviate from prevailing market prices and those trades sometimes establish a high, low or last sale price for a security that does not reflect the true market for the security. The Exchange seeks to address such instances of ''aberrant'' trades by adopting a policy that is substantially similar to a policy of the New York Stock Exchange (''NYSE'').[4] On February 9, 2009, the Exchange also filed a proposed rule change, which it designated as eligible for immediate effectiveness pursuant to Rule 19b–4(f)(6) under the Act,[5] to adopt a policy relating to the Exchange's treatment of trade reports that it determines to be inconsistent with the prevailing market.[6] The policy proposed in the instant rule change is identical to the policy set forth in Release No. 34–59453, except that the instant proposal

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

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 59650 (March 30, 2009), 74 FR 15545.

[4] *See* Securities Exchange Act Release No. 59064 (December 5, 2008), 73 FR 76082 (December 15, 2008) (order approving SR–NYSE–2008–91) (''Release No. 34–59064'').

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* Securities Exchange Act Release No. 59453 (February 25, 2009), 74 FR 9463 (March 4, 2009) (SR–NYSEArca–2009–09) (''Release No. 34–59453'').

is retroactive to January 1, 2008. This retroactive application is similar to the retroactivity provision in the NYSE policy set forth in Release No. 34–59064.

The Consolidated Tape Association (''CTA'') offers each Participant in the CTA Plan the discretion to append an indicator (an ''Aberrant Report Indicator'') to a trade report to indicate that the market believes that the trade price in a trade executed on that market does not accurately reflect the prevailing market for the security. The CTA recommends that data recipients should exclude the price of any trade to which the Aberrant Report Indicator has been appended from any calculation of the high, low and last sale prices for the security.

During the course of surveillance by the Exchange or as a result of notification by another market, listed company or market participant, the Exchange may become aware of trade prices that do not accurately reflect the prevailing market for a security. In such a case, the Exchange proposes to adopt as policies that it:

i. May determine to append an Aberrant Report Indicator to any trade report with respect to any trade executed on the Exchange that the Exchange determines to be inconsistent with the prevailing market; and

ii. Shall discourage vendors and other data recipients from using prices to which the Exchange has appended the Aberrant Report Indicator in any calculation of the high, low or last sale price of a security.

The Exchange believes that retroactive application of its aberrant trade policy is warranted because of the significant market volatility and trade reporting issues that all market centers experienced during 2008. Therefore, the Exchange believes that it should be permitted to act retroactively to append the Aberrant Report Indicator to trades that do not accurately reflect the prevailing market for a security commencing as of January 1, 2008.

The Exchange will urge vendors to disclose the exclusion from high, low or last sale price data of any aberrant trades excluded from high, low or last sale price information they disseminate and to provide to data users an explanation of the parameters used in the Exchange's aberrant trade policy. Upon initial adoption of the Aberrant Report Indicator, the Exchange will also contact all of its listed companies to explain the aberrant trade policy and will notify users of the information that these are still valid trades. The Exchange will inform the affected listed company each time the Exchange or another market appends the Aberrant Report Indicator to a trade in an NYSE Arca listed stock and will remind the users of the information that these are still valid trades in that they were executed and not unwound as in the case of a clearly erroneous trade.

While the CTA disseminates its own calculations of high, low and last sale prices, vendors and other data recipients—and not the Exchange—frequently determine their own methodology by which they wish to calculate high, low and last sale prices. Therefore, the Exchange shall endeavor to explain to those vendors and other data recipients the deleterious effects that can result from including in the calculations a trade to which the Aberrant Report Indicator has been appended.

In making the determination to append the Aberrant Report Indicator, the Exchange shall consider all factors related to a trade, including, but not limited to, the following:

- Material news released for the security;
- Suspicious trading activity;
- System malfunctions or disruptions;
- Locked or crossed markets;
- A recent trading halt or resumption of trading in the security;
- Whether the security is in its initial public offering;
- Volume and volatility for the security;
- Whether the trade price represents a 52-week high or low for the security;
- Whether the trade price deviates significantly from recent trading patterns in the security;
- Whether the trade price reflects a stock-split, reorganization or other corporate action;
- The validity of consolidated tape trades and quotes in comparison to national best bids and offers; and
- The general volatility of market conditions.

In addition, the Exchange proposes that its policy shall be to consult with the listing exchange (if the Exchange is not the listing exchange) and with other markets (in the case of executions that take place across multiple markets) and to seek a consensus as to whether the trade price is consistent with the prevailing market for the security.

In determining whether trade prices are inconsistent with the prevailing market, the Exchange proposes that its policy shall be to follow the following general guidelines: The Exchange will determine whether a trade price does not reflect the prevailing market for a security if the trade occurs during regular trading hours (*i.e.,* 9:30 a.m. to 4 p.m.) and occurs at a price that deviates from the ''Reference Price'' by an amount that meets or exceeds the following thresholds:

Trade price	Numerical threshold (percent)
Between $0 and $15.00	7
Between $15.01 and $50.00	5
In excess of $50.00	3

The ''Reference Price'' refers to (a) if the primary market for the security is open at the time of the trade, the national best bid or offer for the security, or (b) if the primary market for the security is not open at the time of the trade, the first executable quote or print for the security on the primary market after execution of the trade in question. However, if the circumstances suggest that a different Reference Price would be more appropriate, the Exchange will use the different Reference Price. For instance, if the national best bid and offer for the security are so wide apart as to fail to reflect the market for the security, the Exchange might use as the Reference Price a trade price or best bid or offer that was available prior to the trade in question.

