

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58623; File No. SR-BATS-2008-004)

September 23, 2008

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Consolidating into a Single Rule Certain Requirements for Products Traded on the Exchange Pursuant to Unlisted Trading Privileges

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 17, 2008, BATS Exchange, Inc. (“BATS” or “Exchange”) 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. BATS has designated the proposed rule change as constituting a rule change under Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal 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 is proposing to amend BATS Rule 14.1, entitled “Unlisted Trading Privileges” to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to unlisted trading privileges (“UTP”) that have been established in various new product proposals previously approved by the Commission.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis, for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's rules to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to UTP that have been established in various new product proposals previously approved by the Commission. The Exchange proposes to amend BATS Rule 14.1 to set forth rules regarding the extension of UTP to a security that is listed on another national securities exchange. Any such security will be subject to all Exchange trading rules applicable to equity securities, unless otherwise noted. The Exchange will file with the Commission a Form 19b-4(e) with respect to any such security that is a "new derivative securities product" as defined in Rule 19b-4(e) under the Act.⁵ In addition, any new derivative securities product traded on the Exchange pursuant to the proposed BATS Rule 14.1 will be subject to the following criteria.

⁵ 17 CFR 240.19b-4(e).

Proposed BATS Rule 14.1(c)(2) provides that the Exchange will distribute an information circular prior to the commencement of trading in such new derivative securities products, which generally will include the same information as the information circular provided by the listing exchange, including: (1) the special risks of trading the new derivative securities product; (2) the Exchange's rules that will apply to the new derivative securities product, including the suitability rule;⁶ (3) information about the dissemination of the value of the underlying assets or indexes; and (4) the risk of trading during the Exchange's pre-opening session due to the lack of calculation or dissemination of the intraday indicative value or a similar value.⁷

Proposed BATS Rule 14.1(c)(3)(A) reminds Members⁸ that they are subject to the prospectus delivery requirements under the Securities Act of 1933, as amended ("Securities Act"), unless the new derivative securities product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 ("1940 Act")⁹ and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. The Exchange will inform its Members of the application of the provisions of this subparagraph to a particular new securities derivative product governed by the 1940 Act by means of an information circular.

Proposed BATS Rule 14.1(c)(4) addresses trading halts in new derivative securities products traded on the Exchange pursuant to UTP. Proposed BATS Rule 14.1(c)(4)(A) provides

⁶ See BATS Rule 3.7.

⁷ BATS's pre-opening session is from 8:00 a.m. to 9:30 a.m. Eastern Time. BATS does not currently have a post market trading session.

⁸ A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

⁹ 15 U.S.C. 80a-24(d).

that the Exchange, upon notification by the listing market of a halt due to a temporary interruption in the calculation or wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument, will immediately halt trading in that product on the Exchange. If the intraday indicative value (or a similar value) or the value of the underlying index or instrument continues not to be calculated or widely available at the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product on that day. If an interruption in the calculation or wide dissemination of the intraday indicative value (or a similar value) or the value of the underlying index or instrument of a series continues, the Exchange may resume trading in the product only if calculation and wide dissemination of the intraday interactive value (or a similar value) or the value of the underlying index or instrument resumes or trading in such series resumes in the listing market.¹⁰

Additionally, proposed BATS Rule 14.1(c)(4)(B) provides that, for a new derivative securities product where a net asset value (and, in the case of managed fund shares or actively managed exchange-traded funds, a “disclosed portfolio”) is disseminated, the Exchange will immediately halt trading in such security upon notification by the listing market that the net asset value, and, if applicable, such disclosed portfolio, is not being disseminated to all market participants at the same time. The Exchange may resume trading in the new derivative securities product only when trading in such security resumes on the listing market.

