

associated with this class of securities from those for other securities.

FINRA responded that the comment goes beyond the scope of the instant proposal, but that it would consider the comment separately.<sup>19</sup> FINRA stated that if it determines that a similar exemption is appropriate for TRACE reporting, FINRA would submit a separate rule filing to effect that change.

In addition, the commenter argued that the criteria for the exemption should be clarified in certain respects.<sup>20</sup> FINRA disagreed with the comment and reasserted its belief that the criteria for the exemption were sufficiently clear.<sup>21</sup>

Finally, the commenter argued that the proposed exemption should be automatic, and not subject to FINRA staff discretion.<sup>22</sup> The commenter maintained that FINRA has not explained the “relevant factors” that FINRA staff would consider, which could lead to inconsistent application of the new rules. FINRA responded that it is important for its staff to have the opportunity to review an ATS’s application for exemptive relief and to make a determination whether the ATS meets the criteria in the proposed rule before the ATS is able to rely on the exemption.<sup>23</sup> FINRA believes that it is important to know in advance which party—the ATS or one of its subscribers—will have the trade reporting obligation. FINRA stated that, while it expects to grant an exemption to any ATS that can demonstrate that it meets all of the criteria set forth in the new rules, FINRA staff should have notice and discretion in the event of a disagreement with an ATS about whether it qualifies for an exemption under the proposed rule. FINRA plans to post on its Web site which ATSs are operating under any exemption granted pursuant to the new rules.

#### IV. Discussion and Commission’s Findings

The Commission has carefully reviewed the proposed rule change, the comments received, and FINRA’s response to the comments, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>24</sup> In particular, the Commission finds that the proposed

rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>25</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

As described above, the proposal is designed to provide FINRA the authority to exempt an ATS from reporting obligations under FINRA’s equity trade reporting rules where the ATS does not perform all the functions normally associated with those of an executing party. Where an exemption is granted, the duty to report will fall on one of the subscribers that is a counterparty to the trade and that itself satisfies the definition of “executing party.” The Commission believes that the exemption mechanism is reasonably designed to promote efficient reporting of OTC transactions in equity securities, and that FINRA can—consistent with the Exchange Act—be afforded some discretion regarding which of its members should have the duty to report a trade when there are multiple members who could potentially assume that duty.

The Commission does not believe that any commenters raised issues that would preclude approval of this proposal. The Commission believes that the proposal is sufficiently clear, and modifications are not necessary to allow the Commission to find it consistent with the Act. Furthermore, the comments that raised issues with dark pools go beyond the scope of the present proposal. All transactions currently subject to reporting will continue to be reported; the new rules merely allow FINRA to reassign the duty to report in certain circumstances.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>26</sup> that the proposed rule change (SR-FINRA-2011-051) be, and it hereby is, approved.

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

**Kevin M. O’Neill,**

*Deputy Secretary.*

[FR Doc. 2011-29114 Filed 11-9-11; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>19</sup> See FINRA Response at 2.

<sup>20</sup> See OTC Markets Letter at 3-6.

<sup>21</sup> See FINRA Response at 2.

<sup>22</sup> See OTC Markets Letter at 7.

<sup>23</sup> See FINRA Response at 2-3.

<sup>24</sup> In approving this proposed rule change, the Commission has considered the rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>25</sup> 15 U.S.C. 78o-3(b)(6).

<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>27</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65694; File No. SR-BATS-2011-046]

### 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 4, 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 October 31, 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, 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 Substance of the Proposed Rule Change

The Exchange proposes [sic] 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 changes will become operative on November 1, 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

<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.

