

paid to CHX-registered Institutional Brokers when they represent agency orders which execute in the CHX Matching System would also be removed for Tape A & C securities and the credit in Tape B securities would be reduced from \$0.0027 to \$0.0022/share. The Exchange believes that this proposal will simplify its Fee Schedule and will result in increased revenue.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>8</sup> in particular, 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. Among other things, the removal of the Exchange's tiered fee and rebate structure will simplify the Fee Schedule by instituting reasonable rates that do not vary based upon a Participant's ADV and thereby equitably allocate fees among all Participants in a non-discriminatory manner. Additionally, the removal of the provide credit for executions in Tape A & C securities and the lowering of the provide credit in Tape B securities during the regular trading session, as well as for institutional broker transactions, will equitably allocate the same reasonable rebate rates among all Participants.

### 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 that is not necessary or appropriate in furtherance of the purposes of the Act.

### 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 proposed rule change is to take effect pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder<sup>10</sup> because it establishes or changes a due, fee or other charge applicable to the Exchange's members and non-members,

which renders the proposed rule change effective upon filing.

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-CHX-2011-26 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-CHX-2011-26. 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 website (<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 website 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-CHX-2011-26 and should be submitted on or before October 3, 2011.

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

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2011-23172 Filed 9-9-11; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65266; File No. SR-BATS-2011-032]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change by BATS Exchange, Inc. To Adopt Rules Applicable to Auctions Conducted by the Exchange for Exchange-Listed Securities

September 6, 2011.

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 22, 2011, 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 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 adopt rules governing auctions conducted on the Exchange for securities listed on the Exchange.<sup>3</sup>

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.

<sup>11</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> The Commission notes that the Exchange separately proposed, and the Commission approved, rules for the qualification, listing and delisting of companies on the Exchange. See Securities Exchange Act Release No. 34-65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

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

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

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

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

## 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 is proposing to adopt rules to govern auctions conducted on the Exchange for securities listed on the Exchange ("Exchange Auctions").

#### Organization

The Exchange proposes adoption of definitions to govern Exchange Auctions in paragraph (a) of new Rule 11.23. Proposed paragraph (b) of Rule 11.23 sets forth the process for conducting an opening auction on the Exchange ("Opening Auction") and determining an official opening price for dissemination to the consolidated tape ("BATS Official Opening Price"). Proposed paragraph (c) applies to the process for conducting a closing auction on the Exchange ("Closing Auction") and determining an official closing price for dissemination to the consolidated tape ("BATS Official Closing Price"). Finally, proposed paragraph (d) describes the Exchange's process for conducting an auction in the event of an initial public offering ("IPO") or a halt of trading in the security ("IPO Auction" or "Halt Auction", respectively). Each of the Opening Auction, Closing Auction, IPO Auction and Halt Auction operated by BATS will be a single-price Dutch auction to match buy and sell orders at the price at which the most shares would execute.

#### BATS Auction Feed

In addition to the adoption of Rule 11.23, described in greater detail below, the Exchange proposes to add new paragraph (i) to Rule 11.22 to describe a new data feed that will be offered by the Exchange in connection with auctions conducted by the Exchange, the "BATS Auction Feed." The BATS Auction Feed will be available to

Exchange data recipients<sup>4</sup> without charge.

The BATS Auction Feed will be available to all Exchange data recipients equally, and will offer all firms with uncompressed real-time data regarding the current status of price and size information related to auctions conducted by the Exchange. The Exchange will make the BATS Auction Feed available to all market participants via subscription through an established connection to the Exchange through extranets, direct connection, and Internet-based virtual private networks.

