non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would make non-substantive changes to FINRA Rule 2310 (Direct Participation Programs) and would also update rule cross-references within FINRA Rules 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements), 5122 (Private Placements of Securities Issued by Members), 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings), 6635 (FINRA Rules), 9610 (Application), 12805 (Expungement of Customer Dispute Information under Rule 2080) and 13805 (Expungement of Customer Dispute Information under Rule 2080) that are needed as the result of Commission approval of two recent FINRA proposed rule changes.[5] In addition, with respect to FINRA Rule 9610, the proposed rule change would update rule cross-references to reflect the adoption of Rule 5122.[6] FINRA has filed the proposed rule change for immediate effectiveness. The implementation date will be August 17, 2009, the date on which FINRA–2009–016 will also be implemented (FINRA–2008–020 became effective on June 17, 2009).

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

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

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

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

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–FINRA–2009–046 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–FINRA–2009–046. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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 publicly available. All submissions should refer to File Number SR–FINRA–2009–046 and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–17881 Filed 7–27–09; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Securities Exchange Act Release No. 59599 (March 19, 2009), 74 FR 12913 (March 25, 2009) (Order Approving File No. SR–FINRA–2008–020) and Securities Exchange Act Release No. 59987 (May 27, 2009), 74 FR 26902 (June 4, 2009) (Order Approving File No. SR–FINRA–2009–016).

[6] *See* Securities Exchange Act Release No. 59599 (March 19, 2009), 74 FR 12913 (March 25, 2009) (Order Approving File No. SR–FINRA–2008–020).

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60356; File No. SR–NYSE–2009–08]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Rescinding NYSE Rule 110 Which Establishes the Role of Competitive Traders and Exchange Rule 107A Which Establishes the Role of the Registered Competitive Market Makers

July 21, 2009.

I. Introduction

On April 6, 2009, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to rescind NYSE Rule 110, which establishes the role of Competitive Traders (''CTs''), and Exchange Rule

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

[2] 17 CFR 240.19b–4.

107A, which establishes the role of the Registered Competitive Market Makers (''RCMMs'').[3] The proposed rule change was published for comment in the **Federal Register** on April 16, 2009.[4] The Commission received two comment letters on the proposal.[5] On July 10, 2009 the Exchange filed a comment response letter.[6] This order approves the proposed rule change.

II. Description of the Proposal

Currently, NYSE Rule 107A governs the registration and obligations of RCMMs. Similarly, NYSE Rule 110 governs the registration and obligations of CTs. CTs and RCMMs were first established by the Exchange in 1964 and 1978, respectively, as classes of floor traders that could commit capital to trade in a manner that provides additional liquidity, contribute to mitigating price fluctuations, and enhance competition.[7] In 1981, the Commission adopted Rule 11a1–5, which provides that:

> Any transaction by a New York Stock Exchange registered competitive market maker * * * effected in compliance with [NYSE's] governing rules shall be deemed to be of a kind which is consistent with the purposes of section 11(a)(1) of the Act, the protection of investors, and the maintenance of fair and orderly markets.[8]

Included among RCMM's affirmative obligations under Section B of Rule 107A are requirements for a RCMM to: (i) Make a bid or offer in a stock that contributes to the maintenance of a fair and orderly market in such stock whenever called upon by certain parties, and (ii) effect all purchases and sales for the RCMM's proprietary account in a manner that contributes to the maintenance of price continuity with reasonable depth and minimizes the effects of a temporary disparity between supply and demand. In addition, NYSE Rule 107A requires a RCMM to avoid participation as a dealer during the opening of the stock in a manner that would disrupt the public balance of supply and demand, subject to certain exceptions. Further, a RCMM may not effect transactions for its own account or the account of its member organization that are not a part of a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth and to the minimizing of the effects of any temporary disparity between supply and demand. NYSE Rule 107A.10 describes the conditions under which a RCMM must be ready to enter the market if called upon by a Floor Official or Floor broker to narrow the quotation spread or add liquidity to the market.

NYSE Rule 110 describes the obligations applicable to CTs. For example, members acting as CTs that desire to purchase or sell stock for accounts in which they have an interest are prohibited from congregating in a particular stock, and individually or as a group, intentionally or unintentionally, dominating the market in that stock. CTs are also subject to meeting certain stabilization tests which are computed on a monthly basis.

