

The following provisions are covered by the Agreement between the Parties:

- SEC '34 Act Section 28(e) Effect on Existing Law
- SEC '34 Act Rule 10b-10 Confirmation of Transactions
- SEC '34 Act Rule 203 of Regulation SHO Borrowing and Delivery Requirements
- SEC '34 Act Rule 606 of Regulation NMS Disclosure of Order Routing Information
- SEC '34 Act Rule 607 of Regulation NMS Customer Account Statements
- FINRA shall not perform Regulatory or Enforcement Responsibilities under this Agreement for these rules as they pertain to violations of insider trading activities, which is covered by a separate 17d-2 Agreement by and among the American Stock Exchange, LLC, BATS Exchange, Inc., Boston Stock Exchange, Inc., CBOE Stock Exchange, LLC, Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Arca Inc., NYSE Regulation, Inc., and Philadelphia Stock Exchange, Inc. as approved by the SEC on October 17, 2008.

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### III. Date of Effectiveness of the Proposed Plan and Timing for Commission Action

Pursuant to Section 17(d)(1) of the Act<sup>18</sup> and Rule 17d-2 thereunder,<sup>19</sup> after January 6, 2009, the Commission may, by written notice, declare the plan submitted by BX and FINRA, File No. 4-575, to be effective if the Commission finds that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among self-regulatory organizations, or to remove impediments to and foster the development of the national market system and a national system for the clearance and settlement of securities transactions and in conformity with the factors set forth in Section 17(d) of the Act.

### IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the proposed 17d-2 Plan and to relieve BX of the responsibilities which would be assigned to FINRA, interested persons are invited to submit written data, views, and arguments concerning the

foregoing. Comments may be submitted by any of the following methods:

#### Electronic comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number 4-575 on the subject line.

#### Paper comments

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

All submissions should refer to File Number 4-575. 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/other.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan 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, on official business days between the hours of 10 am and 3 pm. Copies of the plan also will be available for inspection and copying at the principal offices of BX and 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 available publicly. All submissions should refer to File Number 4-575 and should be submitted on or before January 6, 2009.

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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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59095; File No. SR-BATS-2008-012]

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

December 12, 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 December 9, 2008, 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. BATS has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. 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 modify its fee schedule applicable to use of the Exchange effective December 12, 2008 in order to (i) implement new pricing for orders routed away from the Exchange that are executed at dark liquidity venues as part of the Exchange's routing strategies, and (ii) substitute the current fee schedule with a fee schedule in a revised format.

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

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

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

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

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

<sup>18</sup> 15 U.S.C. 78q(d)(1).

<sup>19</sup> 17 CFR 240.17d-2.

<sup>20</sup> 17 CFR 200.30-3(a)(34).

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 modify its fee schedule in order to implement new pricing for orders routed away from the Exchange that are executed at dark liquidity venues as part of the Exchange's routing strategies. In addition, the Exchange proposes to reformat the fee schedule to better reflect the routing charges applicable to Members.

(a) Orders Routed to and Executed at Dark Liquidity Venues

The Exchange recently amended its Rule 11.13 to provide additional flexibility to the Exchange's affiliated routing broker-dealer, BATS Trading, Inc. (the "Outbound Router") in making routing determinations.<sup>5</sup> This rule change was primarily made to permit the Outbound Router to send orders to Trading Centers (as defined in Exchange Rule 2.11),<sup>6</sup> without limiting the permissible destinations to execution venues with "protected quotations" (as defined in Rule 600(b)(58) of the Act).<sup>7</sup> Such Trading Centers may include execution venues known as dark liquidity venues, which do not publish quotations. Because dark liquidity venues provide the possibility of executions at reduced rates, the Exchange is proposing to charge Members \$0.0020 per share executed at such a dark liquidity venue. The Exchange will continue to charge \$0.0029 per share executed at any other Trading Center. The proposed fee schedule also notes, consistent with the Exchange's technical specifications, that the default best execution routing strategy first attempts to route to dark liquidity venues ("DART" routing) and then to other Trading Centers ("CYCLE" routing).

<sup>5</sup> See Securities Exchange Act Release No. 34-58776 (October 14, 2008), 73 FR 63529 (October 24, 2008) (SR-BATS-2008-007).

<sup>6</sup> The Exchange's definition of Trading Center, contained in Rule 2.11, is consistent with the definition of "trading center" contained in Rule 600(b)(78) of Regulation NMS.

<sup>7</sup> 17 CFR 242.600(b)(58).

(b) Non-Substantive, Structural Changes

In addition to the proposed change above related to orders routed to and executed at dark liquidity venues, the Exchange is proposing to make certain non-substantive, structural changes to its fee schedule. First, the Exchange is proposing to restructure its fee schedule to distinguish between its standard routing charges (i.e., those charges for orders routed away by the Outbound Router under its best execution strategies) and non-standard routing charges imposed for specific order types and securities (e.g., Destination Specific Orders, odd lot orders and securities priced below \$1.00 per share). In addition, the Exchange proposes to consolidate into one list certain Destination Specific Orders<sup>8</sup> which were previously listed separately, as such order types are each charged the same fee.<sup>9</sup> The Exchange believes that the revised format of the fee schedule is more transparent and easy to understand with respect to fees charged for routed orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.<sup>10</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>11</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, and that reduced transaction fees for shares executed at dark liquidity venues will benefit market participants. Also, although routing options are available to all Members, Members are not required to use the Exchange's Outbound Router for routing to other Trading Centers. The Exchange also believes that the

<sup>8</sup> As defined in BATS Rule 11.9(c)(10).