The BATS Auction Feed will contain the following data elements:

- *Time stamp.* The time of the message.
- *Reference Price.* The Reference Price will be the price within the Reference Price Range that maximizes the number of Eligible Auction Order (as defined below) shares associated with the lesser of the Reference Buy Shares and the Reference Sell Shares as determined at each price level within the Reference Price Range, that minimizes the absolute difference between Reference Buy Shares and Reference Sell Shares, and minimizes the distance from the Volume Based Tie Breaker (as defined below).
- *Reference Price Range.* The Reference Price Range will be the range from the best bid on the BATS Book (the "ZBB") to the best offer on the BATS Book (the "ZBO") for a particular security. In the event that there is either no ZBB or ZBO for the security, the national best bid or offer ("NBBO") will be used if there is at least one limit order on either the Continuous Book or the Auction Book. In the event that there is also either no national best bid ("NBB") or national best offer ("NBO") for the security or no limit orders on the Continuous Book and Auction Book, the price of the "Final Last Sale Eligible Trade" (as defined below) will be used.
- *Indicative Price.* The Indicative Price will be the price at which the most shares from the Auction Book<sup>5</sup> and the Continuous Book<sup>6</sup> would match.
- *Auction Only Price.* The Auction Only Price will be the price at which the most shares from the Auction Book would match. In the event of a volume based tie at multiple price levels, the

<sup>4</sup> Exchange data recipients include Members of the Exchange as well as non-Members that have entered into an agreement with the Exchange that permits them to receive Exchange data.

<sup>5</sup> The term "Auction Book" refers to the book of Eligible Auction Orders available on the BATS Book.

<sup>6</sup> The term "Continuous Book" refers to all orders available on the Exchange that are not Eligible Auction Orders.

Opening Auction price will be the price closest to the Volume Based Tie Breaker.

- *Reference Buy Shares.* Reference Buy Shares will be the total number of shares associated with buy-side Eligible Auction Orders that are priced equal to or greater than the Reference Price.

- *Reference Sell Shares.* Reference Sell Shares will be the total number of shares associated with sell-side Eligible Auction Orders that are priced equal to or less than the Reference Price.

For purposes of the BATS Auction Feed, and the auction processes of the Exchange generally, the term "Final Last Sale Eligible Trade" shall mean the last trade occurring during Regular Trading Hours on the Exchange if the trade was executed within the last one second prior to either the Closing Auction or, for Halt Auctions, trading in the security being halted. Where the trade was not executed within the last one second, the last trade reported to the consolidated tape received by BATS during Regular Trading Hours and, where applicable, prior to trading in the security being halted will be used. If there is no qualifying trade for the current day, the BATS Official Closing Price (as defined below) from the previous trading day will be used.

By making the BATS Pricing Feed data available, the Exchange enhances market transparency and fosters competition among orders and markets. At this time, the Exchange does not have plans to charge any fee associated with the receipt of the BATS Auction Feed.<sup>7</sup> Should the Exchange determine to charge fees associated with the BATS Auction Feed, the Exchange will submit a proposed rule change to the Commission in order to implement those fees.

#### Order Types To Participate in Auctions

The Exchange proposes to offer the following order types in connection with BATS Opening Auctions:

<sup>7</sup> The Exchange does not charge directly for the majority of the data feeds that it offers, nor will the Exchange charge for the BATS Auction Feed. The Exchange notes that it does charge for ports used for receipt of data from the Exchange in order to offset certain infrastructure costs. These fees apply to ports associated with receipt of all of the Data Feeds except for Multicast PITCH, recipients of which are provided with 12 pairs of the requisite ports free of charge. See Securities Exchange Act Release No. 60586 (August 28, 2009), 74 FR 46256 (September 8, 2009) (SR-BATS-2009-026) (order approving proposal to impose fees for ports used for order entry and receipt of market data); see also Securities Exchange Act Release No. 63857 (February 7, 2011), 76 FR 7891 (February 11, 2011) (SR-BATS-2011-004) (notice of filing and immediate effectiveness of proposed rule change related to BATS Exchange fees, including modification of port fees).