The Exchange proposes to rescind NYSE Rule 110 and NYSE Rule 107A, eliminating CTs and RCMMs as recognized classes of floor traders on the Exchange.[9] The Exchange notes that the volume and speed of the securities markets has increased dramatically since the inception of the CTs and RCMMs and that the majority of trades on the Exchange are now executed electronically. When the Exchange introduced its Hybrid Market,[10] the Exchange determined that a review of the viability of RCMMs and CTs to trade in the more electronic trading environment was warranted and undertook to assess the contributions of RCMMs and CTs to the liquidity available to the NYSE. Thus, in October 2005, the Exchange implemented a moratorium on the qualification and registration of new CTs and RCMMs while the Exchange conducted a study on the future viability of CTs and RCMMs (''Moratorium'').[11] The Moratorium was extended six times[12] while the Exchange continued its evaluation of CT and RCMM trading.

In October 2008, the Commission approved the Exchange's new market model filing (''Next Generation NYSE'').[13] In light of the implementation of the NYSE's new market model, the Exchange again extended the Moratorium several times to evaluate the viability of the RCMMs and CTs under its revised structure.[14]

The Exchange notes that, at the time the Moratorium was first imposed, there were 11 registered RCMMs and one registered, but inactive, CT. In December 2006, the largest RCMM firm ceased its RCMM business and left the floor, eliminating 6 RCMMs from the floor. This reduced the number of RCMMs operating on the Exchange to five.[15] These remaining five RCMMs are associated with two member organizations.

In its study of the CT and RCMM trading in the more electronic environment, the Exchange reviewed the trading data associated with the CT and RCMM order execution. The Exchange's review found that the CT class of floor trader had not executed

[3] The Exchange also proposes to make conforming amendments to NYSE Rules 36, 98, 123, 111, 476A, 800, 900 and 1600 to eliminate references to RCMMs and CTs.

[4] *See* Securities Exchange Act Release No. 59746 (April 10, 2009), 74 FR 17702 (the ''Notice'').

[5] *See* letter from Robert Baxter and Charles Bocklet, Partners, Green Mountain Trading LLC (''GMT'') to Elizabeth M. Murphy, Secretary, Commission (''Elizabeth Murphy'') (''GMT Comment Letter''). *See also* e-mail from Chris Forbes to Elizabeth Murphy, dated July 9, 2009 (''Forbes E-mail'').

[6] *See* letter from Pia K. Thompson, Assistant Secretary, New York Stock Exchange LLC to Elizabeth Murphy, dated July 10, 2009 (''NYSE Response Letter'').

[7] For a detailed discussion on the background and functions of RCMMs and CTs, *see* Notice, *supra* note 4.

[8] 17 CFR 240.11a1–5. *See* Securities Exchange Act Release No. 17569 (February 24, 1981), 46 FR 14888 (March 3, 1981). Section 11(a)(1) of the Act prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion unless an exception applies. 15 U.S.C. 78k(a).

[9] The Exchange also proposes to make conforming amendments to NYSE Rules 36, 98, 476A, 111, 800, 900 and 1600 to eliminate references to RCMMs and CTs.

[10] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05) (establishing the Hybrid Market).

[11] *See* Securities Exchange Act Release No. 52648 (October 21, 2005), 70 FR 62155 (October 28, 2005) (SR–NYSE–2005–63).

[12] *See* Securities Exchange Act Release Nos. 54140 (July 13, 2006), 71 FR 41491 (July 21, 2006) (SR–NYSE–2006–48); 54985 (December 21, 2006), 72 FR 171 (January 3, 2007) (SR–NYSE–2006–113); 55992 (June 29, 2007), 72 FR 37289 (July 9, 2007) (SR–NYSE–2007–57); 56556 (September 27, 2007), 72 FR 56421 (October 3, 2007) (SR–NYSE–2007–86); 57072 (December 31, 2007), 73 FR 1252 (January 7, 2008) (SR–NYSE–2007–125); and 57601 (April 2, 2008), 73 FR 19123 (April 8, 2008) (SR–NYSE–2008–22). The Moratorium was also amended to grant RCMM firms the ability to replace a RCMM who relinquishes his or her registration and ceases to conduct business as a RCMM during the Moratorium with a newly qualified and registered RCMM. *See* Securities Exchange Act Release No. 53549 (March 24, 2006), 71 FR 16388 (March 31, 2006) (SR–NYSE–2006–11).

