

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading Venue	Share Volume in NMS Stocks
Other Registered Exchanges ECNs:	3.7
5 ECNs	10.8
Dark Pools:	
32 Dark Pools (Estimated)	7.9
Broker-Dealer Internatization: 200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.²¹

In addition to the need to attract order flow, the availability of alternatives to NYSE's BBO Information data significantly affect the terms on which NYSE can distribute this market data.²² In setting the fees for its NYSE BBO Service, NYSE must consider the extent

²¹ See NYSE Arca Order at 74783.

²² See Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Atlanta Richfield Co. v. United States Petroleum Co.*, 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958).

to which market participants would choose one or more alternatives instead of purchasing the exchange's data.²³ Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.²⁴ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.²⁵ The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on the NYSE in setting the terms for distributing its NYSE BBO Information. The Commission believes that the availability of those alternatives, as well as the NYSE's compelling need to attract order flow, imposed significant competitive pressure on the NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the NYSE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (SR-NYSE-2010-30) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Florence E. Harmon,
Deputy Secretary.

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²³ See NYSE Arca Order at 74783.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62177; File No. SR-BATS-2010-013]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series"

May 26, 2010.

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 May 13, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") 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 Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it 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 is proposing to amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series." 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 aspects of such statements.

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)(iii).

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

1. Purpose

The Exchange is proposing the elimination of a requirement that at least one Options Market Maker be registered for trading a particular series before it may be opened for trading on BATS Options.

An Options Market Maker is an Options Member⁵ registered with the Exchange as a Market Maker.⁶ Options Market Makers on BATS Options have certain obligations such as maintaining two-sided markets and participating in transactions that are “reasonably calculated to contribute to the maintenance of a fair and orderly market.”⁷ To register as an Options Market Maker, an Options Member must file a written application with the Exchange, which will consider an applicant’s market making ability and other factors it deems appropriate in determining whether to approve an applicant’s registration.⁸ All Options Market Makers are designated as specialists on BATS Options for all purposes under the Act or rules thereunder.⁹ The BATS Options Rules place no limit on the number of qualifying entities that may become Options Market Makers.¹⁰ The good standing of an Options Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Options Market Maker violates any of its agreements with the Exchange or any provisions of the BATS Options Rules.¹¹ An Options Member that has qualified as an Options Market Maker may register to make markets in individual series of options.¹²

Currently Exchange Rule 19.5 provides in relevant part that after a particular class of options has been approved for listing on BATS Options, the Exchange will allow trading in series of options in that class only if there is at least one Options Market Maker registered for trading that particular series. The Exchange is proposing to eliminate this requirement

in order to expand the number of series available to investors for trading and for hedging risks associated with securities underlying those options, as well as to enhance markets in products which are likely to receive customer order flow. The Exchange believes that eliminating the listing requirement to have an Options Market Maker in every series would permit Options Market Makers, who currently may choose to serve as Options Market Makers solely to permit an options to trade on BATS Options, to focus their expertise on the products that are more consistent with their business objectives or more likely to receive customer order flow.

Eliminating the Options Market Maker listing requirement would provide the Exchange the opportunity to trade options that may have occasional interest but that do not necessarily require a two-sided market at all times. The lack of a two-sided market would not cause customer orders to receive prices inferior to the best prices available across all exchanges. BATS Options is designed to systematically avoid trading through protected quotations on other options exchanges, and as such, orders accepted into BATS Options in options that do not have Options Market Makers will not trade at inferior prices even if there is not a two-sided market on BATS Options. As a result, incoming orders are protected from receiving inferior execution prices simply by the fact that there is robust quote competition in the exchange-listed options business with eight competing options exchanges and a multitude of competing Market Makers and liquidity providers. Additionally, the Options Order Protection and Locked/Crossed Market Plan requires plan participants to “establish, maintain and enforce written policies and procedures that are reasonably designed to prevent Trade-Throughs in that participant’s market in Eligible Options Classes.”¹³ With the implementation of this plan, a robust network of private routing has been constructed that ensures routable customer orders can access the best prevailing prices in the market.