- A “Market-On-Open” or “MOO” order, which will be a BATS market order that is designated for execution only in the Opening Auction;

- A “Limit-On-Open” or “LOO” order, which will be a BATS limit order that is designated for execution only in the Opening Auction; and

- A “Late-Limit-On-Open” or “LLOO” order, which will be a BATS limit order that is designated for execution only in the Opening Auction. To the extent a LLOO bid or offer received by the Exchange has a limit price that is more aggressive than the ZBB or ZBO, the price of such bid or offer is adjusted to be equal to the ZBB or ZBO, respectively, at the time of receipt by the Exchange. Where the ZBB or ZBO becomes more aggressive, the limit price of the LLOO bid or offer will be adjusted to the more aggressive price, only to the extent that the more aggressive price is not more aggressive than the original User<sup>8</sup> entered limit price. The limit price will never be adjusted to a less aggressive price. In the event that there is no best bid or offer on the Exchange (“ZBBO”), the NBBO will be used to constrain the limit price. If there is also no NBBO, the LLOO will assume its entered limit price.

The Exchange proposes to offer the following order types in connection with BATS Closing Auctions, each of which mirrors an order type available for the Opening Auction:

- A “Market-On-Close” or “MOC” order, which will be a BATS market order that is designated for execution only in the Closing Auction;

- A “Limit-On-Close” or “LOC” order, which will be a BATS limit order that is designated for execution only in the Closing Auction;

- A “Late-Limit-On-Close” or “LLOC”, which will be a BATS limit order that is designated for execution only in the Closing Auction. To the extent a LLOC bid or offer received by the Exchange has a limit price that is more aggressive than the ZBB or ZBO, the price of such bid or offer is adjusted to be equal to the ZBB or ZBO, respectively, at the time of receipt by the Exchange. Where the ZBB or ZBO becomes more aggressive, the limit price of the LLOC bid or offer will be adjusted to the more aggressive price, only to the extent that the more aggressive price is not more aggressive than the original User entered limit price. The limit price will never be adjusted to a less aggressive price. In the event that there is no ZBBO, the NBBO will be used to

constrain the limit price. If there is also no NBBO, the LLOC will assume its entered limit price.

In addition to the order types described above, the Exchange proposes to offer a “Regular Hours Only” or “RHO” order, which will be a BATS order that is designated for execution only during Regular Trading Hours,<sup>9</sup> which includes the Opening Auction, the Closing Auction, and IPO/Halt Auctions. A RHO order, if not executed in an applicable auction can be executed within a BATS Auction or on the Exchange’s book outside of a BATS Auction but will not be subject to execution outside of Regular Trading Hours.

#### Opening Auction

##### Order Entry and Cancellation Before Opening Auction

As proposed, the Exchange will allow Users to submit orders to the Exchange starting at 8 a.m., the beginning of the Pre-Opening Session.<sup>10</sup> Any Eligible Auction Orders (as defined below) designated for the Opening Auction will be queued until 9:30 a.m. at which time they will be eligible to be executed in the Opening Auction. An Eligible Auction Order, as proposed, would include any MOO, LOO, LLOO, MOC, LOC, or LLOC order that is entered in compliance with its respective cutoff for an Opening or Closing Auction, any RHO order prior to the Opening Auction, and any limit or market order not designated to exclusively participate in the Opening or Closing Auction entered during the Quote-Only Period of an IPO or Halt Auction.

Users will also be allowed to submit LOO and MOO orders until 9:28 a.m., at which point any additional LOO and MOO orders submitted to the Exchange will be rejected. RHO market orders will also be rejected between 9:28 a.m. and 9:30 a.m. Users may submit LLOO orders between 9:28 a.m. and 9:30 a.m. Any LLOO orders submitted before 9:28 a.m. or after 9:30 a.m. will be rejected. RHO limit orders submitted between 9:28 a.m. and 9:30 a.m. will be treated as LLOO orders until the Opening Auction has concluded. Eligible Auction Orders designated for the Opening Auction may not be cancelled or modified between 9:28 a.m. and 9:30 a.m. Orders eligible for execution in the Pre-Opening Session may be cancelled

<sup>9</sup> As defined in Rule 1.5(w), “Regular Trading Hours” is the time between 9:30 a.m. and 4 p.m. Eastern Time.