[13] *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46).

[14] *See* Securities Exchange Act Release Nos. 58033 (June 26, 2008), 73 FR 38265 (July 3, 2008) (SR–NYSE–2008–49); 58713 (October 2, 2008), 73 FR 59024 (October 8, 2008) (SR–NYSE–2008–96); and 59069 (December 8, 2008), 73 FR 76081 (December 15, 2008) (SR–NYSE–2008–124). The Exchange extended the Moratorium three additional times due to the filing of this current proposed rule change in order to maintain the Moratorium until the completion of the Rule 19b–4 rule filing process for this proposed rule change. *See* Securities Exchange Act Release Nos. 59551 (March 10, 2009), 74 FR 11624 (March 18, 2009) (SR–NYSE–2009–24); 60062 (June 8, 2009), 74 FR 28297 (June 15, 2009) (SR–NYSE–2009–53); and 60197 (June 30, 2009), 74 FR 32663 (July 8, 2009) (SR–NYSE–2009–62).

[15] Registration as an RCMM is applicable only to individual members, not member organizations. *See* NYSE Rule 107A(1). Accordingly, RCMM trading licenses are issued to individual members.

any transactions on the floor as a result of the non-usage of the CT license and therefore provided no contribution to the quality of the NYSE Market.

The Exchange also states that, from May 2004 to December 2004, RCMM trading volume comprised only .018% of the total NYSE trading volume for that time period. In 2005, the year that the Moratorium was implemented, RCMM trading volume comprised only .017% of the total NYSE trading volume for the year. In 2006, the RCMM trading volume comprised .008% of the total NYSE trading volume for the year. After the largest RCMM firm ceased its business in December 2006, RCMM trading volume in 2007 and 2008 comprised only .001% of the NYSE total trading volume for each of those years.

The Exchange also represents that, from August 2005 through February 2008, RCMM monthly average trading volume for that time period never exceeded .021% of the Exchange's total trading volume for that time period. On average during this time period, RCMMs comprised only .006% of the NYSE's trading volume. The Exchange asserts that review of the trading volume prior to and during the Moratorium indicates that RCMM/CT trading volume was minimally affected by the Moratorium.

The Exchange further states that, for the time period from July 2008 to December 2008, RCMM and CT average trading volume did not exceed .0011% of the Exchange's total trading volume per month for that time period. On average over these six months, RCMMs comprised only .001% of the NYSE's trading volume. The Exchange's review also found that the CT class of floor trader still had not executed any transactions on the floor as a result of the non-usage of the CT license and therefore provided no contribution to the market quality on the NYSE. The Exchange reports that RCMM trading in 2009 (as of the date the Exchange filed this proposed rule change) comprised approximately .001% of the total NYSE trading volume.

In light of these statistics, the Exchange concluded that the level of participation of the RCMMs and CTs no longer serve as viable supplemental market makers because they no longer contribute significantly to the overall liquidity available on the NYSE.

In addition to reviewing the trading statistics of the RCMMs and the sole, inactive CT, NYSE Market and NYSE Regulation reviewed the technology, operational and regulatory costs required to adequately support and surveil RCMM and CT trading activity in a predominantly electronic trading environment. Following such review, the Exchange concluded that the development of technology specifically designed to comport with the RCMM and CT trading rules in the context of Next Generation NYSE would not be cost effective in view of the minimal current trading volume of the five RCMMs and the nonexistent trading volume of the one registered CT.