Proposed BATS Rule 14.1(c)(5) provides for restrictions for any Member registered as a Market Maker (“Restricted Market Maker”) in a new derivative securities product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies

¹⁰ The Exchange also has authority to suspend or halt trading under BATS Rule 11.1.

or commodities, or is based on a basket or index comprised of currencies or commodities (collectively, “Reference Assets”). Specifically, proposed BATS Rule 14.1(c)(5)(A) provides that a Restricted Market Maker in a new derivative securities product is prohibited from acting or registering as a market maker in any Reference Asset of that new derivative securities product or any derivative instrument based on a Reference Asset of that new derivative securities product (collectively, with Reference Assets, “Related Instruments”). Proposed BATS Rule 14.1(c)(5)(B) provides that a Restricted Market Maker shall, in a manner prescribed by the Exchange, file with the Exchange and keep current a list identifying any accounts (“Related Instrument Trading Accounts”) for which Related Instruments are traded: (1) in which the Restricted Market Maker holds an interest; (2) over which it has investment discretion; or (3) in which it shares in the profits and/or losses. In addition, a Restricted Market Maker may not have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account which has not been reported to the Exchange as required by this rule. Proposed BATS Rule 14.1(c)(5)(C) provides that, in addition to the existing obligations under Exchange rules regarding the production of books and records, a Restricted Market Maker shall, upon request by the Exchange, make available to the Exchange any books, records, or other information pertaining to any Related Instrument Trading Account or to the account of any registered or non-registered employee affiliated with the Restricted Market Maker for which Related Instruments are traded. Finally, proposed BATS Rule 14.1(c)(5)(D) provides that a Restricted Market Maker shall not use any material nonpublic information in connection with trading a Related Instrument.¹¹

¹¹ As of the date of this filing, the Exchange does not have a market maker classification. However, the Exchange intends to amend its rules to adopt a market maker classification.

Lastly, BATS represents that the Exchange’s surveillance procedures for new derivative securities products traded on the Exchange pursuant to UTP will be similar to the procedures used for equity securities traded on the Exchange and will incorporate and rely upon existing Exchange surveillance systems. The Exchange will closely monitor activity in new derivative securities products traded on the Exchange pursuant to UTP to deter any improper trading activity. The proposed rule change also provides that the Exchange will enter into a comprehensive surveillance sharing agreement (“CSSA”) with a market trading components of the index or portfolio on which the new derivative securities product is based to the same extent as the listing exchange’s rule require the listing market to enter into a CSSA with such market.

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, specifically, with the requirements of Section 6(b) of the Act.¹² In particular, for the reasons described above, the proposed changes are consistent with Section 6(b)(5) of the Act,¹³ because they 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 by providing for the trading of securities, including new derivative securities products, on BATS pursuant to UTP, subject to consistent and reasonable standards.

Accordingly, the Exchange has incorporated the market maker prohibition set forth in proposed Rule 14.1(c)(5) in anticipation of that rule filing.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

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

The Exchange does not believe that the proposed rule changes impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes 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

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵

BATS has asked the Commission to waive the 30-day operative delay. The Commission believes that such waiver is consistent with the protection of investors and the public interest because such waiver should benefit investors by creating, without undue delay, additional competition in the trading of new derivative securities products, subject to consistent and reasonable standards. Proposed BATS Rule 14.1 is closely modeled after similar rules of other

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6). The Commission notes that BATS has satisfied the five-day pre-filing notice requirement.

national securities exchanges¹⁶ and does not raise any novel or significant regulatory issues. Therefore, the Commission designates the proposed rule change as operative upon filing.¹⁷

At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate 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. Please include File Number SR-BATS-2008-004 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹⁶ See NSX Rule 15.9 and Securities Exchange Act Release No. 57448 (March 6, 2008), 73 FR 13597 (March 13, 2008) (SR-NSX-2008-05); Phlx Rule 803(o) and Securities Exchange Act Release No. 57806 (May 9, 2008), 73 FR 28541 (May 16, 2008) (SR-Phlx-2008-34); ISE Rule 2101 and Securities Exchange Act Release No. 57387 (February 27, 2008), 73 FR 11965 (March 5, 2008) (SR-ISE-2007-99).

¹⁷ For purposes only of waiving the operative date of this proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-BATS-2008-004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site <http://www.sec.gov/rules/sro.shtml>. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 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 Number SR-BATS-2008-004 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Florence E. Harmon
Acting Secretary

¹⁸ 17 CFR 200.30-3(a)(12).