<sup>9</sup> The Exchange charges \$0.0029 per share for Destination Specific Orders routed to the NASDAQ Stock Market, the International Securities Exchange, and the National Securities Exchange.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4).

reformatted fee schedule sets forth the fees applicable to routed orders in a more transparent manner. 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>12</sup> and Rule 19b-4(f)(2) thereunder,<sup>13</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-2008-012 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-2008-012. This file

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2008-012 and should be submitted on or before January 12, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59102; File No. SR-DTC-2008-11]

### Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change To Implement a New Service To Allow Issuers To Track and Limit the Number of Beneficial Owners for an Individual CUSIP

December 15, 2008.

#### I. Introduction

On August 6, 2008, The Depository Trust Company ("DTC") 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").<sup>1</sup> On September 5, 2008, the Commission published notice of the proposed rule change in the **Federal Register** to solicit comments from interested persons.<sup>2</sup> The Commission received one comment letter in response to the proposed rule change.<sup>3</sup> For the reasons discussed below, the Commission is approving the proposed rule change.

#### II. Description

The rule change provides for the implementation of a new service that will allow issuers, either themselves or through an issuer-designated administrator, to track and limit the number of beneficial owners of their privately transacted and closely held securities. This service will be called the Security Holder Tracking Service ("SH Tracking Service").

The SH Tracking Service will facilitate the book-entry settlement and asset servicing for securities that are privately transacted and closely held by providing a tool for issuers and their agents to monitor and limit the number and character (e.g., qualified institutional buyers or "QIBs") of beneficial owners of its securities ("Tracked Securities").<sup>4</sup> Although the SH Tracking Service was developed to address the specific concerns of Rule 144A securities,<sup>5</sup> in practice DTC envisions that it could be utilized for other types of securities for which the number or character of the beneficial owners requires some level of control.

The eligibility process for a Tracked Security to be made and remain DTC-eligible will not change from DTC's current process. However, under the new system, DTC will be requested in writing to set up a specific CUSIP for tracking such securities<sup>6</sup> and will be notified who will perform the function of the issuer's administrator for the CUSIP in the SH Tracking Service.<sup>7</sup> Upon receipt of all of such documentation, DTC will make the CUSIP DTC-eligible and will activate the tracking indicator on its security

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

<sup>2</sup> Securities Exchange Act Release No. 58436 (Aug. 27, 2008), 73 FR 51870.

<sup>3</sup> Letter from Brent Welke, CEO, Agnova Corporation (Sept. 8, 2008).

<sup>4</sup> Issuers must control the number of beneficial owners pursuant to certain registration and reporting requirements. In order for issuers to be able to avoid the periodic reporting requirements required by the Act, they must not have more than 500 beneficial owners. 15 U.S.C. 78j(g), 15 U.S.C. 78m(a), 15 U.S.C. 78o(d).

<sup>5</sup> 17 CFR 230.144A.

<sup>6</sup> DTC anticipates that this instruction will come from the underwriter at the time of the initial distribution at DTC.

<sup>7</sup> DTC anticipates that the issuer's transfer agent will serve as its administrator.

master file. Additionally, once it is made eligible, DTC will perform asset servicing for the issue.

The issuer's administrator will control movements of the particular CUSIP for which it had been appointed. Once the tracking indicator has been activated on the master file and the Administrator has been appointed, no transfer of the securities will take place in the Tracked Security without the approval of the administrator through DTC's Inventory Management System ("IMS"). The administrator, based on requirements of the issuer, will be solely responsible for determining whether a transaction should be effected in DTC. Once approved by the administrator, DTC will perform centralized book-entry settlement. IMS will only allow an administrator access to view and approve transactions for CUSIPs for which it had been appointed administrator as reflected in DTC's records.

Because DTC is relying solely on the instructions of the administrator in order to effect settlement in Tracked Securities and will have no knowledge of the number or character of the underlying beneficial owners, use of the SH Tracking Service by any party will constitute an agreement that DTC shall not be liable for any loss or damages related to the use of the SH Tracking System. Each user of the SH Tracking Service must agree to indemnify and hold harmless DTC and its affiliates from and against any and all losses, damages, liabilities, costs, judgments, charges, and expenses arising out of or relating to the use of the SH Tracking Service.

The Tracked Securities will not be held as part of a participant's general free account and will not be considered eligible collateral in DTC's settlement system.

To recover the costs of building the SH Tracking Service, DTC will add the following fees to its Fee Schedule:

- \$25,000 per CUSIP for SH Tracking Services;
- \$5 per delivery and receive for Tracked Securities;
- \$5 per receive and delivery for reclaims of Tracked Securities.

#### III. Comment Letter

Brent Welke, CEO of Agnova Corporation, wrote that, in the context of the settlement cycle, "DTCC (sic) [should be] strictly liable for double ownership repercussions" and that "DTCC (sic) stockholders [should] jointly and severally guarantee DTCC obligations." Finally, Mr. Welke expressed concern about "brokers who are facilitating share counterfeiting."

<sup>14</sup> 17 CFR 200.30-3(a)(12).