

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70853; File No. SR-BATS-2013-058]

### 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.

November 13, 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 October 31, 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 filed a proposal 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). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the proposed changes will become operative on November 1, 2013.

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 modify its fee schedule applicable to use of the Exchange effective November 1, 2013, in order to: (1) Modify the fees applicable to executions occurring through certain routing strategies at the Exchange's affiliate, BATS Y-Exchange, Inc. ("BYX"); and (2) modify the way that, for purposes of tiered pricing on the Exchange's equities trading platform ("BATS Equities"), the Exchange calculates ADV, ADAV, and TCV (as such terms are defined below).

###### Routing Strategies to BYX

BYX currently provides a base rebate of \$0.0001 per share when removing liquidity. To create a direct pass through of the applicable economics of executions at BYX through the Destination Specific,<sup>6</sup> TRIM (including TRIM2 and TRIM3),<sup>7</sup> and SLIM<sup>8</sup> routing strategies, the Exchange proposes to rebate \$0.0001 per share for orders routed through such strategies and executed on BYX, rather than the \$0.0002 per share that it currently rebates for such orders. The Exchange is not proposing any other changes to its routing fees at this time.

###### Modifications to Definitions Used for Equities Pricing Tiers

The Exchange proposes to modify its fee schedule in order to amend the way that the Exchange calculates rebates for removing liquidity from and fees for adding liquidity to the Exchange. Specifically, the Exchange is proposing to amend the methodology by which it determines the rebate that it will provide to Members based on the Exchange's tiered pricing structure by excluding from the calculation of ADV,<sup>9</sup>

ADAV,<sup>10</sup> and average daily TCV<sup>11</sup> any day that trading is not available on the Exchange for more than sixty (60) minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time) but continues on other markets during such time (an "Exchange Outage").

The Exchange currently offers a tiered structure for determining the rebates that Members receive for executions that add liquidity to the Exchange. Under the tiered pricing structure, the Exchange provides different rebates to Members based on a Member's ADV or ADAV as a percentage of average daily TCV. The Exchange notes that it is not proposing to modify any of the existing rebates or the percentage thresholds at which a Member may qualify for certain rebates pursuant to the tiered pricing structure. Rather, as mentioned above, the Exchange is proposing to modify its fee schedule in order to exclude trading activity occurring on any day that the Exchange experiences an Exchange Outage, defined as an outage lasting for more than sixty (60) minutes, from the calculation of ADV, ADAV and average daily TCV. The Exchange believes that including trading activity on days when trading on the Exchange is unavailable for a significant portion of the day can unfairly skew the calculation of ADV, ADAV and TCV. Thus, the Exchange believes that the most accurate and fair implementation of its tiered pricing structure is to exclude from the calculation of ADV, ADAV and TCV all days where the Exchange experiences an Exchange Outage.

The Exchange believes that eliminating days where the Exchange experiences an Exchange Outage from the definition of ADV, ADAV and TCV, and thereby eliminating that day from the calculation as it relates to rebates and fees based on trading activity on the Exchange, will help to eliminate significant uncertainty faced by Members as to their monthly ADV or ADAV as a percentage of average daily TCV and the rebates that this percentage will qualify for, providing Members with an increased certainty as to their monthly cost for trades executed on the Exchange.

The Exchange notes that it recently adopted changes to exclude the last Friday of June from the calculation of

<sup>6</sup> As defined in BATS Rule 11.9(c)(12).

<sup>7</sup> As defined in BATS Rule 11.13(a)(3)(G).

<sup>8</sup> As defined in BATS Rule 11.13(a)(3)(H).

<sup>9</sup> As provided in the fee schedule, "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day on a monthly basis; routed shares are not included in ADV calculation.

<sup>10</sup> As provided in the fee schedule, "ADAV" means average daily volume calculated as the number of shares added per day on a monthly basis; routed shares are not included in ADV calculation.

<sup>11</sup> As provided in the fee schedule "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

<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.

ADV and average daily TCV.<sup>12</sup> The last day of June is the day that Russell Investments reconstitutes its family of indexes (“Russell Reconstitution”), resulting in particularly high trading volumes, much of which the Exchange believes derives from market participants who are not generally as active entering the market to rebalance their holdings in-line with the Russell Reconstitution. The Exchange also notes that its affiliate, BYX, recently implemented a similar change to its definitions of ADV and TCV for purposes of BYX tiered pricing.<sup>13</sup>

## 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>14</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>15</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 the proposed changes to the Exchange’s rebate for TRIM (including TRIM2 and TRIM3), SLIM and Destination Specific Orders executed on BYX are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to mirror the rebate applicable

to the execution if such routed orders were executed directly by the Member at BYX.

