At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2009–100 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2009–100. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[15] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–100 and should be submitted on or before December 21, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–28535 Filed 11–27–09; 8:45 am]

BILLING CODE 8011–01–P

proposed rules impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[15] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/*.

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61042; File No. SR–FINRA–2009–057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to Section 1(c) of Schedule A to the FINRA By-Laws To Amend the Personnel Assessment and Gross Income Assessment

November 20, 2009.

I. Introduction

On August 20, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (formerly known as the National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder[2] to amend Section 1(c) of Schedule A to the FINRA By-Laws (''Schedule A'') to increase the Personnel Assessment and to revise the formulation of the Gross Income Assessment calculation to be paid by each FINRA member. The proposed rule change was published for comment in the **Federal Register** on September 11, 2009.[3] The Commission received 745 comment letters on the proposal.[4] FINRA submitted a response to the comment letters on November 18, 2009.[5] This order approves the proposal.

II. Description of FINRA's Proposal

Currently, FINRA's primary fee structure to support its regulatory programs consists of the following fees: the Personnel Assessment (''PA''); the Gross Income Assessment (''GIA''); the Trading Activity Fee; and the Branch Office Assessment. These fees are used to fund FINRA's regulatory activities, including rulemaking and FINRA's examination and enforcement programs. According to FINRA, the economic and industry downturns experienced in 2008 and 2009 have strained FINRA's resources, yet its regulatory responsibilities remain constant and its programs robust. To stabilize its revenues and provide protection against future industry downturns, FINRA proposes to increase the PA and revise the calculation of the GIA. This will enable FINRA to achieve a more consistent and predictable funding stream to carry out FINRA's regulatory mandate.

To those ends, the proposed rule change will increase the PA for all members. The PA currently is assessed on a three-tiered rate structure based on the number of the firm's registered representatives and principals (''registered persons'') as follows: members with one to five registered persons are assessed $75 for each such registered person; 6–25 registered persons, $70 for each such registered person; and 26 or more registered persons, $65 for each such registered person. The proposed rule change will increase those rates, for the first time in five years, to $150, $140, and $130, respectively, based on the same tiered structure. FINRA notes that there is a correlation between the cost of FINRA's regulatory programs and the number of registered persons within a firm and that the population of registered persons has remained fairly stable, even throughout the recent economic downturn.[6] Accordingly, FINRA believes that an increase of the PA is

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60624 (September 3, 2009), 74 FR 46828 (September 11, 2009) (''Notice'').

[4] 676 of the letters were form comment letters. Of these, four utilized ''Letter Type A'' and 672 utilized ''Letter Type B.'' An example of Letter Type A and Letter B as well as all of the non-form comment letters are posted on the Commission's Internet Web site (*http://www.sec.gov/comments/sr-finra-2009–057/finra2009057.shtml*). *See* Exhibit 1 for a list of comment letters noted on the Commission's Internet Web site. All 745 comment letters are available for inspection and copying at the Commission's Public Reference Room.

[5] *See* letter from Phillip Shaikun, Associate Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated November 18, 2009. (''Response Letter'').

[6] For example, FINRA records show that since 2000, the average number of registered persons per year has been approximately 667,680 and that for each of the past three years the population has been 669,626 (2009), 676,927 (2008) and 662,742 (2007) (based on numbers at the end of the preceding calendar year).

both a fair and appropriate means to achieve a more consistent and reliable foundation to fund its regulatory operations.

FINRA states that even with the proposed increase of the PA, the GIA remains the most important component of FINRA's regulatory funding. The GIA is currently assessed through a seven-tier rate structure with a minimum GIA of $1,200.00. Under the existing GIA rate structure, members are required to pay an annual GIA as follows:

(1) $1,200.00 on annual gross revenue up to $1 million;

(2) 0.1215% of annual gross revenue greater than $1 million up to $25 million;

(3) 0.2599% of annual gross revenue greater than $25 million up to $50 million;

(4) 0.0518% of annual gross revenue greater than $50 million up to $100 million;

(5) 0.0365% of annual gross revenue greater than $100 million up to $5 billion;

(6) 0.0397% of annual gross revenue greater than $5 billion up to $25 billion; and

(7) 0.0855% of annual gross revenue greater than $25 billion.

For 2010, the current year GIA will be subject to the cap set forth in *Regulatory Notice* 08–07 (February 2008), which describes the funding structure that resulted from the consolidation of NASD's and the New York Stock Exchange's member regulation operations. FINRA states in *Regulatory Notice* 08–07 that it will apply a 10% cap on any increase or decrease to a firm's 2010 current year GIA [7] resulting from the new pricing structure implemented in January 2008.

According to FINRA, since the GIA is assessed based on a member's annual gross revenue for the preceding calendar year,[8] FINRA's revenues derived from the GIA are subject to the year-to-year volatility of member revenues. In years when industry revenues are significantly lower, FINRA's operating revenues can drop precipitously. In 2009, for example, GIA revenues are down by approximately 37% compared to 2008 due to 2008 fourth quarter write-offs taken by members, particularly the largest securities firms.

The proposed rule change seeks to ameliorate this vulnerability not only by shifting some of FINRA's revenue generation to the more consistent PA stream, but also by smoothing out the volatility inherent in the GIA. To that end, the proposed rule change will amend Schedule A to assess a GIA that is the greater of: (1) The amount that will be the GIA based on the existing rate structure (''current year GIA''); or (2) a three-year average of the GIA to be calculated by adding the current year GIA plus the GIA assessed on the member over the previous two calendar years, divided by three. For a newer firm that has been assessed only in the prior year, FINRA will compare the current year GIA to the two-year average and assess the greater amount. The existing GIA rate structure and phase-in implementation through 2010 will remain the same.[9] Accordingly, the proposed rule change will preserve the current rate structure, while building a buffer against industry downturns. FINRA notes that it has a long history of providing rebates to members when revenues exceed the expenditures necessary to discharge its regulatory obligations and is committed to continuing that practice in the future.