<sup>10</sup> As defined in Rule 1.5(r), the “Pre-Opening Session” is the time between 8 a.m. and 9:30 a.m. Eastern Time.

or modified at any time prior to execution.

#### Opening Auction Process for BATS Listed Securities

The Exchange will conduct an Opening Auction for all BATS listed securities. Beginning at 9:28 a.m. and updated every five seconds thereafter, the Reference Price, Indicative Price, Auction Only Price, Reference Buy Shares, and Reference Sell Shares associated with the Opening Auction will be disseminated via electronic means.

Auctions operated by the Exchange will utilize both a Collar Price Range and a Volume Based Tie Breaker in certain situations. The Collar Price Range will be the range from 10% of the Volume Based Tie Breaker below the ZBB to 10% of the Volume Based Tie Breaker above the ZBO. In the event that there is either no ZBB or ZBO for the security, the Collar Price Range will be the range from 10% of the Volume Based Tie Breaker below the NBB to 10% of the Volume Based Tie Breaker above the NBO if there is at least one limit order on either the Continuous Book or the Auction Book. In the event that there is also either no NBB or NBO for the security or no limit orders on the Continuous Book and the Auction Book, the range from 10% above and below the price of the Final Last Sale Eligible Trade will be used. The term Volume Based Tie Breaker will mean the midpoint of the ZBBO for a particular security. In the event that there is either no ZBB or ZBO for the security, the NBBO will be used if there is at least one limit order on either the Continuous Book or the Auction Book. In the event that there is also either no NBB or NBO for the security or no limit orders on the Continuous Book and the Auction Book, the price of the Final Last Sale Eligible Trade will be used.

The Opening Auction price will be established by determining the price level within the Collar Price Range that maximizes the number of shares executed between the Continuous Book and Auction Book in the Opening Auction. In the event of a volume based tie at multiple price levels, the Opening Auction price will be the price closest to the Volume Based Tie Breaker. In the event that at the time of the Opening Auction there are no limit orders on both the Continuous Book and the Auction Book, the Opening Auction will occur at the price of the Final Last Sale Eligible Trade. The Opening Auction price will be the BATS Official Opening Price. In the event that there is no Opening Auction for an issue, the BATS Official Opening Price will be the price

<sup>8</sup> A “User” is defined in BATS Rule 1.5(cc) as any member or sponsored participant of the Exchange who is authorized to obtain access to the System.

of the Final Last Sale Eligible Trade, which will be the previous BATS Official Closing Price.

MOO and market RHO orders have priority over all other Opening Auction Eligible Orders. To the extent there is executable contra side interest, such MOO and market RHO orders will execute at the BATS Official Opening Price in accordance with time priority. After the execution of all MOO and market RHO orders, the remaining orders priced at or more aggressively than the BATS Official Opening Price on the Auction Book and the Continuous Book will be executed on the basis of price priority. Equally priced trading interest shall execute in time priority in the following order: (i) The displayed portion of limit orders, LOO orders, LLOO orders, and limit RHO orders (all such orders to have equal priority after execution of all MOO and market RHO orders); (ii) non-displayed orders; and (iii) the reserve portion of Limit Orders.

#### Transition to Regular Trading Hours

Limit order shares on the Continuous Book that are not executed in the Opening Auction will remain on the Continuous Book during Regular Trading Hours, subject to the User's instructions. RHO order shares that are not executed in the Opening Auction will be added to the Continuous Book at the conclusion of the Opening Auction, subject to the User's instructions. LOO, LLOO, and MOO orders that are not executed in the Opening Auction will be cancelled immediately at the conclusion of the Opening Auction.