Moreover, the Commission recently approved the proposed rule change filing of the NASDAQ Options Market (“NOM”), which has rules that are

substantially similar to the Exchange’s, in which NOM eliminated the requirements for having at least one Options Market Maker registered for trading in a particular series before it may be opened for trading on NOM.¹⁴ In its recent approval order for NOM’s identical rule change the Commission cited certain findings that it made in its earlier approval of NOM, including that “the Act does not mandate a particular market model for national securities exchanges” and that “many different types of market models could satisfy the requirements of the Act”.¹⁵ The Commission stated that it does not believe that the Act requires an exchange to have Market Makers.¹⁶ The Commission also noted that in the context of approving NOM, it had previously stated that although Options Market Makers could be an important source of liquidity on NOM, they likely would not be the only source.¹⁷ The Exchange notes that the NOM System operates in a substantially similar manner to the Exchange’s System, and is designed to match buying and selling interest of all participants on the Exchange. The Exchange is proposing simply to remove the Options Market Maker participation requirement as superfluous to the existence of a vibrant options market, nevertheless acknowledging the value Options Market Makers provide to the Exchange.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed by this filing.

The Exchange also proposes to delete paragraph (b) of Rule 19.5, which states that a class of options will be put into a non-regulatory halt if at least one series for that class is not open for trading. Originally, this provision was put in place so that the Exchange could approve underlying securities for the listing of options but delay the listing if

¹⁴ See Securities Exchange Act Release No. 61735 (March 18, 2010), 75 FR 14227 (March 24, 2010) (File No. SR-NASDAQ-2010-007).

¹⁵ *Id.* (citing Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521, 14527 (March 18, 2008) (File No. SR-NASDAQ-2007-004) (“NOM Approval Order”).

¹⁶ As the Commission noted in its approval order for the NOM filing, in its release adopting Regulation ATS, the Commission rejected the suggestion that a guaranteed source of liquidity was a necessary component of an exchange. See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (“Regulation ATS Release”).

¹⁷ See NOM Approval Order, *supra* note 15, at 14527.

⁵ The term “Options Member” means a firm, or organization that is registered with the Exchange pursuant to Chapter XVII of the Exchange’s rules for purposes of participating in options trading on BATS Options as an “Options Order Entry Firm” or “Options Market Maker.”

⁶ See Exchange Rule 22.2.

⁷ See Exchange Rule 22.5(a).

⁸ See Exchange Rule 22.2(a).

⁹ See Exchange Rule 22.2(c).

¹⁰ See Exchange Rule 22.2(c).

¹¹ See Exchange Rule 22.4(b).

¹² See Exchange Rule 22.3(a).

¹³ See Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546) (approval order for the Protection and Locked/Crossed Plan); see also Securities Exchange Act Release No 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (File No. SR-BATS-2009-031) (approval order of BATS Options rules, including rules governing participation in Protection and Locked/Crossed Plan).

the Options Market Makers on the Exchange were not yet ready to register in any series of options for that class. With the elimination of the other paragraphs in Rule 19.5 requiring an Options Market Maker, the Exchange will no longer need to delay the listings of particular series and thus will no longer need this provision.

Finally, the Exchange proposes to delete paragraph (c) of Rule 19.5, which addresses the situation where a series of options only has one Options Market Maker that then withdraws its registration. Based on the proposed change described above, this provision is no longer necessary.

2. Statutory Basis

Approval of 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.¹⁸ In particular, the proposed change is consistent with Section 6(b)(5) of the Act,¹⁹ because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. Specifically, the Exchange believes that the proposed amendment would expand the ability of investors to trade options and hedge risks associated with securities underlying options which are not currently listed due to the lack of an Options Market Maker registration in such options series.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30

days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁰ and Rule 19b-4(f)(6) thereunder.²¹

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act²² normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²³ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. In making this determination, the Commission notes that BAT's proposed rule change is substantially similar to Nasdaq's recently approved rule change to eliminate its requirement that at least one options Market Maker be registered for trading a particular series before it could be opened for trading on NOM,²⁴ and the Commission believes that BATS' proposed rule change raises no new regulatory issues. The Commission believes that waiving the operative delay will allow BATS to immediately expand the number of series available for trading, permitting BATS to compete with NOM in the trading of these series and should foster intermarket price competition by providing an additional market and source of liquidity for options series that would otherwise have been prohibited from trading on BATS due to the lack of a Market Maker registered in that series. For these reasons, the Commission designates that the proposed rule change become operative immediately.²⁵

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²² 17 CFR 240.19b-4(f)(6).