FINRA believes that the proposed rule change will stabilize its operating cash flows by augmenting revenues based on the registered person population (on which FINRA's costs are more closely aligned) and reducing dependency on, and exposure to, less predictable industry revenues. FINRA estimates that, if the proposed rule change had been in effect for 2009, it would have replaced about 90% of the revenue shortfall that resulted primarily from the significant drop in GIA revenues. FINRA notes that, in general, those replacement revenues will come from several larger firms whose steep income declines in 2008 primarily account for FINRA's current revenue deficit.

FINRA intends to announce the proposed rule change and its approval by the Commission in a *Regulatory Notice.* The proposed rule change will become effective January 1, 2010.

III. Discussion of Comments and Commission Findings

The Commission received 676 form comment letters, and 69 individual comment letters, regarding this proposal. FINRA responded to the comment letters on November 18, 2009.[10] After careful review of the proposal and consideration of the comment letters and the Response Letter, the Commission finds, for the reasons discussed below, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[11] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act,[12] which requires, among other things, that FINRA's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.

The commenters object to FINRA's fee proposal primarily for the following reasons: (1) FINRA should have anticipated the market downturn and budgeted accordingly; (2) the proposed assessment increases are unreasonable in light of the difficult economic times for the industry and fee increases imposed by other entities, including regulators and market operators; (3) the percentage increase of the PA is too steep and out of step with inflation; and (4) the proposed increases will disproportionately impact small and independent broker-dealers that were not responsible for FINRA's revenue shortfalls. Some commenters question whether the proposed rule change meets the statutory requirements of Section 15A(b)(5) of the Act. Several commenters offer alternative approaches to the proposed changes to the PA and GIA fees, including: implementing caps on the PA and GIA increases; implementing a phase-in period for the PA and GIA increases; reversing the volume discount structure for the PA assessment; and using a three-year GIA average instead of the proposed higher of actual year GIA or the three-year GIA average.

As an initial matter, the Commission notes that, as a national securities association, FINRA is obligated to be so organized and to have the capacity to be able to carry out the purposes of the Act and (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of the Act) [13] to enforce compliance by its members and persons associated with its members, with the provisions of the Act, and rules and

[7] ''2010 current year GIA'' means the amount of GIA assessment due under the proposed new formulation. However, if 2010 current year GIA represents an increase or decrease of more than 10% compared to 2009 current year GIA, the increase or decrease will be capped at 10%.

[8] Gross revenue for assessment purposes is set out in Section 2 of Schedule A, which defines gross revenue as total income as reported on FOCUS form Part II or IIA excluding commodities income.

[9] The actual amount of GIA assessed in any given year, *e.g.,* the current year GIA (including a cap, if applicable) or the three-year average, will be used to calculate subsequent three-year average determinations.

[10] *See* Response Letter, *supra* note 5.

[11] 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).

[12] 15 U.S.C. 78*o*–3(b)(5).

[13] *See* 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2).

regulations thereunder, and FINRA's own rules.[14] Adequate regulatory funding is critical to FINRA's ability to meet these statutory requirements.

While some member firms understandably question whether it is reasonable for FINRA to increase regulatory fees at a time when the securities industry has faced declining revenues as a result of the economic downturn, it is incumbent on FINRA to continue to support a robust regulatory program irrespective of market events. The discussion below addresses the significant issues raised by the commenters, FINRA's response to those comments, and the Commission's views with respect to those issues.

A. PA Increase Is Equitable

Currently, FINRA member firms are charged annually per registered person at the following rates: firms with up to five registered persons pay $75 for each such person; firms with between 6–25 registered persons pay $70 for each such person (a 6.7% discount from $75); firms with over 25 registered persons pay $65 for each person (a 13.3% discount from $75). The proposal will increase the rates to $150, $140 (a 6.7% discount from $150), and $130 (a 13.3% discount from $150), respectively. While most commenters, including the 672 Form B commenters, state specifically that the GIA assessment changes unfairly burden small independent broker-dealers,[15] some commenters note in general that any increase in fees, including the PA increase, unfairly burdens independent broker-dealers, especially in the current economic climate.[16] One of these commenters advocates for a reversal of the discount structure, noting that FINRA should offer per person discounts to the smallest firms instead of the largest firms, to remedy the alleged inequities.[17] Another commenter argues that the number of representatives is not necessarily a better indicator of FINRA resources consumed than overall income.[18] This commenter advocates for a more complex PA structure with additional tiers and possible differentiation of PA rates based on the activity that the registered representative conducts, *e.g.*, a higher PA rate for Series 7 registered representatives than for Series 6. Another commenter supports placing a limit on the annual percentage increase in the PA to ten percent, if the PA increase is approved.[19] This commenter favors a fee structure in which firms engaging in higher-risk activities would be subject to higher fees.