Moreover, NYSE notes that it has developed a new class of electronic liquidity providers, Supplemental Liquidity Providers (''SLPs'') [16] that, the Exchange contends, has largely supplanted the role once filled by RCMMs and CTs. SLPs are off-floor entities that quote and trade on the NYSE electronically. The operation of SLPs is intended to provide incentives for quoting and to add competition to the existing group of floor-based liquidity providers, the designated market makers (''DMMs'').[17]

III. Summary of Comments [18]

In its comment letter, GMT objects to the Exchange's elimination of CTs and RCMMs as classes of floor traders on the NYSE for several reasons. First, GMT argues that the Exchange's assertion that CTs and RCMMs provide only limited liquidity to the Exchange as compared to the overall trading volume on the NYSE is invalid because the Exchange itself imposed a limitation on the growth of the RCMM community by placing the Moratorium on the registration of new RCMMs.[19] As such, the GMT Comment Letter speculates that, had the Exchange permitted the registration of additional RCMMs, the group's trading volume would have been much greater, and contended that over 100 NYSE members desired to become RCMMs.

In addition, GMT questions the reliability of the Exchange's data on RCMM trading because it ''only accounts for trading done through hand-held systems or 'paper' trading on the floor.'' [20] GMT asserts that, had the Exchange included volume traded away from the floor via the DOT system in its review, the trading data would have been ''dramatically larger,'' particularly if NYSE had not placed the Moratorium on RCMMs and if the number of RCMMs had numbered ''500 or 1000.''

Finally, GMT argues that RCMMs should be maintained as an additional source of liquidity on the floor, in addition to the liquidity supplied from DMMs and from off the floor by SLPs, and advocates for a trial period during which RCMMs could receive rebate incentives and upgraded handheld technology, among other things, to determine whether RCMMs could benefit the Exchange's market.[21]

In the NYSE Response Letter, the Exchange notes that the RCMM community has never been large.[22] Specifically, the Exchange states that there were only eleven registered RCMMs at the time the Moratorium was imposed and, since the year 2000, the number of registered RCMMs has never exceeded thirteen.[23] Further, the Exchange notes that, in the filing, it had included volume data for a period preceding the imposition of the Moratorium and, as indicated, that volume was small in comparison to overall trading volume on the Exchange. In addition, the Exchange responded that the elimination of the RCMM and CT categories would not revoke the Exchange memberships of these individuals.[24] If they retain their memberships, the Exchange notes that they would be able to trade from off the floor through the Exchange's electronic systems, without the obligations currently applicable to RCMMs trading on the Exchange. Moreover, the Exchange states that the current RCMMs would be able to seek to become Floor brokers or DMMs if they wish to continue to trade on the floor of the Exchange.[25] Thus, the Exchange contends that the elimination of RCMMs and CTs would not prevent these individuals from trading and adding liquidity to the Exchange.

Finally, the Exchange states that it has consulted with the RCMM community over a period of years to determine whether to continue the RCMM trading category.[26] However, the Exchange has

[16] *See* Securities Exchange Act Release No. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108). *See also* NYSE Rule 107B.

[17] A SLP is required to quote at the National Best Bid (''NBB'') or the National Best Offer (''NBO'') at least 5% of the trading day for each assigned security in round lots to maintain its status as an SLP. If a SLP posts liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate per share for such executions provided that the SLP meets its monthly quoting requirement for rebates averaging 3% at the NBB or NBO in its assigned securities in round lots.

[18] In addition to the GMT Comment Letter, the Commission also received the Forbes E-mail from Chris Forbes, who identified himself as a RCMM on the floor of the NYSE. *See supra* note 5. Mr. Forbes expressed his belief that RCMMs can provide a vital service on the NYSE. Mr. Forbes did not provide any further substantive arguments against the NYSE's proposal to eliminate CTs and RCMMs as classes of floor traders.

[19] *See* GMT Comment Letter, *supra* note 5.

[20] *Id.*

[21] *Id.*

[22] *See* NYSE Response Letter, *supra* note 6.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

concluded that it is not cost effective to devote resources to the facilitation and regulation of RCMM or CT trading in view of the limited liquidity provided by these floor traders.[27]

IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[28] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[29] which requires that an exchange have rules designed 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, and, in general, to protect investors and the public interest.