#### Closing Auction

##### Order Entry and Cancellation Before Closing Auction

As proposed, Users may submit orders to the Exchange starting at 8 a.m., the beginning of the Pre-Opening Session. Any Eligible Auction Orders designated for the Closing Auction will be queued until 4 p.m. at which time they will be eligible to be executed in the Closing Auction. Users may submit LOC and MOC orders until 3:55 p.m., at which point any additional LOC and MOC orders submitted will be rejected. Unlike in the Opening Auction, User submitted Market RHO orders will be accepted immediately prior to the Closing Auction. Users may submit LLOC orders between 3:55 p.m. and 4 p.m. Any LLOC orders submitted before 3:55 p.m. or after 4 p.m. will be rejected.

Eligible Auction Orders designated for the Closing Auction may not be cancelled between 3:55 p.m. and 4 p.m.

Orders eligible for execution during Regular Trading Hours may be cancelled at any time prior to execution.

#### Closing Auction Process for BATS Listed Securities

The Exchange will conduct a Closing Auction for all BATS listed securities. Beginning at 3:55 p.m. and updated every five seconds thereafter, the Reference Price, Indicative Price, Auction Only Price, Reference Buy Shares, and Reference Sell Shares associated with the Closing Auction will be disseminated via electronic means. The Closing Auction price will be established by determining the price level within the Collar Price Range that maximizes the number of shares executed between the Continuous Book and Auction Book in the Closing Auction. In the event of a volume based tie at multiple price levels, the Closing Auction price will be the price closest to the Volume Based Tie Breaker. In the event that at the time of the Closing Auction there are no limit orders on both the Continuous Book and the Auction Book, the Closing Auction will occur at the price of the Final Last Sale Eligible Trade. The Closing Auction price will be the BATS Official Closing Price. In the event that there is no Closing Auction for an issue, the BATS Official Closing Price will be the price of the Final Last Sale Eligible Trade.

MOC orders have priority over all other Closing Auction Eligible Orders. To the extent there is executable contra side interest, such MOC orders will be executed at the BATS Official Closing Price according to time priority. After the execution of all MOC orders, the remaining orders priced at or more aggressively than the BATS Official Closing Price on the Auction Book and the Continuous Book will be executed on the basis of price priority. Equally priced trading interest shall execute in time priority in the following order: (i) The displayed portion of limit orders, LOC orders, LLOC orders, and limit RHO orders (all such orders to have equal priority after execution of all MOC orders); (ii) non-displayed orders; and (iii) the reserve portion of Limit Orders.

#### Transition to After Hours Trading Session

Limit Order shares on the Continuous Book that are not executed in the Closing Auction will remain on the Continuous Book during the After Hours Trading Session, subject to the User's instructions. RHO order shares not executed in the Closing Auction will be cancelled at the conclusion of the Closing Auction. LOC, LLOC, and MOC orders that are not executed in the

Closing Auction will be cancelled immediately at the conclusion of the Closing Auction.

#### IPO and Halt Auctions

For trading in a BATS listed security in an IPO or following a trading halt in that security, the Exchange will conduct an IPO or Halt Auction, as described below.

##### Order Entry and Cancellation Before an IPO or Halt Auction

The Quote-Only Period is a period of time prior to an IPO or Halt Auction during which the Exchange will permit Users to submit orders but the Exchange will not execute any transactions in the applicable security (*i.e.*, there are no Continuous Book executions occurring while orders are collected). The Quote-Only Period with respect to a Halt Auction shall commence five (5) minutes prior to such Halt Auction. The Quote-Only Period with respect to an IPO Auction shall commence fifteen (15) minutes plus a short random period prior to such IPO Auction. The Exchange has proposed a short random period of time prior to an IPO Auction to provide a protective mechanism against potential manipulation of the IPO price through orders entered for participation in the IPO Auction but then withdrawn immediately prior to the commencement of the auction process. There are no IPO or Halt Auction specific order types. Any Eligible Auction Orders associated with an IPO or Halt Auction will be queued until the end of the Quote-Only Period at which time they will be eligible to be executed in the associated auction. All orders associated with IPO or Halt Auctions must be received prior to the end of the Quote-Only Period in order to participate in the auction.