The Commission notes that the current three-tiered PA structure, including the discount percentages, was found to be consistent with the Act and was approved by the Commission nearly seven years ago.[20] The proposed increase to the PA will not change the three-tiered structure of the PA or the level of the discount percentages for larger firms. Also, the manner of allocation of the PA fee among FINRA members will remain unchanged. Moreover, viewing the increase in absolute dollar terms, FINRA estimates that the average increase in total PA fees for firms with 100 or fewer registered persons, a population that constitutes 4,074 out of 4,868, or nearly 84%, of FINRA firms, will amount to approximately $1,000 per firm, whereas the largest 100 firms (based on the number of registered persons as of year end 2008) will experience an average increase of approximately $300,000.[21] Lastly, as FINRA notes, the number of registered representatives is a significant factor that impacts FINRA's oversight responsibilities and thus is an equitable criterion for assessing PA fees.[22] Therefore, additional tiers and/or differentiation based on Series 6 or Series 7 or other criteria is not necessarily a better solution. The Commission finds that the PA increase based on the current three-tiered PA fee structure is an equitable allocation of fees.[23]

B. PA Increase Is Reasonable

735 commenters argue that a 100% increase in annual PA fees is an unreasonably large increase.[24] Many commenters note that an increase of 100% is not commensurate with the rate of inflation over the past five years and, in general, is not justified.[25] FINRA responds to these comments by stating that assessing the proposed fee change in percentage terms and measuring it against an inflation benchmark such as the Consumer Price Index is not the proper method of analysis.[26] FINRA contends that the proper measure of reasonableness is arrived at by comparing the absolute dollar value of the increase against the costs associated with operating FINRA's regulatory oversight programs and examination and enforcement responsibilities.[27]

FINRA notes that over the past two years, a time marked by modest inflation, FINRA's annual funding mechanisms have proven insufficient to sustain its regulatory programs.[28] FINRA believes that, by assessing the fee increase from this perspective, the PA increase is reasonable and will better align FINRA's revenues with its costs. Based on projections that the registered representative population will modulate at a rate consistent with historical trends, FINRA estimates that the proposal will result in a total increase of $42 million in PA fees, an average of approximately $8,600 per firm. As noted above, FINRA further estimates that the average increase in total PA fees for firms with 100 or fewer registered persons—a population that constitutes 4,074 out of 4,868, or nearly 84%, of FINRA firms—will amount to approximately $1,000 per firm, whereas the largest 100 firms (based on the number of registered persons as of year end 2008) will see an average increase of approximately $300,000. FINRA notes that these estimates assume that firms do not pass along the PA to the individual registered persons, a practice that FINRA understands is done in certain segments of the securities industry. For firms that do engage in such practice, FINRA notes that the impact will shift from the firm to the registered persons.[29]

Furthermore, FINRA believes that a PA fee of between $130 and $150 per year is reasonable, particularly when compared to other professional licensing fees.[30] According to FINRA, for the past two years, the PA has accounted for approximately 10–11% of FINRA's regulatory revenue.[31] With

[14] 15 U.S.C. 78*o*–3(b)(2).

[15] The issue of whether the GIA fee revision is equitable is addressed in Section III.C. *infra.*

[16] *See, e.g.,* First Independent Letter, Financial Network Letter, Form Letter B, Sykes Financial Letter, and Whitestone Letter, *infra* in Exhibit 1.

[17] *See* Abel Noser Letter, *infra* in Exhibit 1.

[18] *See* State Farm Letter, *infra* in Exhibit 1.

[19] *See* MetLife Letter, *infra* in Exhibit 1.

[20] *See* Securities Exchange Act Release No. 47106 (December 30, 2002), 68 FR 819 (January 7, 2003) (NASD–2002–99) (order approving current PA fee structure).

[21] *See* Response Letter, *supra* note 5 at page 6.

[22] In 2008, FINRA conducted 4,924 oversight and cause examinations. These examinations, in large part, focused on broker-dealer conduct and activity involving interaction with customers. As result, in that year, FINRA brought 586 formal disciplinary actions against registered representatives and an additional 115 formal actions against member firms for failing to supervise their employees. *See* Response Letter, *supra* note 5 at page 6.

[23] A discussion of the appropriateness of a PA fee increase given these economic circumstances follows in Section III.E.2. *infra.*

[24] *See, e.g.,* Form Letter B, Sykes Financial Letter, and Whitestone Letter, *infra* in Exhibit 1.

[25] *See, e.g.,* Form Letter B, Curnes Financial Letter, and Marvel Financial Letter, *infra* in Exhibit 1.

[26] *See* Response Letter, *supra* note 5 at page 5.

[27] *See Id.* at page 5.

[28] *See Id.* at page 5.

[29] *See Id.* at page 6.

[30] *See Id.* at page 6.

[31] In 2008, PA accounted for $44 million of $454 million in total revenue or 9.7% and in 2009, PA accounted for $44 million of $383 million in total

adoption of the proposed rule change, PA assessments will account for approximately 19% of FINRA's regulatory revenue.[32] FINRA believes that this PA increase as a percentage of total regulatory revenue creates a more stable funding source with respect to FINRA's ability to mitigate any potentially negative fluctuations in GIA due to market conditions. FINRA believes that this is particularly important because regulatory demands typically rise in declining markets.[33]

After reviewing the comment letters and considering FINRA's response to the commenters' issues, the Commission believes that the PA increase is reasonable. As FINRA notes, PA revenue is less vulnerable to economic fluctuations than the GIA. As a result, increasing the portion of regulatory revenue FINRA derives from the PA should reduce overall revenue volatility. In addition, the Commission believes that the dollar amount of the PA increase is reasonably correlated to FINRA's oversight of member firms and their registered representatives and will assist FINRA to comply with the statutory requirement that it have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members, with provisions of the Act, the rules and regulations thereunder, and FINRA's own rules.[34] Therefore, the Commission finds the increase in PA fees to be reasonable.[35]

C. GIA Reformulation Is Equitable

719 commenters argue that the burdens resulting from the reformulation of the GIA calculation will fall disproportionately on small firms and independent broker-dealers. Under the existing GIA rate structure, members are required to pay an annual GIA as follows:

(1) $1,200.00 on annual gross revenue up to $1 million;

(2) 0.1215% of annual gross revenue greater than $1 million up to $25 million;

(3) 0.2599% of annual gross revenue greater than $25 million up to $50 million;

(4) 0.0518% of annual gross revenue greater than $50 million up to $100 million;

(5) 0.0365% of annual gross revenue greater than $100 million up to $5 billion;

(6) 0.0397% of annual gross revenue greater than $5 billion up to $25 billion; and

(7) 0.0855% of annual gross revenue greater than $25 billion.