The Commission believes that it is reasonable and consistent with the Act for the Exchange to eliminate RCMMs and CTs as classes of floor traders on the Exchange. The Commission notes that the Exchange analyzed this issue over a three-year period to review the contributions of RCMMs and CTs to the liquidity of the Exchange in light of its more electronic trading environment. As detailed above, the Exchange's data demonstrated that the trading of RCMMs and CTs on the Exchange amounted to a negligible portion of the overall trading volume of the Exchange. For example, according to NYSE, from August 2005 through February 2008, RCMM monthly average trading volume for that time period never exceeded .021% of the Exchange's total trading volume and, on average, RCMMs comprised only .006% of the NYSE's trading volume. In addition, NYSE represents that, during the time period reviewed, there was no trading on the Exchange by CTs.

The GMT Comment Letter takes issue with the Exchange's RCMM trading data, stating that the low RCMM trading volume figures were the result of the Exchange imposing the Moratorium and thereby restricting the size of the RCMM community. However, as the NYSE Response Letter notes, the GMT Comment Letter fails to address the fact that NYSE did review and provide data for a period of time prior to the Moratorium. Specifically, the Notice stated that from May 2004 to December 2004, before the Moratorium was imposed, RCMM trading volume comprised only .018% of the total trading volume on the Exchange and that in 2005, the year that the Moratorium was implemented (in October 2005), RCMM trading volume comprised only .017% of the total NYSE trading volume for the year. Thus, it appears that RCMM trading volume was quite limited in comparison to the overall trading volume of the Exchange, even before the Exchange imposed the Moratorium. In addition, the NYSE Response Letter represents that, even before the implementation of the Moratorium, the RCMM community has always been relatively small, with a maximum of only 13 individuals registered as RCMMs since the year 2000.

The GMT Comment Letter also criticizes the RCMM trading data because it fails to take into account trading done on the DOT System. However, the Commission notes that GMT itself concedes that adding the DOT trading data for the five active RCMMs would not have made a significant difference in the figures.

In light of the above, the Commission believes that the Exchange's conclusion that RCMMs and CTs no longer serve as viable supplemental market makers and no longer contribute significantly to the overall liquidity available on the NYSE is reasonable.

Further, the Commission notes that the Exchange also considered the technological, operational and regulatory costs required to adequately support and surveil RCMM and CT trading activity. According to the Exchange, the rules and functions of RCMMs and CTs were developed when NYSE was a manual trading center and are not well-suited for the electronic, high speed trading environment found on the Exchange today.[30] The Commission notes that the Exchange concluded that it would not be cost effective to develop technology specifically designed to comport with the RCMM and CT trading rules in the context of Next Generation NYSE in view of the minimal current trading volume of the five RCMMs and the nonexistent trading volume of the one registered CT. Instead, the Exchange argues that SLPs ''largely supplanted'' the role that the RCMMs and CTs once filled on the Exchange.

Though the GMT Comment Letter argues that more floor traders mean more liquidity and efficient price discovery and thus the Exchange should retain RCMMs and CTs as classes of floor traders,[31] the Commission agrees with NYSE that there are a number of other types of market participants to provide liquidity, competition, and price discovery, even after the elimination of the CTs and RCMMs. Along with SLPs who quote and trade electronically from off the floor, DMMs and Floor brokers will still provide liquidity and competition on the floor of the Exchange. Importantly, as NYSE noted in its Response Letter, the Exchange is not rescinding RCMM and CT traders' membership to the Exchange.[32] Members currently operating as RCMMs and CTs may choose to continue to trade and provide liquidity to the Exchange either by trading from off of the floor through the Exchange's electronic systems or by trading as a different class of trader, such as Floor brokers or DMMs, assuming they are willing and able to meet the requirements applicable to such classes of traders.

The GMT Comment Letter also argues that the rule change should be delayed to allow for additional input and testing, and to implement a one-year trial period.[33] However, according to NYSE, the continuation of RCMM and CT trading would require trading system enhancements, the cost of continued development of surveillance technology and procedures, and staff training and hours spent in these efforts. Moreover, as noted in the NYSE Response Letter, the Exchange has consulted with RCMM firms over several years regarding whether this class of traders should be continued. The Commission also notes that the Exchange has already extended the Moratorium a number of times over a period of more than three years. Thus, the Commission finds NYSE's proposal to be reasonable in balancing the costs of maintaining RCMMs and CTs as classes of trades on the Exchange against the benefits that they provide to the Exchange.