Eligible Auction Orders associated with an IPO or Halt Auction may be cancelled at any time prior to execution.

#### IPO and Halt Auction Process

Coinciding with the beginning of the quotation only period for a security and updated every five seconds thereafter, the Reference Price, Indicative Price, Auction Only Price, Reference Buy Shares, and Reference Sell Shares associated with the Halt Auction will be disseminated via electronic means.

The Quote-Only Period may be extended where: (i) There are unmatched market orders on the Auction Book associated with the auction; (ii) in an IPO Auction, the underwriter requests an extension; or (iii) where the Indicative Price moves the greater of 10% or fifty (50) cents in the fifteen (15) seconds prior to the

auction. The Exchange will typically extend the Quote-Only Period in five minute intervals, however, reserves the right to vary this interval and/or continue to extend the Quote-Only Period depending on the nature and magnitude of the reason for the extension.

Orders will be executed at the price that maximizes the number of shares executed in the auction. In the event of a volume based tie at multiple price levels, the price level closest to the issuing price will be used for IPO Auctions and the price level closest to the Final Last Sale Eligible Trade will be used for Halt Auctions. In the event that there are no limit orders among the Eligible Auction Orders for a Halt Auction, the Halt Auction will occur at the price of the Final Last Sale Eligible Trade. In the event that there are no limit orders among the Eligible Auction Orders for an IPO Auction, the IPO Auction will occur at the issuing price. The IPO Auction price will be BATS Official IPO Opening Price.

If any orders are not executed in their entirety during the IPO or Halt Auction, then the remaining shares from such orders shall be executed in accordance with BATS Rule 11.13 after the completion of the Halt Auction. After the completion of the IPO or Halt Auction, the Exchange will open for trading in the security in accordance with Chapter 11 of BATS Rules.

Whenever, in the judgment of the Exchange, the interests of a fair and orderly market so require, the Exchange may adjust the timing of or suspend the auctions set forth in this Rule with prior notice to Members. For purposes of Rule 611(b)(3) of Regulation NMS, orders executed pursuant to the Opening Auction, Closing Auction, and Halt Auction may trade-through any other Trading Center's Manual or Protected Quotations if the transaction that constituted the trade-through was a single-priced opening, reopening, or closing transaction by the trading center.

The Exchange also proposes language for Rule 11.23 to make clear that all references including a.m. and p.m. times shall refer to times in Eastern Time.

## 2. Statutory Basis

Approval of the rule changes 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.<sup>11</sup> In particular, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>12</sup> 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. The Exchange believes that operation of an Exchange Auction for securities listed on the Exchange will assist in the price discovery process and help to ensure a fair and orderly market for securities listed on the Exchange.

For the reasons described above, the Exchange's proposal is also integral to its adoption of rules applicable to the qualification, listing and delisting of companies on the Exchange.<sup>13</sup> The Exchange's proposal to operate as a primary listings market, including the adoption of rules to conduct Exchange Auctions, comes at a time when there are two dominant primary listing venues, the New York Stock Exchange LLC ("NYSE") and the NASDAQ Stock Market LLC ("Nasdaq"). The Exchange believes that the proposed change would increase competition by providing an alternative to Nasdaq and NYSE for a company seeking to list its securities and for such securities to be traded in an orderly fashion at the open and close of trading, as well as in the context of an IPO or halted trading in the security. Accordingly, the Exchange believes that the proposal will allow the Exchange to provide companies with another option for raising capital in the public markets, thereby promoting the aforementioned principles discussed in Section 6(b)(5) of the Act.<sup>14</sup> For the reasons described above, the proposed rule change is also designed to support the principles of Section 11A(a)(1)<sup>15</sup> of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets.