The proposed rule change will leave this seven-tiered structure unchanged but will assess GIA based on the greater of the amount that will be the current year GIA or a three-year average of the GIA to be calculated by adding the current year GIA plus the GIA assessed on the member over the previous two calendar years.[36] In its Response Letter, FINRA disagrees with the commenters that the revised GIA formulation will disadvantage small firms.[37] FINRA believes that the proposal instead aligns the fee revision with the largest 100 firms (based on the number of registered persons as of year-end of 2008 for PA and the amount of GIA assessed for 2008) [38] that primarily caused the GIA shortfall because of substantial write-downs against their FOCUS income. FINRA offers evidence, discussed in detailed below, in the form of data and projections to demonstrate that the change to the GIA formulation will not unfairly burden small firms and independent broker-dealers but will largely fall on the largest 100 firms (based on the number of registered persons as of year-end of 2008 for PA and the amount of GIA assessed for 2008 for GIA) whose dramatic GIA decline in 2009 resulted in FINRA's need for additional fees.

FINRA notes that revenues from the GIA have dropped nearly $100 million since 2008. Nearly $95 million of that decline relates to the GIA paid in by the largest 100 GIA-assessed firms. Had the new proposed GIA calculation been in place for the 2009 billing cycle, FINRA projects that approximately $47 million (nearly 49%) of the lost revenues would have been replaced, and these largest 100 GIA-assessed firms would have absorbed approximately $44 million, or nearly 94%, of the shortfall. For 2010, FINRA estimates that with the proposed fee structure, the percentage of GIA paid will shift back toward the largest 100 GIA-assessed firms, rising to 63% from 57% in 2009. If the current GIA structure remains in place, these 100 firms are estimated to account for only 59% of GIA in 2010.[39]

For firms with 100 or fewer registered persons, FINRA estimates that, if the proposal had been implemented for 2009, the new GIA calculation would have resulted in an average increased GIA of $850 as compared to the actual amount assessed on those firms.[40] FINRA notes that these firms currently receive a rebate of $1,200 against their GIA fee and that that rebate will continue until at least 2012. Therefore, under the current and the proposed GIA, these firms, if they have FOCUS revenues of less than $1 million, effectively pay no GIA assessment.[41]

The Financial Services Institute (''FSI''), which represents the interests of independent broker-dealers, believes that the GIA modification is inequitably allocated and will ''fall particularly heavily on independent broker-dealer firms. * * * '' [42] FINRA believes that its data shows that the proposal, if implemented, will not disparately impact the GIA of independent firms.[43] FINRA reports that, for 2009, independent broker-dealers paid a total of $11.63 million in GIA fees. Under the proposal, that figure is estimated to fall to $11.17 million for 2010. By comparison, the GIA of the largest 100 GIA-assessed firms is projected to rise from $94 million in 2009 to $123.53 million under the proposal. Thus, FINRA believes that the increases resulting from the proposed GIA calculation will fall most heavily not on independent broker-dealers but on the largest 100 GIA-assessed firms, which include the several largest firms whose steep income declines primarily account for FINRA's current revenue deficit.

After reviewing the comment letters and considering FINRA's Response Letter, the Commission believes that the GIA reformulation is an equitable allocation of fees. As FINRA notes, nearly 95% of the $100 million in GIA revenue drop since 2008 is attributable to the largest 100 GIA-assessed firms. Had the proposed new GIA calculation been in place for the 2009 billing cycle, FINRA projects that approximately $47 million (nearly 49%) of the lost revenues would have been replaced, and those largest 100 GIA-assessed firms would have absorbed approximately $44 million, or nearly 94%, of the shortfall. FINRA estimates also show that the new GIA calculation will increase the GIA burden for the largest 100 GIA-assessed firms in 2010 from 57% to 63% of total GIA revenue. The GIA assessments for

revenue or 11.5% *See* Response Letter, *supra* note 5 at page 4.

[32] *See Id.* at page 4.

[33] *See Id.* at pages 4 and 6.

[34] *See* 15 U.S.C. 78*o*–3(b)(1)–(2).

[35] In addition, should large revenue surpluses occur in the future, FINRA notes that it will consider rebating those surpluses to members.

[36] For newer firms that have only been assessed in the prior year, FINRA will use a two-year average instead of a three-year average.

[37] *See* Response Letter, *supra* note 5 at page 6.

[38] *See Id.* at pages 6–7.

[39] *See Id.* at page 7.

[40] *See Id.* at page 7.

[41] *See Id.* at page 7.

[42] *See* FSI Letter, *infra* in Exhibit 1.

[43] *See* Response Letter, *supra* note 5 at page at page 7.

the largest 100 GIA-assessed firms are predicted to be $280,000 more per firm in 2010 under the new formulation than under the current formulation. The expected average increase for all other firms is expected to be only $1,000 per firm. The totality of the data appears to show that any increase that results from the new GIA formulation falls primarily on the largest 100 GIA-assessed firms, the same firms largely responsible for the revenue shortfall.

In addition, one commenter argues that using income to determine assessment fees is too simplified an approach and ignores many other factors that may be indicative of FINRA's regulatory costs relative to member firms, such as significant proprietary trading positions held by a member firm, holding of customer funds or securities by the member firm, and whether a member firm is self-clearing.[44] As FINRA notes, it has a large and diverse membership of differing sizes and business models and therefore it is impossible for FINRA to develop a pricing scheme that accounts for the particulars of every firm.[45] FINRA believes, and the Commission agrees, that the current pricing structure is reasonable in that it achieves a generally equitable impact across FINRA's membership and correlates the fees assessed to the regulatory services provided by FINRA.[46] Therefore, the Commission finds that the proposed change to the GIA calculation will result in an equitable allocation that will help reduce the risk of future fluctuations in GIA income.