Finally, the Commission recognizes that the Exchange operates in a competitive marketplace and believes that the Exchange should have the ability to structure its rules to accommodate the implementation of its own business model, provided that such rules comply with the Act and the rules promulgated thereunder. Given the considerations noted above—the limited trading volume of RCMMs and CTs, the high costs of maintaining and surveiling these classes of floor traders, the existence of other market participants to provide liquidity and competition, as

[27] *Id.*

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

[29] 15 U.S.C. 78f(b)(5).

[30] *See* Notice, *supra* note 4.

[31] *See* GMT Comment Letter, *supra* note 5.

[32] *See* Notice, *supra* note 4.

[33] *Id.*

well as the fact that those currently trading as RCMMs or CTs may choose to continue trading in another role as members of the Exchange—the Commission believes that the Exchange's decision to eliminate RCMMs and CTs from the Exchange is reasonable and within the business judgment of the Exchange, and is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[34] that the proposed rule change (SR–NYSE–2009–08) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–17879 Filed 7–27–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60364; File No. SR–BATS–2009–026]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend BATS Fee Schedule to Impose Fees for Ports Used for Order Entry and Receipt of Market Data

July 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 21, 2009, BATS Exchange, Inc. (''BATS'' or the ''Exchange'') filed with the Securities and Exchange Commission (''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 has filed a proposed rule change to amend the fee schedule applicable to Members[3] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Pursuant to the proposed rule change the Exchange will commence charging fees to Members and non-members for ports used to enter orders into Exchange systems and to receive data from the Exchange. The Exchange will implement the proposed rule change on the first day of the month immediately following Commission approval (or on the date of approval, if on the first business day of a month).

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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 Exchange 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 these 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to begin charging a monthly fee for ports used to enter orders in the Exchange's trading system and to receive data from the Exchange. The Exchange proposes to charge $250.00 per month per pair[4] of any port type other than a Multicast PITCH Spin Server Port or a GRP Port. Thus, this proposed charge will apply to all Exchange FIX, FIXDROP, DROP, TCP PITCH, TCP FAST PITCH and TOP ports.[5] In addition, the Exchange proposes to provide all Exchange constituents that receive the Exchange's Multicast PITCH Feed with 12 pairs of Multicast PITCH Spin Server Ports free of charge and, if such ports are used, one free pair of GRP Ports. The Exchange proposes to charge such customers $250.00 per month per additional pair of GRP Ports or additional set of 12 pairs of Multicast PITCH Spin Server Ports. The Exchange's proposal to provide certain ports free of charge to Multicast Pitch customers is designed to encourage use of the Exchange's Multicast PITCH Feed because such feed is a relatively new offering by the Exchange and because the Exchange believes that the feed is its most efficient feed, and thus, will reduce infrastructure costs for both the Exchange and those who utilize the feed. Any Member or non-member that has entered into the appropriate agreements with the Exchange is permitted to receive Multicast Pitch Spin Server Ports and GRP Ports from the Exchange.

Based on the proposal, the change applies to Members that obtain ports for direct access to the Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients. The Exchange has previously provided ports free of charge to all Members and non-members that use such ports for order entry to the Exchange or for receipt of market data. However, over time, the Exchange's infrastructure costs have increased. In addition, the Exchange believes that providing ports free of charge has not encouraged Members and non-members to reserve and maintain ports efficiently, but rather, has led to a significant number of ports that are reserved and enabled by such market participants but are never used or are under used. Accordingly, the Exchange believes that the imposition of port fees will help the Exchange to continue to maintain and improve its infrastructure, while also encouraging Exchange customers to request and enable only the ports that are necessary for their operations related to the Exchange.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act,[7] because it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that its proposed port fees are reasonable in light of the benefits to members of direct market access and

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[34] 15 U.S.C. 78s(b)(2).

[35] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[4] Each pair of ports will consist of one port at the Exchange's primary data center and one port at the Exchange's secondary data center.

[5] BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including Multicast PITCH and GRP Ports, permit Members and non-members to receive information from the Exchange.

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

[7] 15 U.S.C. 78f(b)(4).