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 the "Options Pricing" section of its fee schedule to: (i) Recognize a new category of participant, a "Professional", in light of recent changes the Exchange made to its rules that become operative November 1, 2011; and (ii) modify the Quoting Incentive Program, which is a program intended to incentivize sustained, aggressive quoting on the BATS options platform ("BATS Options"). In addition to these changes, the Exchange proposes to correct a typographical error on the fee schedule. Specifically, the Exchange no longer offers a discounted fee to remove liquidity for Firm or Market Makers that meet certain average daily volume requirements but the fee schedule still contains language indicating that such a reduced fee is available. The Exchange proposes to delete this language.

Professional Pricing

The Exchange recently modified the rules applicable to BATS Options to amend Rule 16.1 (Definitions) to adopt a definition of "Professional" on the Exchange and require that all Professional orders be appropriately marked by members of BATS Options ("Options Members").<sup>6</sup> As defined in Rule 16.1, which, as modified becomes operative November 1, 2011, the term "Professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

The Exchange currently charges and provides rebates based on the capacity in which a User is acting, either as a Firm, as a Market Maker, or on behalf of a Customer. With respect to rebates, the Exchange also currently differentiates the rebate paid to Firms and Market Makers depending on the capacity of the counter-party to the trade, either a Customer or another Firm or Market Maker. In order to properly

align Professionals with other sophisticated market participants, the Exchange proposes to modify its fee schedule by listing a Professional with a Firm and Market Maker in every instance where a distinction is made for options fees and rebates based on the capacity of the User or the counter-party. For instance, the Exchange currently charges a fee of \$0.42 per contract for all Firm and Market Maker orders that remove liquidity from BATS Options. The Exchange proposes to charge this same fee for all Professional orders that remove liquidity from BATS Options.

Modification to Quoting Incentive Program (QIP)

BATS Options offers a Quoting Incentive Program (QIP), through which Members receive a rebate of \$0.05 per contract, in addition to any other applicable liquidity rebate, for executions subject to the QIP. Currently to qualify for the QIP a BATS Options Market Maker must be at the NBB or NBO 70% of the time for series trading between \$0.03 and \$5.00 for the front three (3) expiration months in that underlying during the current trading month. A Member not registered as a BATS Options Market Maker can also qualify for the QIP by quoting at the NBB or NBO 80% of the time in the same series. The Exchange proposes to modify the qualification levels to make qualifying for the QIP attainable by more Members and BATS Options Market Makers. Specifically, the Exchange proposes to reduce the level at which a BATS Options Market Maker must be at the NBB or NBO from 70% to 60% and for Members not registered as a BATS Options Market Maker from 80% to 70%.

All other aspects of the QIP currently in place will remain the same. As is true under the current operation of the QIP, the Exchange will determine whether a Member qualifies for QIP rebates at the end of each month by looking back at each Member's (including BATS Options Market Makers) quoting statistics during that month. If at the end of the month a Market Maker meets the 60% criteria or a Member that is not registered as a Market Maker meets the 70% criteria, the Exchange will provide the additional rebate for all executions subject to the QIP executed by that Member during that month. The Exchange will provide Members with a report on a daily basis with quoting statistics so such Members can determine whether or not they are meeting the QIP criteria. The Exchange is not proposing to impose any ADV

requirements in order to qualify for the QIP at this time.

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 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 it is equitable, reasonable and non-discriminatory to assess fees and provide liquidity rebates for Professional orders that are the same as those fees and rebates for Firms and Market Makers. The Exchange believes that application of a simple pricing structure that groups all sophisticated participants together is advantageous to all Members of BATS Options. As stated above, the Exchange operates within a highly competitive market. The Exchange, however, does not assess ongoing fees [sic] for BATS Options market data or fees related to order cancellation. Professional accounts, while otherwise considered to be Customers by virtue of not being broker-dealers, generally engage in trading activity more similar to broker-dealer proprietary trading accounts (more than 390 orders per day on average). This level of trading activity draws on a greater amount of Exchange system resources than that of non-Professional Customers. Simply, the more orders submitted to the Exchange, the more messages sent to and received from the Exchange, and the more Exchange system resources utilized. This level of trading activity by Professional accounts results in greater ongoing operational costs to the Exchange. As such, the Exchange aims to recover its costs by assessing Professional accounts the same fees that it assesses to other sophisticated Exchange market participants. Generally, competing options exchanges assess Professionals fees at rates more comparable to fees charged to broker-dealers. Sending

<sup>6</sup> Securities Exchange Act Release No. 65500 (October 6, 2011), 76 FR 63686 (October 13, 2011) (SR-BATS-2011-041).