D. GIA Reformulation Is Reasonable

Based on two quarters of 2009 FOCUS data, FINRA estimates that under the proposed GIA revision, in 2010, the assessment for the largest 100 firms (based on the amount of GIA assessed for 2008) will increase approximately $280,00 per firm over the current formulation.[47] The remaining firms are estimated to experience an average increase of approximately $1,000 per firm. FINRA believes that this increase does not disproportionately burden the firms outside of the largest 100 (based on the amount of GIA assessed for 2008) in terms of the revenue generated by those firms. In addition, FINRA contends that this increase is necessary to cover its costs of regulatory oversight and will ensure that it is able to continue meet its regulatory obligations.[48]

One commenter, while appreciative of the need for stability resulting from the use of a three-year average, suggested that GIA should be based on a three-year average instead of the proposed greater of a three-year average or GIA based on actual current year FOCUS revenue.[49] The Commission notes that using the greater of the two figures allows FINRA to recoup any losses on a faster time frame, thereby reducing the duration of the risk that any deficits in funding would affect FINRA's ability to meet its statutory obligations. Therefore, the Commission finds that FINRA's proposed GIA reformulation is reasonable as proposed.

In addition, the Commission notes that the intent of the GIA reformulation is not to impose additional burdens on FINRA members. The intent is to enable FINRA to fulfill its regulatory obligations by guarding against future revenue declines as a result of drastic reductions in the FOCUS revenue of FINRA members. The introduction of a three-year average should make this revenue stream less volatile and more reliable for FINRA in the future. Therefore, the Commission believes that the proposed GIA increase is appropriate.

E. Other Concerns of Commenters

1. FINRA Should Have Foreseen/Prepared for the Inevitable Shortfall

727 commenters state that FINRA should have predicted the market downturn and taken budgetary steps to account for it. As many commenters stated in Letter Type B, ''FINRA's failure to properly prepare for the inevitable market downturn is the root cause of their operating cash flow concerns.'' [50]

The Commission notes that FINRA is an SRO and is obligated under the Act to carry out its regulatory obligations even during a period of economic downturn. FINRA notes that it actually planned for a decline in GIA from 2008 to 2009 and accordingly adjusted its 2009 budget downward compared to 2008 in anticipation of the reduced revenues.[51] The Commission is aware that, in a market downturn, each element of FINRA's funding sources is vulnerable. A firm's gross income declines as its trading activity declines, thereby affecting FINRA's funding for its regulatory programs. It would be difficult for FINRA to account for economic events outside of its control when planning its regulatory program needs and its budget. This is because one of FINRA's primary means of meeting its regulatory costs is the GIA, and the funding FINRA receives from the GIA is wholly dependent on firms' revenues.[52] Moreover, to the extent that the commenters raise issues with FINRA's balance sheet investments, the Commission agrees with FINRA that those comments are misplaced. The balance sheet is used to augment FINRA's funding and thereby decrease the full cost of regulation assessed to FINRA's member firms; its value does not negate the need to adequately fund FINRA's regulatory programs. As an SRO, FINRA's needs and requirements differ from those of its members and it would be improper for FINRA to cut its regulatory programs to adjust to leaner times when those programs are necessary to meet its statutory obligations. As FINRA has noted, it has established a comprehensive cost-cutting program that so far has reduced expenses that do not directly impact its regulatory programs by more than $70 million from the prior year.[53] This cost-cutting is in addition to the income yield from its balance sheet portfolio that supplements the PA and GIA fees. In the Commission's view, FINRA's fee proposal is fair and reasonable in light of FINRA's regulatory responsibilities.

2. Any Fee Increase Is Inappropriate Given the Current Economic Conditions

728 commenters believe that the proposal is unfair because it occurs at a time when firms are suffering financially and have incurred fee increases from a variety of other entities, including the Commission, the Securities Investor Protection Corporation, a national securities exchange, the Municipal Securities Rulemaking Board and several states. In response, FINRA notes that its regulatory responsibilities have not lessened—if anything, they may have increased.[54] To that end, FINRA refers to statistics that demonstrate that the population of registered representatives has remained fairly constant, even throughout recent market events.[55] The Commission strongly believes that FINRA must have sufficient resources to carry out its statutory obligations, particularly during periods of market turmoil, even when its members also are

[44] *See* MetLife Letter, *infra* in Exhibit 1.

[45] *See* Response Letter, *supra* note 5 at page 2.

[46] *See Id.* at page 2.

[47] *See Id.* at page 2.

[48] *See* Response Letter, *supra* note 5 at page 6.

[49] *See* Committee of Annuity Issuers Letter, *infra* Exhibit 1.

[50] *See* Letter Type B.

[51] *See* Response Letter, *supra* note 5 at page 4–5.

[52] *See Id.* at page 4.

[53] *See Id.* at page 2.

[54] *See Id.* at page 5.

[55] *See supra,* note 6.

assessed fees by other organizations or governmental entities. In the Commission's view, fee increases imposed by other regulators, market operators or securities-related entities are not dispositive regarding whether it is appropriate for FINRA to increase its regulatory fees. The proposed PA and GIA fee increases are designed to allow FINRA to maintain a robust regulatory program, which the Commission believes is both necessary and appropriate so that FINRA can carry out its regulatory responsibilities effectively.