²³ 17 CFR 240.19b-4(f)(6)(iii).

²⁴ See *supra* note 14.

²⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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-BATS-2010-013 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-BATS-2010-013. 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 Web site viewing and printing 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-2010-013 and

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62169; File No. SR-NYSEAmex-2010-43]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Certain Reporting Requirements Punishable Under its MRVP

May 25, 2010.

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 May 7, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II 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 NYSE Amex Disciplinary Rule 476A (Imposition of Fines for Minor Violation(s) of Rules) to add a new Part 1D: List of Reports Required to be Filed with the Exchange by ATP Holders and Filing Deadlines. The Exchange also proposes to add violations of NYSE Amex Rule 340.01 to Part 1C of Disciplinary Rule 476A, and to make other technical changes to the Rule. The text of the proposed rule change is available on NYSE Amex's Web site at <http://www.nyse.com>, on the Commission's Web site at <http://www.sec.gov>, at NYSE Amex, 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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Amex Disciplinary Rule 476A (Imposition of Fines for Minor Violation(s) of Rules) to add a new Part 1D: List of Reports Required to be filed with the Exchange by ATP Holders and Filing Deadlines. The Exchange also proposes to add violations of NYSE Amex Rule 340.01 to Part 1C of Disciplinary Rule 476A, and to make other technical changes to the Rule.

Background

As described more fully in a related rule filing, effective October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger"). Pursuant to the Merger the Exchange's predecessor, the American Stock Exchange LLC, a subsidiary of AMC, became a subsidiary of NYSE Euronext.³

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange's legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to new trading systems and facilities located at 11 Wall Street, New York, New York (known as "NYSE Amex Equities").⁴ Similarly, on March 2, 2009, the Exchange relocated all options trading conducted on the Exchange's legacy trading systems and facilities to new trading systems and facilities

located at 11 Wall Street (known as "NYSE Amex Options").⁵

As part of this process, the Exchange adopted NYSE Rules 475-477, including Rule 476A, subject to such changes as necessary to apply the Rules to the Exchange, as NYSE Amex Disciplinary Rules 475-477 to govern transactions and the conduct of its members and member organizations on both NYSE Amex Equities and NYSE Amex Options.⁶

Current NYSE Amex Disciplinary Rule 476A

NYSE Amex Disciplinary Rule 476A, the Exchange's Minor Rule Violation Plan ("MRVP"), governs transactions and conduct on both NYSE Amex Equities and NYSE Amex Options.

Under NYSE Amex Disciplinary Rule 476A, the Exchange may impose a summary fine on any member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization for a minor violation of specified Exchange rules: Supplementary Part 1A to the Rule contains a list of NYSE Amex Equities Rules subject to summary fine; Part 1B contains a list of legacy Exchange rules; and Part 1C contains a list of NYSE Amex Options Rules. The fines permitted under the MRVP provide an appropriate sanction when, given the facts and circumstances of a particular rule violation, a response stronger than a simple admonition letter is needed but the initiation of a formal disciplinary proceeding under Disciplinary Rule 476 is unwarranted.

Violations of the listed rules are subject to the fine schedules in NYSE Amex Disciplinary Rule 476A. For violations of the rules listed in Parts 1A and 1B, individuals may be charged \$500.00 for a first offense, \$1,000.00 for a second offense and \$2,500.00 for subsequent offenses; member firms may be charged \$1,000.00 for a first offense, \$2,500.00 for a second offense and \$5,000.00 for subsequent offenses. Violations of the rules listed in Part 1C are subject to varying fines as specified, depending on the rule violated.

⁵ See Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR-NYSEALTR-2008-14) (approving the adoption of the "NYSE Amex Options" rules).

⁶ See Securities Exchange Act Release Nos. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (adopting NYSE Amex Disciplinary Rules 475-477); 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (adopting NYSE Amex Disciplinary Rule 476A).

³ See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex-2008-62).

⁴ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) (approving the adoption of the "NYSE Amex Equities" rules).

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.