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

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

orders to and trading on the Exchange are entirely voluntary. Under these circumstances, Exchange transaction fees must be competitive to attract order flow, execute orders, and grow its market. As such, the Exchange believes its trading fees proposed for Professional accounts are fair and reasonable. While Professional orders will be assessed comparably higher transaction fees than those assessed to other Customer orders, as proposed, because Professional orders will be treated in the same manner as Firm and Market Maker orders, Professional orders will have the ability to achieve a higher rebate of \$0.32 per contract when executing against other Firm, Market Maker or Professional orders (as compared to a \$0.30 per contract rebate that a Customer order would receive).<sup>9</sup> The Exchange also notes that Professional orders will still qualify for additional rebates under existing programs such as the Exchange's Quoting Incentive and NBBO Setter Programs.

Moreover, the Exchange believes it is equitable and not unfairly discriminatory to charge Customers lower fees than fees charged to Professional accounts, which are more akin to broker-dealer accounts. The securities markets generally, and the Exchange in particular, have historically aimed to improve markets for investors and develop various features within the market structure for customer benefit. As such, the Exchange believes the proposed fees for Professional accounts, as compared to Customer transaction fees, is appropriate and not unfairly discriminatory.

Finally, the Exchange believes that the proposed change to charge the same fee for routing Professional customer orders to various markets as is charged for Firm and Market Maker orders is reasonable, equitable, and not unfairly discriminatory in that the fee will allow the Exchange to recoup its costs attendant with offering optional routing services. The Exchange incurs various costs related to providing routing services. In order to better recover those related costs and to potentially generate additional revenue, the Exchange proposes a routing fee to provide this optional service to Professional accounts. The Exchange also notes that although routing is available to Exchange participants for customer orders, including Professionals,

Exchange participants are not required to use the routing services. Rather, Exchange routing services are completely optional. Exchange participants can manage their own routing to different options exchanges or can utilize a myriad of other routing solutions that are available to market participants. Further, as noted above, the characteristics of Professional accounts tend to be more similar to broker-dealers than to non-Professional Customers. As such, the Exchange believes Professionals are more likely to be able to directly route their orders to the exchange venues where they wish to trade. By assessing a fee on Professional accounts for routing orders, the Exchange aims to recover its costs in providing this optional service to its Participants and their Professional customer accounts. The Exchange believes that providing Customers a preferred rate for routing is consistent with the long history in the options markets of such customers being given preferred fees.

Additionally, the Exchange believes that the proposed modification to the Quoting Incentive Program, which is similar to a fee structure in place on at least one of the Exchange's competitors,<sup>10</sup> will further incentivize the provision of competitively priced, sustained liquidity that will create tighter spreads, benefitting both Members and public investors. The Exchange also believes that continuing to maintain a slightly lower threshold for meeting the QIP for registered BATS Options Market Makers appropriately incentivizes Members of BATS Options to register with the Exchange as Options Market Makers. While the Exchange does wish to allow participation in the QIP by all Members, the Exchange believes that registration by additional Members as Market Makers will help to continue to increase the breadth and depth of quotations available on the Exchange. The Exchange notes that in addition to the fact that the QIP will be available to all Members, the proposal is not unfairly discriminatory despite a slightly higher quotation requirement for non-Market Makers due to the fact that registration as a BATS Options Market Maker is equally available to all 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>11</sup> and Rule 19b-4(f)(2) thereunder,<sup>12</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.

