

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58871; File No. SR-BATS-2008-009]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Fees for Use of BATS Exchange

October 28, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 21, 2008, BATS Exchange, Inc. (“BATS” or “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 Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change.

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

The Exchange is proposing to implement a fee schedule applicable to use of the Exchange commencing on the date it begins operating as a national securities exchange. The Exchange currently intends to commence operations as a national securities exchange on October 24, 2008.

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 Exchange proposes to implement a fee schedule applicable to use of the Exchange commencing on the date it begins operating as a national securities exchange. The Exchange currently intends to commence operations as a national securities exchange on October 24, 2008. Please find below a description of the fees and rebates that the Exchange intends to impose under the initial, proposed fee schedule.

The Exchange does not propose to charge different fees or grant different rebates depending on the amount of orders submitted to, and/or trades executed on or through, the Exchange. Accordingly, all fees and rebates described below are applicable to all Members,<sup>5</sup> regardless of the overall volume of their trading activities on the Exchange.

##### (i) Standard Fees for Removing Liquidity.

The Exchange is proposing to charge \$0.0025 per share for executions that remove liquidity from the Exchange, with the exception of executions that remove non-displayed liquidity and securities priced under \$1.00 per share, as described below. The charge for removing liquidity will apply to securities traded on the Exchange pursuant to unlisted trading privileges that are listed on: (A) The New York Stock Exchange (“NYSE”); (B) regional exchanges, such as NYSE Arca Equities (“NYSE Arca”) and NYSE Alternext US (“NYSE Alternext,” formerly the American Stock Exchange); and (C) the NASDAQ Stock Market (“NASDAQ”) (“Tape A Securities”, “Tape B Securities” and “Tape C Securities”, respectively, and collectively, “All Tapes”).

##### (ii) Standard Rebates for Adding Liquidity.

With the exception of executions that result from non-displayed orders and securities priced under \$1.00 per share, as described below, the Exchange is proposing to rebate: (A) \$0.0030 per share for executions that add liquidity to the Exchange in Tape B Securities; and (B) \$0.0024 per share for executions that add liquidity to the Exchange in Tape A Securities and Tape C Securities.

(iii) *Securities Priced under \$1.00 per Share.*

In connection with executions in securities priced under \$1.00 per share, the Exchange does not propose to charge any fee or to provide any rebates to Members.

##### (iv) *Routing Charges.*

The Exchange proposes to charge the routing charges described below. All charges by the Exchange for routing are applicable only in the event that an order is executed. In other words, there is no charge for orders that are routed away from the Exchange but are not filled. In connection with routing of orders away from the Exchange, the Exchange proposes to charge: (A) \$0.0029 per share for Destination Specific Orders<sup>6</sup> routed to NASDAQ, the International Securities Exchange (“ISE”), and the National Securities Exchange (“NSX”); (B) \$0.0028 per share for Destination Specific Orders routed to NYSE Arca; (C) \$0.0009 per share (other than exchange traded funds, or “ETFs”, if applicable)<sup>7</sup> for Destination Specific Orders routed to the NYSE; (D) \$0.0005 per share for Modified Destination Specific Orders<sup>8</sup> routed to a dark liquidity venue (i.e., an alternative trading system known as a “dark pool”); (E) \$0.0035 per share for Directed ISO’s;<sup>9</sup> (F) \$0.03 per share for Odd Lot Orders<sup>10</sup> routed to NYSE Arca in Tape A Securities and Tape B Securities; (G) 0.004 per share for Odd Lot Orders routed to NYSE Arca in Tape C Securities; (H) 0.29% of the total dollar value of the execution of an order for any security (All Tapes) priced under \$1.00 per share that is routed away from the Exchange; and (I) \$0.0029 per share for all other routing options offered by the Exchange, including routing as part of the Exchange’s default best execution routing strategy (“CYCLE”). The differences between the fees charged for routing to specific market centers and routing of specific order types described above are due to different cost structures at the various market centers to which orders may be routed and other factors. For instance, lower transaction fees at NYSE Arca (in round lots) and NYSE allow the Exchange to charge lower routing fees for Destination Specific Orders routed to such markets than Destination Specific Orders routed elsewhere (i.e., to

<sup>6</sup> As defined in BATS Rule 11.9(c)(10).

