

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59364; File No. SR-NYSEArca-2009-03)

February 5, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. To Establish A Technical Original Listing Fee Specific to Derivative Securities Products and Structured Products

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Exchange Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 23, 2009, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its rules governing NYSE Arca, LLC (also referred to as the “NYSE Arca Marketplace”), which is the equities trading facility of NYSE Arca Equities. The Exchange proposes to adopt a technical original listing fee applicable specifically to Derivative Securities Products (as defined below) and Structured Products (as defined below). The filing also removes from the NYSE Arca Schedule of Fees and Charges a reference to a fee waiver that was applicable only in 2007 and is therefore no longer relevant. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.nyse.com>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 Exchange proposes to adopt a technical original listing fee applicable specifically to Derivative Securities Products and Structured Products.

For the purposes of this proposed fee, the term “Derivative Securities Products” shall include securities described in NYSE Arca Equities Rules 5.2(j)(3) (Investment Company Units); 8.100 (Portfolio Depositary Receipts); 8.200 (Trust Issued Receipts); 8.201 (Commodity-Based Trust Shares); 8.202 (Currency Trust Shares); 8.203 (Commodity Index Trust Shares); 8.204 (Commodity Futures Trust Shares); 8.300 (Partnership Units); 8.500 (Trust Units); and 8.600 (Managed Fund Shares). The term “Structured Products” shall include securities listed under Rule 5.2(j)(1) (Other Securities); 5.2(j)(2) (Equity Linked Notes), Rule 5.2(j)(4) (Index-Linked Exchangeable Notes); Rule 5.2(j)(6) (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities); Rule 5.2(j)(7) (Trust Certificates); Rule 8.3 (Currency and Index Warrants); and Rule 8.400 (Paired Trust Shares).

Derivative Securities Products and Structured Products are currently subject to the Exchange’s existing technical original listing fee of \$5,000, which is applicable to all listed

securities (other than closed-end funds, for which the Exchange previously adopted a separate technical original listing fee of \$15,000⁴). For purposes of the existing technical original listing fee and the proposed separate technical original listing fee for Derivative Securities Products and Structured Products, a technical original listing would occur as a result of a change in state of incorporation, reincorporation under the laws of same state, reverse stock split, 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 believes that the existing \$5,000 fee is not suitable for Derivative Securities Products and Structured Products, as it is very high in comparison to the initial and continued listing fees for those securities. Issuers of Derivative Securities Products pay a flat initial listing fee of \$5,000 and issuers of Structured Products pay a minimum of \$5,000 in initial listing fees and a maximum of \$45,000, depending on how many securities are issued. In comparison, the minimum initial listing fee for operating company common stock is \$100,000 and the maximum is \$150,000. The annual fee for Derivative Securities Products ranges from \$2,000 to \$25,000 and for Structured Products from \$10,000 to \$55,000. Generally, in comparison, annual fees for common stock of operating companies range from \$30,000 to \$85,000. Generally, for any given number of securities issued and outstanding, the initial and annual fees payable for a listed common stock far exceeds the amount payable for a comparable number of securities of a Derivative Securities Product or Structured Product. The Exchange

⁴ See Exchange Act Release No. 55917 (June 15, 2007), 72 FR 34325 (June 21, 2007) (SR-NYSEArca-2007-22).

believes that the existing technical original listing fee is disproportionate in relation to the other costs of listing Derivative Securities Products and Structured Products on the Exchange and that a \$2,500 fee is more consistent with the pricing expectations of issuers of these categories of securities. The \$2,500 fee may include multiple issues of securities from the same issuer. The Exchange believes that charging a single application fee for multiple securities covered on a single application is appropriate, as there is very little additional work required by Exchange staff to process multiple technical original listings of the same issuer in comparison to the work required in connection with the processing of an application for a single security. The Exchange recognizes that it does not take this approach to multiple classes of equity securities of an operating company, but believes that the distinction is appropriate for two reasons: (i) given the much lower listing fees associated with the listing of Derivative Securities Products and Structured Products than with operating company equity listings, even the \$2,500 technical original listing fee would be proportionately much greater in comparison to the initial and annual fees paid by issuers of Derivative Securities Products and Structured Products than would be the case for issuers of operating company equity securities, and (ii) issuers of Derivative Securities Products and Structured Products are much more likely than issuers of operating company securities to effectuate reverse stock splits (one of the most common events giving rise to a technical original listing) in multiple classes of securities at the same time.⁵

⁵ The Exchange notes that it has listed a significant number of Derivative Securities Products and Structured Products that are leveraged, i.e., whose value changes based on a positive or negative multiple of the performance of an index. The leveraged nature of these products makes it much more likely that they will have an unusually low trading price, which frequently leads an issuer to effectuate a reverse stock split to reprice the security at a more typical trading price. The Exchange has not had this experience yet with leveraged products, but notes that leveraged products have been listed for the first time over the last two years.

The filing also removes from the NYSE Arca Schedule of Fees and Charges a reference to a fee waiver that was applicable only in 2007 and is therefore no longer relevant. Issuers are subject to Annual Fees in the year of listing, pro-rated based on days listed that calendar year. However, for those issuers dually listed on the Exchange and another securities exchange on January 1, 2007 who gave notice by June 30, 2007 to the Exchange of their intention to voluntarily withdraw from listing on the Exchange (and in fact withdraw during 2007), the 2007 annual listing fees were waived (and not subject to prorating). This filing removes text from Footnote 8 to the NYSE Arca Schedule of Fees and Charges which described this waiver, as that text is of no further relevance.

The NYSE Arca Schedule of Fees and Charges can be found on the Exchange's website at http://www.nyse.com/pdfs/NYSEArca_Listing_Fees.pdf.

2. Statutory Basis

The bases under the Exchange Act for this proposed rule change are: (i) the requirement under Section 6(b)(4)⁶ that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and (ii) the requirement under Section 6(b)(5)⁷ of the Exchange Act 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. The Exchange believes that the proposed technical original listing fee specific to Derivative Securities Products and Structured Products constitutes an equitable allocation of fees, as it will be applied consistently to all listed securities in those

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78f(b)(4)(sic). The Commission notes that the correct citation should reflect 15 U.S.C. 78f(b)(5).

classes and is set at a level that is consistent with the Exchange's overall approach to pricing for Derivative Securities Products and Structured Products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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 Exchange 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

2009-03 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-2009-03. 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, 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 Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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-2009-03 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon
Deputy Secretary

⁸ 17 CFR 200.30-3(a)(12).