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2011-046 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-2011-046. 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

<sup>9</sup> The Exchange notes that when executing against a Customer order, a Professional order will receive a liquidity rebate of \$0.22 per contract. This is the same liquidity rebate provided to Firm and Market Maker orders that execute against Customer orders today.

<sup>10</sup> See Securities Exchange Act Release No. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR-ISE-2010-25) (notice of filing and immediate effectiveness of changes to fees and rebates including adoption of specific rebates for market makers qualifying for the Market Maker Plus program).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

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-2011-046 and should be submitted on or before December 1, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011-29113 Filed 11-9-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65692; File No. SR-FINRA-2011-063]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Order Audit Trail System Rules

November 4, 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 October 28, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") 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 FINRA. 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

FINRA is proposing to amend (i) Rules 5320 and 7440 to require that members report to the Order Audit Trail System ("OATS") information barriers put into place by the member in reliance on Supplementary Material .02 to Rule 5320; (ii) Rule 7440 to require that members report customer instructions regarding the display of a customer's limit order in any OATS-eligible security; and (iii) Rule 7450 to codify the specific time OATS reports must be transmitted to FINRA.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA 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, FINRA 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. FINRA 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, Proposed Rule Change

###### 1. Purpose

FINRA is proposing two changes to the order recording requirements in Rule 7440 of the OATS rules to reflect two recent amendments to other FINRA rules. First, the proposed rule change requires members relying on the "No-Knowledge Exception" in Supplementary Material .02 to Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) to report information to OATS regarding the information barriers adopted by the member in reliance on the exception. The proposed rule change also adds this requirement into Supplementary Material .02 of Rule 5320. Second, the proposed rule change extends the existing requirement to reflect on OATS reports a customer's instruction regarding display of the customer's limit orders. The requirement currently

applies only to limit orders involving NMS stocks; the proposed rule change extends the requirement to all OATS-eligible securities.

FINRA is also proposing amendments to Rule 7450 to codify the specific time by which OATS reports must be transmitted to FINRA.

###### (1) Customer Order Protection

First, FINRA is proposing to require members to identify on OATS reports information barriers that the member has in place in reliance on the No-Knowledge Exception in Supplementary Material .02 to Rule 5320.

On February 11, 2011, the SEC approved FINRA's proposed rule change to consolidate NASD Rule 2111 and IM-2110-2 into new FINRA Rule 5320.<sup>3</sup> Under Rule 5320, a member that accepts and holds an order in an equity security from its own customer, or a customer of another broker-dealer, without immediately executing the order is prohibited from trading that security on the same side of the market for its own proprietary account at a price that would satisfy the customer order unless the member immediately thereafter executes the customer order up to the size and at the same, or better, price at which the member traded for its proprietary account. The No-Knowledge Exception in Supplementary Material .02 to Rule 5320 provides that if a firm implements and uses an effective system of internal controls—such as appropriate information barriers—that operate to prevent one trading unit from obtaining knowledge of customer orders held by a separate trading unit, those other trading units may trade in a proprietary capacity at prices that would satisfy the customer orders held by the separate, walled-off trading unit.<sup>4</sup>

When FINRA originally proposed Rule 5320, members claiming the No-Knowledge Exception would have been required to assign and use a unique market participant identifier ("MPID") for any walled-off market-making desk.<sup>5</sup> In response to commenters' concerns with the proposed MPID requirement, FINRA amended the proposal to delete the unique MPID requirement, but stated that it intended to examine alternative means of achieving the same regulatory objective of being able to

<sup>3</sup> See Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011).

<sup>4</sup> The Commission notes that the No-Knowledge Exception in Supplementary Material .02 to FINRA Rule 5320 contains different procedures for OTC equity securities.

<sup>5</sup> See Securities Exchange Act Release No. 61168 (December 15, 2009), 74 FR 68084 (December 22, 2009).

<sup>13</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.