F. Other Approaches Suggested by Commenters

In addition to the concerns and suggestions raised by commenters that are discussed above, commenters offered several alternative approaches to the proposed PA and GIA increases. For example, some commenters suggest that the proposed revisions to PA and GIA assessments be capped at a certain amount or phased in over a period of years.[56] Other commenters note that FINRA has failed to sufficiently demonstrate a need for additional revenue in the form of increased PA and GIA.[57]

1. Caps on Increases or Phase-In Period

Eight commenters suggest that any fee increase should be subject to an annual cap or a gradual phase-in period.[58] One commenter suggests a one year delay in any fee increase[59] while another commenter favors a three year phase-in period for any fee increase.[60] Three other commenters recommend a phase-in period of an unspecified length.[61] Five of the commenters favored a cap on any PA increase. Two of these commenters support a 10% cap,[62] another commenter prefers a 10%-15% cap,[63] and the two others do not suggest a specific amount.[64]

In its Response Letter, FINRA states that it is critical to implement the proposed rule change as of January 2010 and without any limitations. FINRA notes that it has already phased in the need for additional assessed funding by not charging firms in 2008 and 2009 for cash flow shortfalls that are funded out of its capital. FINRA points out that the GIA will remain subject to an existing cap for 2010,[65] but notes that any further caps could leave FINRA facing the same fiscal quandary it currently faces in the event of continuing decreased revenue at firms. For the same reason, FINRA opposes a phased-in implementation period. FINRA believes that prolonging implementation of these changes will only lead to a ''geometric future fee increase, as FINRA perpetuates a budget imbalance and depletes its revenue-producing assets.''[66]

The Commission agrees with FINRA that by not charging members increases in 2008 and 2009 when its cash flow shortfalls were occurring, FINRA effectively has provided a type of delayed or phased-in implementation of the fee increases. The Commission also agrees with FINRA's view that any further delay in implementing the fee increases could result in a greater financial impact to firms in the future and, in the Commission's view, could potentially impact FINRA's ability to meet its statutory requirements. Therefore, the Commission believes that it is reasonable for FINRA to refrain from implementing a yearly cap on, or a phase-in period for, the PA and GIA fee increases.

2. FINRA Does Not Need the Additional Revenue

Nine commenters suggest that FINRA has failed to sufficiently demonstrate a need for additional revenue and thus argue against any increase in the PA or GIA.[67] One commenter remarks that ''it is apparent from FINRA's annual report that the organization has more than adequate assets and reserves to withstand the recent downturn.''[68] Another commenter states that ''FINRA's proposed Rule Change lacks proper and adequate support. Nowhere does FINRA provide any disclosure of what proportion PA and GIA fees represent in its revenue or income. Nor does FINRA describe its financial or investment models or state what if any preparations or actions it took or has taken in light of the economic and industry downturns.''[69]

In its Response Letter, FINRA states that income from its reserves is used to offset a part of the cost of its regulatory program each year, and consequently that funding stream is in lieu of a more substantial fee increase on members.[70] FINRA expects such income to offset regulatory costs by approximately $50 million in 2010.[71] Moreover, FINRA notes that it delayed seeking any fee increase for 2008 and 2009 by utilizing the principal of its reserves. However, FINRA does not believe that it would be prudent to continue to exhaust its reserves to cover all future operating deficits, because such a practice is unsustainable and would inevitably result in a much more substantial fee increase in the future.[72]

FINRA further notes that it has minimized the proposed fee increases through a comprehensive cost-cutting program that so far has reduced expenses that do not directly impact its regulatory programs by more than $70 million from the prior year.[73] According to FINRA, it supplements, where possible, member fees and assessments with the income yield from its balance sheet portfolio. FINRA states that by reallocating assets it has reduced performance volatility, while creating a more reliable income stream to subsidize fees. However, FINRA notes that these actions alone have been insufficient to make up the funding deficits it has experienced over the prior two years. According to FINRA, the proposed rule change is intended to remedy ongoing deficits and ameliorate vulnerability to future revenue shortfalls. Therefore, FINRA believes that the proposed fee increases are necessary and any delay in their implementation will necessitate future fee increases of much greater magnitude.[74]

The Commission believes that FINRA has sufficiently demonstrated that the proposed increases in PA and GIA fees are necessary to adequately support FINRA's regulatory programs. FINRA makes a compelling argument that its balance sheet resources are finite and cannot be relied upon solely to overcome a regulatory revenue shortfall. As an SRO, FINRA needs to maintain adequate reserves to ensure that it can

[56] *See e.g.,* SIFMA Letter, MetLife Letter, and GBS Financial Letter, *infra* Exhibit 1.

[57] *See e.g.,* Whitestone Letter, PFS Investment Letter, and SagePoint Financial Letter, *infra* Exhibit 1.

[58] *See* Foresters Equity Letter, State Farm Letter, FSI Letter, MetLife Letter, GBS Financial Letter, SIFMA Letter, World Group Letter, and Committee of Annuity Insurers Letter, *infra* Exhibit 1.

[59] *See* Foresters Equity Letter, *infra* Exhibit 1.

[60] *See* FSI Letter, *infra* Exhibit 1.

[61] *See* GBS Financial Letter, SIFMA Letter, and World Group Letter, *infra* Exhibit 1.

[62] *See* State Farm Letter and Committee of Annuity Insurers Letter, *infra* Exhibit 1.

[63] *See* Foresters Equity Letter, *infra* Exhibit 1.

[64] *See* SIFMA Letter and World Group Letter, *infra* Exhibit 1.

[65] For 2010, any increase or decrease in GIA will be capped at 10% of what a firm would have paid under the prior NASD or NYSE rate structures that it was subject to before FINRA's GIA rate structure was amended in 2008.

[66] *See* Response Letter, *supra* note 5 at page 8.

