

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Elizabeth M. Murphy,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63630; File No. SR-BATS-2010-039]

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

January 3, 2011.

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 22, 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, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a 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 Members<sup>5</sup> 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 10G direct circuit connections, change pricing for certain other physical ports, and begin passing through in full certain hardware expenses incurred by the Exchange that are directly related to completing a cross-connect. While changes to the fee schedule pursuant to this proposal will be effective upon

filing, the changes will become operative on January 3, 2011.

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 establish fees for direct 10G circuit connections, to raise the monthly fees for “physical” ports into the Exchange at the data centers where the Exchange’s servers are located, and to pass through in full any hardware costs or connectivity fees incurred by the Exchange that are directly related to completing a cross-connect where the cost or fee exceeds \$1,000. The Exchange already provides Members and non-Members four pairs<sup>6</sup> of 1G physical ports free of charge and charges \$2,000 per month for each additional single physical port.

The Exchange proposes to provide the option to connect directly with the Exchange via 10G physical ports to any Member or non-member that has been approved to connect to the Exchange. Due to the infrastructure costs associated with providing the additional bandwidth for 10G physical ports, the Exchange proposes to charge \$2,500 per month for each single physical 10G port provided by the Exchange to any Member or non-member in any data center. The Exchange’s proposal is intended to permit those Members and non-members that require additional bandwidth and wish to establish 10G physical ports to do so if such constituent is willing to pay for such

ports. The Exchange notes that other market centers provide similar services to their Members and non-members.<sup>7</sup>

The Exchange also proposes to increase the fee for each 1G physical port used by Members and non-members in excess of the four ports provided free of charge from \$2,000 per port each month to \$2,500 per port each month. The proposal is intended to account for increasing infrastructure costs associated with providing physical ports while at the same time permitting those Members and non-members that wish to establish additional physical ports do so if such constituents are willing to pay for such ports. Based on the proposal, the change applies to all Exchange constituents with 1G physical connections, including 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, Sponsored Participants, and market data recipients. There are zero non-members and very few Members that currently require more than four physical ports for their operations related to the Exchange and thus, the proposal should not affect many of the Exchange’s constituents.

Lastly, the Exchange proposes to pass through in full any hardware costs or connectivity fees incurred that are directly related to completing a cross-connect where the expense to the Exchange billed by a third party exceeds \$1,000. The Exchange proposes to pass through the expense as an alternative to the flat installation fees charged by the Exchange’s primary competitors. The Exchange does not anticipate that passing through these expenses will affect many of the Exchange’s constituents, because the majority of cross-connect completions cost less than \$1,000. For this reason, the Exchange proposes to pass-through the charges associated with cross-connect completions that cost more than \$1,000 rather than to subsidize these expensive completions by charging an installation fee for all completions regardless of their cost.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>8</sup> in that it

<sup>7</sup> See Securities Exchange Act Release Nos. 62663 (August 9, 2010), 75 FR 49543 (August 13, 2010) (SR-NASDAQ-2010-077) (order approving fees for both 1G and 10G non-co-located port connections); Securities Exchange Act Release No. 62681 (August 10, 2010), 75 FR 50020 (August 16, 2010) (SR-EDGA-2010-06) (order approving fees for both 1G and 10G port connections).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>22</sup> 17 CFR 200.30-3(a)(12).

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

<sup>6</sup> Each pair of ports consists of one port at the Exchange’s primary data center and one port at the Exchange’s secondary data center.

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. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members and non-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**

Pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and Rule 19b-4(f)(2) thereunder,<sup>10</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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-2010-039 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-2010-039. 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, 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 will also 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 No. SR-BATS-2010-039 and should be submitted on or before January 28, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

[Docket No. FRA-2011-0003]

#### **Establishment of an Emergency Relief Docket for Calendar Year 2011**

**AGENCY:** Federal Railroad Administration (FRA), DOT.

**ACTION:** Notice of establishment of public docket.

**SUMMARY:** This Notice announces the establishment of FRA's emergency relief docket (ERD) for calendar year 2011. The designated ERD for calendar year 2011 is docket number FRA-2011-0003.

**ADDRESSES:** See Supplementary Information section for further information regarding submitting petitions and/or comments to Docket No. FRA-2011-0003.

**SUPPLEMENTARY INFORMATION:** On May 19, 2009, FRA published a direct final rule addressing the establishment of ERDs and the procedures for handling petitions for emergency waivers of safety rules, regulations, or standards during an emergency situation or event. 74 FR 23329. That direct final rule became effective on July 20, 2009 and made minor modifications to § 211.45 to the FRA's Rules of Practice published at 49 CFR Part 211. Paragraph (b) of § 211.45 provides that each calendar year FRA will establish an ERD in the publicly accessible DOT docket system (available on the internet at <http://www.regulations.gov>). Paragraph (b) of § 211.45 further provides that FRA will publish a notice in the **Federal Register** identifying by docket number the ERD for that year. As noted in the rule, FRA's purpose for establishing the ERD and emergency waiver procedures is to provide an expedited process for FRA to address the needs of the public and the railroad industry during emergency situations or events. This Notice announces that the designated ERD for calendar year 2011 is docket number FRA-2011-0003.

As detailed § 211.45, if the FRA Administrator determines that an emergency event as defined in 49 CFR 211.45(a) has occurred, or that an

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> See Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase "on any person, whether or not the person is a member of the self-regulatory organization" after "due, fee or other charge imposed by the self-regulatory organization." As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both.

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