

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70348; File No. SR-BATS-2013-048]

### 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.

September 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 28, 2013, 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 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule applicable to Members<sup>5</sup> and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

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 adopt fees for new physical connections that the Exchange is making available to Members and non-Members.

The Exchange currently maintains a presence in two third-party data centers: (i) The primary data center where the Exchange's business is primarily conducted on a daily basis, and (ii) a secondary data center, which is predominantly maintained for business continuity purposes. The Exchange currently assesses fees to Members and non-Members of \$1,000 for any 1G physical port connection at either data center and of \$2,500 for any 10G physical port connection at either data center. The Exchange is not proposing to modify its port fees for 1G or 10G physical ports at either of its data centers.

The Exchange recently received approval to provide market participants with the ability to access the Exchange's network through another data center entry point, or Point of Presence ("PoP"), at a data center other than the Exchange's primary or secondary data center.<sup>6</sup> By offering an optional means of access to the Exchange via PoPs at other data centers, the Exchange is providing market participants with another means of accessing the Exchange. In particular, participants that do not maintain a presence in either of the Exchange's data centers must establish connectivity to such data centers. By making PoP entry points available, the Exchange is adding additional entry points to the Exchange's network and reducing the need for such connectivity for participants located in the same data center as such PoPs.

A PoP connection could be used by any Member, non-member service bureau that acts as a conduit for orders entered by Exchange Members, Sponsored Participant, or market data recipient. This new access option is in response to industry demand. Clients

opting not to access the Exchange at a PoP point of entry will still be able to access the Exchange directly in the existing data centers in the same way as they do currently.

In connection with offering PoP connectivity in other data centers, the Exchange proposes to charge physical port fees as follows. The Exchange proposes to charge \$2,000 for any 1G physical port to connect to the Exchange in any data center where the Exchange maintains a PoP other than the Exchange's primary or secondary data center. The proposed fee for PoP connectivity is higher than the fee for connectivity in the Exchange's primary and secondary data centers due to the increased infrastructure costs of maintaining the PoP, including the necessary connectivity maintained by the Exchange from such PoP to the Exchange's data centers. Due to the further infrastructure costs associated with providing the additional bandwidth for 10G physical ports, the Exchange proposes to charge \$5,000 per month for each single physical 10G port provided by the Exchange to any Member or non-member in any data center where the Exchange maintains a PoP other than the Exchange's primary or secondary data center.

##### 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>7</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>8</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 operates in a highly competitive market in which exchanges offer connectivity services as a means to facilitate the trading activities of members and other participants. Accordingly, fees charged for connectivity are constrained by the active competition for the order flow of such participants as well as demand for market data from the Exchange. If a particular exchange charges excessive fees for connectivity, affected members will opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative

<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> Securities Exchange Act Release No. 70199 (August 14, 2013), 78 FR 51250 (August 20, 2013) (SR-BATS-2013-036) (Order Approving a Proposed Rule Change to Introduce a Connectivity Option Through Points of Presence).

<sup>7</sup> 15 U.S.C. 78f.

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

strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, the exchange charging excessive fees would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it by affected members, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. The Exchange believes that the proposal to offer PoP connectivity clearly evidences such competition. Specifically, the Exchange is offering a new connectivity option to keep pace with changes in the industry and evolving customer needs. PoP connectivity will be available to all Exchange constituents to whom such connectivity will be useful and cost-effective. The offering is entirely optional, and is geared towards attracting new customers, as well as retaining existing customers.

Moreover, the Exchange believes the proposed fees for PoP connectivity to the Exchange are reasonable because they are based on the Exchange's costs to cover hardware, installation, testing and connection, as well [sic] expenses involved in maintaining and managing the PoP infrastructure. The proposed fees allow the Exchange to recoup these costs and may someday allow the Exchange to make a profit, while providing customers the ability to access the Exchange via a potentially more cost-effective mechanism than if they obtain third-party connectivity to the Exchange's primary and/or secondary data centers. The Exchange believes the proposed fees for PoP connectivity are equitably allocated and non-discriminatory in that all Exchange constituents that voluntarily select this service option will be charged the same amount for the same services.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, this proposal will promote competition through the offering of an optional, additional mechanism to connect to the Exchange. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. Further, excessive fees for connectivity, including port fee access, would serve

to impair an exchange's ability to compete for order flow rather than burdening competition.

The proposed rule change will likewise enhance competition among service providers offering connections between market participants and the data centers. The offering will expand the multiple means of connectivity available, allowing customers to compare the benefits and costs connectivity with reference to numerous variables. The Exchange, and presumably its competitors, selects service providers on a competitive basis in order to pass along price advantages to their customers, and to win and maintain their business. The offering is consistent with the Exchange's own economic incentives to facilitate as many market participants as possible in connecting to its market.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>10</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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### **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:

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

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-048 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-2013-048. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m. Copies of such 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-2013-048 and should be submitted on or before October 4, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>11</sup> 17 CFR 200.30-3(a)(12).