[67] *See* IBN Financial Letter, First Independent Letter, Whitestone Letter, JanHobbs Financial Letter, SagePoint Financial Letter, Magdaleno Letter, GBS Financial Letter, FSC Securities Letter, and PFS Investment Letter, *infra* Exhibit 1.

[68] *See e.g.,* First Independent Letter, *infra* Exhibit 1.

[69] *See e.g.,* FSC Securities Letter, *infra* Exhibit 1.

[70] *See* Response Letter, *supra* note 5 at page 3.

[71] *See Id.* at page 3.

[72] *See Id.* at pages 3–4.

[73] *See Id.* at page 2.

[74] *See Id.* at page 2.

continue to operate a vigorous regulatory system. In addition, the Commission notes that FINRA has implemented cost cutting measures and taken other steps to minimize the magnitude of the proposed fee increases. Therefore, the Commission finds that the proposed fee increases are equitable and consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[75] that the proposed rule change (SR–FINRA–2009–057), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Elizabeth M. Murphy,

Secretary.

EXHIBIT 1

Comments on FINRA Rulemaking

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Section 1(c) of Schedule A to the FINRA By-Laws to Amend the Personnel Assessment and Gross Income Assessment.

(Release No. 34–60624; File No. SR–FINRA–2009–057).

Total Number of Comment Letters Received—745.

Comments have been received from individuals and entities using the following Letter Types:

a. 4 individuals or entities using Letter Type A.

b. 672 individuals or entities using Letter Type B.

1. Jonathan Zulauf, dated September 2, 2009.

2. Richard J. Carlesco Jr., LUTCF, IBN Financial Services, Inc., dated September 17, 2009 (''IBN Financial Letter'').

3. Phillip H. Palmer, ChFC, President and CEO, First Independent Financial Services Inc. dated September 17, 2009 (''First Independent Letter'').

4. William R. Sykes, President, Sykes Financial Services LLC, dated September 17, 2009 (''Sykes Financial Letter'').

5. Anthony Pappas, Ph.D., President, Whitestone Securities Inc., dated September 21, 2009 (''Whitestone Letter'').

6. David M. Sobel, Esq., EVP/COO, Abel/Noser Corp., dated September 22, 2009 (''Abel Noser Letter'').

7. Kevin Hart Korfield, Kevin Hart Korfield & Co. Inc. dated September 23, 2009.

8. Nancy Wheeler Bertacini, Curnes Financial Group, FNIC, dated September 24, 2009 (''Curnes Financial Letter'').

9. David L. Ehrig, dated September 24, 2009.

10. Janice Hobbs, President, JanHobbs Financial Group, dated September 24, 2009 (''JanHobbs Financial Letter'').

11. Bryon Holz, dated September 24, 2009.

12. John Ikeda, Registered Principal Financial Network Investment Corp., dated September 24, 2009 (''Financial Network Letter'').

13. Timothy Jones, Chairman CJM Wealth Advisers LTD, dated September 24, 2009.

14. Kate Marvel, President, Marvel Financial Planning, Inc., dated September 24, 2009 (''Marvel Financial Letter').

15. Jonathan Meany, CFP, dated September 24, 2009.

16. Gary Orler, Investment Executive, Raymond James Financial Services, Inc., dated September 24, 2009.

17. Suzanne Seay, CFP, Royal Alliance, dated September 24, 2009.

18. John Sklencar, Financial Advisor FSC Securities Corp., dated September 24, 2009.

19. Frank L. Smith, President, Foresters Equity Services, Inc., dated September 24, 2009 (''Foresters Equity Letter'').

20. Daniel G. Trout, Senior Associate, Financial Principles LLC, dated September 24, 2009.

21. James Woytcke, CEO/Owner, Financial Success Ltd., dated September 24, 2009.

22. Tim, dated September 24, 2009.

23. Jeffrey M. Auld, President and Chief Executive Officer, SagePoint Financial Inc., dated September 24, 2009 (''SagePoint Letter'').

24. Kurt Dressler, Capital Investment Counsel, dated September 25, 2009.

25. Bruce Ferguson, Managing Member, Raymond James Financial, dated September 25, 2009.

26. Pamela Fritz, CCO, MWA Financial Services, dated September 25, 2009.

27. Robert B. Lyons, CLU, ChFC, ING Financial Partners, dated September 25, 2009.

28. Brian Perley, ChFC, CFP, Hammond Financial Inc., dated September 25, 2009.

29. S. Ann Pugh, CFP, ING Financial Partners, dated September 25, 2009.

30. William Robbins, Registered Representative, Coordinated Capital Securities, Inc., dated September 25, 2009.

31. Stephen Russell, Senior Vice President, VSR Financial Services, dated September 25, 2009.

32. James G. Timpa, dated September 25, 2009.

33. Sherri White, CPA/PFS, dated September 25, 2009.

34. Martin Cohen, President, Balanced Financial Securities, dated September 26, 2009.

35. Joel Dash, dated September 28, 2009.

36. D.W. Hadley, Jr., Capital Analyst of NC Inc., dated September 28, 2009.

37. Michelle E. Heyne, CCO, McAdams Wright Ragen, Inc., dated September 28, 2009.

38. Penn Rettig, Branch Manager, Multi Financial Securities Corp., dated September 28, 2009.

39. Donna M. Stevenson, dated September 28, 2009.

40. John Terry, President, High Street Securities Inc., dated September 28, 2009.

41. Russell L. Bacon, MBA, CSA, Director, Montgomery Wealth Management, dated September 29, 2009.

42. Robert Black, Jr., President, Legacy Planning Group, dated September 29, 2009.

43. Nicholas C. Cochran, Vice President, American Investors Company, dated September 29, 2009.

44. Pamela Goodall, dated September 29, 2009.

45. Cynthia Iquinto, Registered Representative, FSC Securities Corporation, dated September 29, 2009.

46. Jim Loessberg, Financial Advisor, Raymond James Financial, dated September 29, 2009.

47. Sandra Hay Magdaleno, CFP, dated September 29, 2009 (''Magdaleno Letter'').

48. Edward Skelly, President, Sterling Financial Planners, dated September 29, 2009.

49. Neal E. Nakagiri, President, CEO, CCO, NPB Financial Group LLC, dated September 30, 2009.

50. Kevin Tucker, dated September 30, 2009.

51. Paige W. Pierce, CEO, RW Smith Associates Inc., dated October 1, 2009.

52. Richard P. Woltman, CEO & Chairman, Girard Securities Inc., dated October 1, 2009.

53. David E. Axtell, Compliance Director, State Farm Investment Management Corp, dated October 2, 2009 (''State Farm Letter'').