With respect to the proposed changes to the tiered pricing structure for removing liquidity from the Exchange and adding liquidity to the Exchange, the Exchange believes that its proposal is reasonable because, as explained above, it will help provide Members with a greater level of certainty as to their level of rebates and costs for trading in any month where the Exchange experiences an Exchange Outage on one or more trading days. The Exchange also believes that its proposal is reasonable because it is not changing the thresholds to become eligible or the dollar value associated with the tiered rebates or fees and, moreover, by eliminating the inclusion of a trading day that would almost certainly lower a Member’s ADV or ADAV as a percentage of average daily TCV, it will make the majority of Members more likely to meet the minimum or higher tier thresholds, which will provide additional incentive to Members to increase their participation on the Exchange in order to meet the next tier. In addition, the Exchange believes that the proposed changes to fees are equitably allocated among Exchange constituents as the methodology for calculating ADV, ADAV and TCV will apply equally to all Members. While, although unlikely, certain Members may have a higher ADV or ADAV as a percentage of average daily TCV with their activity included from days where the Exchange has an Exchange Outage, the proposal will make all Members’ cost of trading on the Exchange more predictable, regardless of how the proposal affects their ADV or ADAV as a percentage of average daily TCV. The Exchange also notes that its affiliate, BYX, recently made a similar change.<sup>16</sup>

Volume-based tiers such as the liquidity adding tiers maintained by the Exchange have been widely adopted, and are equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide higher rebates or lower fees that are reasonably related to the value to an exchange’s market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery process. Accordingly, the Exchange believes that the proposal is equitably allocated and not unfairly discriminatory because it is consistent with the overall goals of enhancing

market quality. Further, the Exchange believes that a tiered pricing model not significantly altered by a day of atypical trading behavior which allows Members to predictably calculate what their costs associated with trading activity on the Exchange will be is reasonable, fair and equitable and not unreasonably discriminatory as it is uniform in application amongst Members and should enable such participants to operate their business without concern of unpredictable and potentially significant changes in expenses.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange’s routing services if they believe that alternatives offer them better value. For orders routed through the Exchange and executed at BYX through the TRIM (including TRIM2 and TRIM3), SLIM and Destination Specific Order strategies, the proposed fee change is designed to equal the rebate that a Member would have received if such routed orders would have been executed directly by a Member at BYX. Further, the proposed changes will help to promote intramarket competition by avoiding a penalty to Members for days when trading on the Exchange is unavailable for a significant portion of the day. As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if the deemed fee structures to be unreasonable or excessive.

## 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>17</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>18</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

<sup>12</sup> Securities Exchange Act Release No. 69793 (June 18, 2013), 78 FR 37865 (SR-BATS-2013-034) (notice of filing and immediate effectiveness of proposed rule change to exclude the Russell Reconstitution day from the calculation of ADV and TCV for purposes of BATS Equities tiered pricing). The Exchange notes that while it did not have a definition of ADAV in its fee schedule at the time the Russell Reconstitution exclusion was added, the exclusion does apply to ADAV pursuant to the fee schedule, as amended. See Securities Exchange Act Release No. 70664 (October 11, 2013), 78 FR 68204 (October 22, 2013) (SR-BATS-2013-054) (notice of filing and immediate effectiveness to modify the fees of BATS Exchange, Inc., including the addition of a definition of ADAV).

<sup>13</sup> Securities Exchange Act Release No. 70666 (October 11, 2013), 78 FR 37865 [sic] (October 22, 2013) (SR-BYX-2013-034) (notice of filing and immediate effectiveness of proposed rule change to exclude from the definition of ADV and TCV days that BATS Y-Exchange, Inc. experiences an outage lasting more than 60 minutes).

<sup>14</sup> 15 U.S.C. 78f.

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

<sup>16</sup> See *supra* note 13.

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f).

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-058 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-2013-058. 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-

2013-058 and should be submitted on or before December 10, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70866; File No. SR-Phlx-2013-113]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer a Customer Rebate

November 13, 2013.

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 31, 2013, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III 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 Section B of the Exchange's Pricing Schedule, entitled "Customer Rebate Program", to offer its market participants an additional rebate.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on November 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.cchwallstreet.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.

#### 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 amend the Customer Rebate Program in Section B of the Pricing Schedule to increase Customer rebates available to market participants that transact Customer-denominated orders on Phlx. Specifically, Phlx proposes to offer its members the opportunity to increase the Customer rebates offered in Section B of the Pricing Schedule for transactions on Phlx if the aggregate volumes of Customer orders transacted by a member organization and its affiliates on Phlx, The NASDAQ Options Market LLC ("NOM") and/or NASDAQ OMX BX, Inc. ("BX Options") (collectively "NASDAQ OMX exchanges") exceed a specified volume. The Exchange would increase the applicable Phlx Customer rebate for which the member organization qualified in the Customer Rebate Program by \$0.02 per contract, in any category, provided the member organization, together with any affiliate under Common Ownership,<sup>3</sup> transacts Customer volume on Phlx, NOM and/or BX in multiply-listed options that is electronically delivered and executed equal to or greater than 2.5% of national customer volume in multiply-listed options during the month.

Today, the Exchange pays Customer Rebates based on a four-tier structure comprised of percentage thresholds of Customer Orders in multiply-listed options based on national volume. There are two Categories, A and B, of transactions eligible for rebates. In Category A, rebates are paid to members executing electronically-delivered Customer Simple Orders in Penny Pilot Options and Customer Simple Orders in Non-Penny Pilot Options in Section II symbols.<sup>4</sup> In Category B, rebates are

<sup>3</sup> Common ownership is defined in the Preface to the Pricing Schedule as [sic] member organizations under 75% common ownership or control.

<sup>4</sup> Rebates are paid on PIXL Orders in Section II symbols that execute against non-Initiating Order interest, except in the case of Customer PIXL Orders that are greater than 999 contracts. All Customer

<sup>19</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.