### (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.

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

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> See *supra* note 3.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> 15 U.S.C. 78k-1(a)(1).

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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 No. SR-BATS-2011-032 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 No. SR-BATS-2011-032. 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 changes 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-2011-032 and should be submitted on or before October 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2011-23170 Filed 9-9-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65282; File No. SR-MSRB-2011-14]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule G-36, on Fiduciary Duty of Municipal Advisors, and a Proposed Interpretive Notice Concerning the Application of Proposed Rule G-36 to Municipal Advisors

September 7, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 23, 2011, the Municipal Securities Rulemaking Board ("Board" or "MSRB") 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 MSRB. 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 MSRB is filing with the SEC a proposed rule change consisting of proposed Rule G-36 (on fiduciary duty of municipal advisors) and a proposed interpretive notice (the "Notice") concerning the application of proposed Rule G-36 to municipal advisors. The MSRB requests that the proposed rule change be made effective on the date that rules defining the term "municipal

advisor" under the Exchange Act are first made effective by the Commission or such later date as the proposed rule change is approved by the Commission.

The text of the proposed rule change is available on the MSRB's Web site at <http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2011-Filings.aspx>, at the MSRB's principal office, 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 MSRB 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 Board 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

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),<sup>3</sup> the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, the MSRB is proposing Rule G-36 and an interpretive notice thereunder to address the fiduciary duty of municipal advisors to their municipal entity clients.

A more-detailed description of the provisions of the Notice follows:

*Duty of Loyalty.* The Notice would provide that the Rule G-36 duty of loyalty would require the municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best interests without regard to financial or other interests of the municipal advisor. It would require a municipal advisor to make clear, written disclosure of all material conflicts of interest, such as those that might impair its ability to satisfy the duty of loyalty, and to receive the written, informed consent of officials of the municipal entity the municipal advisor reasonably believes have the authority to bind the municipal entity by contract with the municipal advisor. Such disclosure would be required to be made before the municipal advisor could provide

municipal advisory services to the municipal entity or, in the case of conflicts discovered or arising after the municipal advisory relationship has commenced, before the municipal advisor could continue to provide such services.

The Notice would provide that a municipal advisor may not undertake an engagement if certain unmanageable conflicts exist, including (i) kickbacks and certain fee-splitting arrangements with the providers of investments or services to municipal entities, (ii) payments by municipal advisors made for the purpose of obtaining or retaining municipal advisory business other than reasonable fees paid to a municipal advisor for solicitation activities regulated by the MSRB, and (iii) acting as a principal in matters concerning the municipal advisory engagement (except when providing investments to the municipal entity on a temporary basis to ensure timely delivery for closing; when engaging in activities permitted under Rule G-23; when it is a municipal advisor solely because it recommends investments or municipal financial products provided or offered by it to a municipal entity as a counterparty (other than a swap or security-based swap counterparty); or when acting as a swap or security-based counterparty to a municipal entity represented by an "independent representative," as defined in the Commodity Exchange Act or the Exchange Act, respectively.

The Notice would provide that, in certain cases, the compensation received by a municipal advisor could be so disproportionate to the nature of the municipal advisory services performed that it would be inconsistent with the proposed Rule G-36 duty of loyalty and would represent an unmanageable conflict. The Notice would also provide that a municipal advisor would be required to disclose conflicts associated with various forms of compensation (except where the form of compensation has been required by the municipal entity client), in which case the disclosure need only address that form of compensation. The Notice would also include a form of disclosure of conflicts relating to the forms of compensation to aid advisors in preparing their disclosure. Use of the form would not be required.

*Duty of Care.* The Notice would provide that the proposed Rule G-36 duty of care would require that a municipal advisor act competently and provide advice to the municipal entity after inquiry into reasonably feasible alternatives to the financings or products proposed (unless the engagement is of a limited nature). The

<sup>16</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> Public Law 111-203, 124 Stat. 1376 (2010).