54. Dale E. Brown, CAE, President & CEO, Financial Services Institute, Inc., dated October 2, 2009.

55. Paul Cellupica, Chief Counsel, Securities Regulation & Corporate Services, MetLife, Inc., dated October 2, 2009 (''MetLife Letter'').

[75] 15 U.S.C. 78s(b)(2).

[76] 17 CFR 200.30–3(a)(12).

56. James M. Clous, Registered Representative, dated October 2, 2009.
57. Gerard P. Gloisten, President, GBS Financial Corp, dated October 2, 2009 (''GBS Financial Letter'').
58. Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, dated October 2, 2009.
59. Debra G. McGuire, CPA, McGuire Dyke Investment Group, dated October 2, 2009.
60. E. John Moloney, Chairman, SIFMA Small Firms Committee, Securities Industry and Financial Markets Association, dated October 2, 2009 (''SIFMA Letter'').
61. Kevin L. Palmer, CEO/President, World Group Securities Inc., dated October 2, 2009 (''World Group Letter'').
62. Mark J. Schlafly, President & CEO, FSC Securities Corporation, dated October 2, 2009 (''FSC Securities Letter'').
63. Sutherland Asbill & Brennan LLP, on behalf of Committee of Annuity Insurers, dated October 2, 2009 (''Committee of Annuity Insurers Letter'').
64. John S. Watts, SVP & Chief Counsel, PFS Investment Inc., dated October 2, 2009 (''PFS Investment Letter'').
65. Edward Wiles, SVP & CCO, Genworth Financial Securities Corp, dated October 2, 2009.
66. Cuneo, Gilbert & Laduca LLP and Greenfield & Goodman LLC, on behalf of Standard Investment Chartered Inc., dated October 5, 2009.
67. Elliott Harris, dated October 5, 2009.
68. Daniel W. Roberts, President/CEO, Roberts & Ryan Investments Inc., dated October 5, 2009.
69. Mark E. Larson, Esquire, CPA, Academic Director of the Certificate in Financial planning Program at Marquette University, dated October 13, 2009.

[FR Doc. E9–28472 Filed 11–27–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61041; File No. SR–BX–2009–073]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the $1.00 Strike Program To Allow Low-Strike LEAPS on the Boston Options Exchange Facility

November 20, 2009.

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 November 19, 2009, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

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

The Exchange proposes to amend Chapter IV, Section 6 (Series of Options Contracts Open for Trading) of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to amend the $1 Strike Price Program. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to expand the $1 Strike Price Program (''Program'') in a limited fashion to allow BOX to list new series in $1 intervals up to $5 in long-term option series (''LEAPS'') in up to 200 option classes on individual stocks.[5] Currently, under the Program, BOX may not list LEAPS at $1 strike price intervals for any class selected for the $1 Strike Price Program. BOX also is restricted from listing any series that would result in strike prices being $0.50 apart, unless the series are part of the $0.50 Strike Price Program.[6]

The Exchange believes that this proposal is appropriate and will allow investors to establish option positions that are better tailored to meet their investment objectives, vis-à-vis credit risk, using deep out-of-the-money put options. Deep out-of-the-money put options are viewed as a viable, liquid alternative to OTC-traded credit default swaps (''CDS''). These options do not possess the negative characteristics associated with CDS, namely, lack of transparency, insufficient collateral requirements, and inefficient trade processing. Moreover, deep out-of-the-money put options and CDS are functionally similar, as there is a high correlation between low-strike put prices and CDS spreads.

BOX notes that its proposal is limited in scope, as $1 strikes in LEAPS may only be listed up to $5 and in only up to 200 option classes. As is currently the case, BOX would not list series with $1.00 intervals within $0.50 of an existing $2.50 strike price in the same series. As a result, the Exchange does not believe that this proposal will cause a significant increase in quote traffic.

Moreover, as the SEC is aware, BOX has adopted various quote mitigation strategies in an effort to lessen the growth rate of quotations. When it expanded the $1 Strike Price Program several months ago, BOX included a delisting policy that would be applicable with regard to this proposed expansion.[7] The Exchange and the other options exchanges amended the Options Listing Procedures Plan (''OLPP'') in 2008 to impose a minimum volume threshold of 1,000 contracts national average daily volume per underlying class to qualify for an additional year of LEAP series.[8] Most recently, the Exchange, along with the other options exchanges, amended the OLPP to adopt objective, exercise price range

[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] Under the Chapter IV, Section 8 of the BOX Rules LEAPS expire from 12–39 months from the time they are listed.

[6] On October 6, 2009, BOX filed SR–BX–2009–063 for immediate effectiveness, which filing established a $0.50 Strike Price Program.

[7] The delisting policy includes a provision that states BOX may grant Participant requests to add strikes and/or maintain strikes in series of options classes traded pursuant to the $1 Strike Price Program that are otherwise eligible for delisting.

[8] *See* SEC Release No. 34–58630 (September 24, 2008), approving Amendment No. 2 to the OLPP.