If the Exchange determines that a trade price does not reflect the prevailing market for a security and the trade represented the last sale of the security on the Exchange during a trading session, the Exchange may also determine to remove that trade's designation as the last sale. The Exchange may do so either on the day of the trade or at a later date, so as to provide reasonable time for the Exchange to conduct due diligence regarding the trade, including the consideration of input from markets and other market participants.

The Exchange advises that it proposes to use the Aberrant Report Indicator in accordance with the guidelines set forth above and that it may apply the Aberrant Report Indicator on a retroactive basis commencing January 1, 2008.

III. Discussion

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 and, in particular, with Section 6(b) of the Act[7] and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent

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

with Section 6(b)(5) of the Act [8] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.[9]

The Commission believes that the Exchange's proposal to append an Aberrant Report Indicator to certain trade reports is a reasonable means to alert investors and others that the Exchange believes that the trade price for a trade executed in its market does not accurately reflect the prevailing market for the security. In addition, the Commission notes that the Exchange will use objective numerical thresholds in determining whether a trade report is eligible to have an Aberrant Trade Indicator appended to it. The Commission further notes that the Exchange's appending the Aberrant Trade Indicator to a trade report has no effect on the validity of the underlying trade. The Commission previously found a similar proposal by the NYSE to be consistent with the Act.[10] Finally, the Commission notes that the retroactive application of this proposal to January 1, 2008 is similar to the retroactive period approved for the NYSE.[11]

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–NYSEArca-2009–24) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–12215 Filed 5–26–09; 8:45 am]

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[8] 15 U.S.C. 78f(b)(5).

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

[10] *See supra* note 4.

[11] *Id.*

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 59947; File No. SR–FINRA–2009–017]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt Incorporated NYSE Rule 406 (Designation of Accounts) as a FINRA Rule in the Consolidated FINRA Rulebook

May 20, 2009.

I. Introduction

On March 26, 2009, the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')), filed with the Securities and Exchange Commission (''SEC'' or ''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 Incorporated NYSE Rule 406 (Designation of Accounts) as a FINRA rule in the consolidated FINRA rulebook (''Consolidated FINRA Rulebook'') [3] with the minor changes discussed below. The proposed rule change was published in the **Federal Register** on April 16, 2009.[4] The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

As part of the process of developing the Consolidated FINRA Rulebook,[5] FINRA proposed to adopt Incorporated NYSE Rule 406, with minor changes, as renumbered FINRA Rule 3250 in the Consolidated FINRA Rulebook. Incorporated NYSE Rule 406 provides that no member organization shall carry an account on its books in the name of a person other than that of the customer, except that an account may be designated by a number or symbol, provided that the member has on file a written statement signed by the customer attesting to the ownership of such account. In effect, this rule establishes a general requirement that a member must hold each customer account in the customer's name, except that a member may identify a customer's account with a number or symbol, as long as the member maintains documentation identifying the customer.[6] Currently, Incorporated NYSE Rule 406 applies only to Dual Members.

NYSE's enforcement of the rule has addressed, among other things, sales practice abuses such as co-mingling of funds, the failure to disclose ownership interests in accounts and unauthorized trading.[7] In the notice, FINRA proposed to adopt Incorporated NYSE Rule 406 as FINRA Rule 3250, stating it believes that the rule will continue to be an important enforcement tool and should be expanded to apply to the entire FINRA membership. In the notice, FINRA stated that Incorporated NYSE Rule 406 could provide members' customers with a level of anonymity within the member and with certain external relationships that they find useful, while still allowing customers' identities to be clearly known to members and available to regulators. In the proposal, FINRA indicated that Incorporated NYSE Rule 406 would be renumbered as FINRA Rule 3250 with minor changes to replace references to ''member organization'' or ''organization'' with the term ''member.'' [8]

III. Discussion and Findings

After careful review of the proposal, 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 associations,[9] and in particular, with

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

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together referred to as the ''Transitional Rulebook''). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). Dual members must also comply with NASD Rules. For more information about the rulebook consolidation process, *see* FINRA *Information Notice,* March 12, 2008 (''Rulebook Consolidation Process'').

[4] *See* Exchange Act Release No. 59745 (April 10, 2009), 74 FR 17705 (April 16, 2009) (''notice'' or ''proposal'').

[5] *See supra* note 3.

[6] Members are subject to additional requirements regarding customer accounts. *See, e.g.,* Rule 17a–3(a)(9) under the Act (requiring records indicating the name and address of the beneficial owner of each cash and margin customer account). 17 CFR 240.17a–3(a)(9).

[7] *See, e.g.,* Robert S. Bartek, Exchange Hearing Panel Decision 73–60 (August 28, 1973); Jeffrey Alan Schultz, Exchange Hearing Panel Decision 82–23 (March 18, 1982); Kery Shane Hutner, Exchange Hearing Panel Decision 02–27 (January 31, 2002). *See also* NYSE *Information Memo* 78–80, Members' Accounts and Initiating Orders on the NYSE Floor (November 10, 1978) (addressing, among other things, NYSE Rule 406(1), now Rule 406).

[8] FINRA also stated that it will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

[9] In approving this proposal, the Commission has considered the proposed rule's impact on

Continued