<sup>7</sup> To the extent any Destination Specific Orders in ETF products are routed to the NYSE, the charge will be \$0.0029 per share, as set forth in (I) and on the schedule of fees (“all other routing options offered by the Exchange”).

<sup>8</sup> As defined in BATS Rule 11.9(c)(11).

<sup>9</sup> As defined in BATS Rule 11.9(d)(2).

<sup>10</sup> As defined in BATS Rule 11.9(c)(2).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.196-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

NASDAQ, ISE or NSX) or for odd lots routed to NYSE Arca. Similarly, lower transaction fees at dark liquidity venues permit the Exchange to charge lower routing fees for Modified Destination Specific Orders routed to such venues. Because the Exchange incurs additional costs and performs additional services in connection with the routing of Directed ISOs, it charges a higher routing fee for such orders. Finally, because the Exchange believes that a uniform routing fee for all other orders routed away from the Exchange (other than those set forth in (A) through (H) above) provides Members with certainty as to transaction costs, it proposes to charge a standard routing fee for such orders, rather than further differentiating routing fees that it charges to Members.

(v) *Fees and Rebates for Non-Displayed Liquidity.*

The Exchange proposes to charge different fees and provide different rebates for executions involving non-displayed liquidity on the Exchange's book (this pricing is referred to by the Exchange as "Dark Match" pricing on the proposed fee schedule). Because the Exchange wishes to encourage larger trade sizes to execute against non-displayed liquidity on the Exchange's book, orders that remove non-displayed liquidity from the Exchange will be charged fees lower than the Exchange's standard fees, as set forth on the schedule below. Conversely, non-displayed orders, including Pegged Orders,<sup>11</sup> Mid-Point Peg Orders,<sup>12</sup> and Non-Displayed Orders,<sup>13</sup> will receive rebates lower than the Exchange's standard rebates, as set forth on the schedule below. Dark Match pricing for rebates does not apply to Reserve Orders<sup>14</sup> or Discretionary Orders.<sup>15</sup>

Below is the proposed Dark Match pricing schedule:

| Trade size          | Rebate/<br>share | Fee/<br>share |
|---------------------|------------------|---------------|
| 1-500 .....         | \$0.0020         | \$0.0025      |
| 501-5,000 .....     | 0.0020           | 0.0024        |
| 5,001-10,000 .....  | 0.0016           | 0.0020        |
| 10,001-25,000 ..... | 0.0010           | 0.0018        |
| 25,001+ .....       | 0.0005           | 0.0015        |

2. Statutory Basis

The Exchange believes that 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 of the Act.<sup>16</sup> Specifically, the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>17</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees and credits are competitive with those charged by other venues. The Exchange also believes that the proposed rates further the objectives of Regulation NMS by promoting competition and granting fair and equal access to all exchange participants. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members.

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

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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

No written comments were solicited or received.

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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>18</sup> and Rule 19b-4(f)(2) thereunder,<sup>19</sup> because it establishes or changes a due, fee or other charge imposed on members by the Exchange. Accordingly, the proposal is effective upon filing with the Commission.

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](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2008-009 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-BATS-2008-009. 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 BATS. 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-BATS-2008-009 and should be submitted on or before November 24, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

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<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> As defined in BATS Rule 11.9(c)(6).

<sup>12</sup> As defined in BATS Rule 11.9(c)(7).

<sup>13</sup> As defined in BATS Rule 11.9(c)(9).

<sup>14</sup> As defined in BATS Rule 11.9(c)(1).

<sup>15</sup> As defined in BATS Rule 11.9(c)(8).

<sup>16</sup> 15 U.S.C. 78f.

<sup>17</sup> 15 U.S.C. 78f(b)(4).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).