

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65448; File No. SR-BYX-2011-024)

September 30, 2011

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend BYX Rule 13.3 to Prohibit Members from Voting Uninstructed Shares on Certain Matters and to Align BYX Rule 13.3, Concerning the Forwarding of Proxy and Other Material and Proxy Voting, with the Rules of Other Self-Regulatory Organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act” or the “Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 16, 2011, BATS Y-Exchange, Inc. (the “Exchange” or “BYX”) 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 and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BYX Rule 13.3, entitled “Forwarding of Issuer Materials,” in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Exchange is also proposing changes to BYX Rule 13.3 in order to better align the Exchange’s rule with the rules of other self-regulatory organizations (“SROs”).

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule addition is available at the Exchange's website 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

Section 957 of the Dodd-Frank Act amends Section 6(b) of the Act<sup>3</sup> to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12 of the Act<sup>4</sup> from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive

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<sup>3</sup> 15 U.S.C. 78f(b).

<sup>4</sup> 15 U.S.C. 78l.

compensation, or (iii) any other significant matter, as determined by the Commission, by rule.

Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to add new paragraph (b) to BYX Rule 13.3 to prohibit a Member from giving a proxy to vote stock that is registered in its name, unless: (i) such Member is the beneficial owner of such stock; (ii) such proxy is given pursuant to the written instructions of the beneficial owner; or (iii) such proxy is given pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following. The Exchange is proposing to adopt these rules because other national securities exchanges and associations do allow proxy voting under certain limited circumstances while the current Exchange Rules are silent on such matters. Therefore, a Member that is also a member of another national securities exchange or association may vote the shares held for a customer when allowed under its membership at another national securities exchange or association, provided that the records of the Member clearly indicate the procedure it is following.

Notwithstanding the above, as proposed in new paragraph (c) to Rule 13.3, a Member that is not the beneficial owner of a security registered under Section 12 of the Exchange Act is prohibited from granting a proxy to vote the security in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the

Commission, by rule, unless the beneficial owner of the security has instructed the Member to vote the proxy in accordance with the voting instructions of the beneficial owner.

In order to promote consistency with FINRA Rule 2251, the Exchange also proposes to add language to the existing text of Rule 13.3 to state that for beneficial owners, the proxy materials or other materials to be forwarded on behalf of an issuer can be sent to the beneficial owner's designated investment adviser, if applicable. In conjunction with this change, the Exchange proposes to adopt the definition of "designated investment adviser" set forth in FINRA Rule 2251(f) as Interpretation and Policy .01 to Rule 13.3.

Similarly, the Exchange proposes to add new paragraph (d) to Rule 13.3, based entirely on FINRA Rule 2251(d), to explicitly state that a Member may give a proxy to vote any stock registered in its name if such Member holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote. Proposed paragraph (d) will also state that a Member that has in its possession or within its control stock registered in the name of another Member and that desires to transmit signed proxies pursuant to the provisions of paragraph (a) of Rule 13.3, shall obtain the requisite number of signed proxies from such holder of record. Lastly, proposed paragraph (d) also states that, notwithstanding the foregoing: (1) any Member designated by a named Employee Retirement Income Security Act of 1974 (as amended) ("ERISA") Plan fiduciary as the investment manager of stock held as assets of the ERISA Plan may vote the proxies in accordance with the ERISA Plan fiduciary responsibilities if the ERISA Plan expressly grants discretion to the investment manager

to manage, acquire, or dispose of any plan asset and has not expressly reserved the proxy voting right for the named ERISA Plan fiduciary; and (2) any designated investment adviser may vote such proxies.

The Exchange also proposes modifying the text of Rule 13.3, which currently would require forwarding of proxy material but which does not explicitly reference such material, to add such an explicit reference. The Exchange further proposes to modify the text of Rule 13.3 to reference “security holders,” rather than stockholders, in the initial sentence, to ensure that the coverage of the rule applies to all securities, including debt securities to the extent applicable, and not just equity securities. The Exchange also proposes to incorporate certain language from FINRA Rule 2251 that provides additional detail regarding the material that must be provided to beneficial owners in the event of a proxy solicitation. Specifically, Rule 13.3 as amended will state that in the event of a proxy solicitation, materials provided pursuant to the Rule shall include a signed proxy indicating the number of shares held for such beneficial owner and bearing a symbol identifying the proxy with proxy records maintained by the Member, and a letter informing the beneficial owner (or the beneficial owner's designated investment adviser) of the time limit and necessity for completing the proxy form and forwarding it to the person soliciting proxies prior to the expiration of the time limit in order for the shares to be represented at the meeting. The Rule will also require a Member to furnish a copy of the symbols to the person soliciting the proxies and shall also retain a copy thereof pursuant to the provisions of Exchange Act Rule 17a-4. Finally, the Exchange proposes to modify the title of Rule 13.3 to include reference to proxy voting.

The Exchange believes that these additional changes to Rule 13.3 will help to avoid confusion by Members of the Exchange that are also members of FINRA by further aligning the Exchange's rules with FINRA Rule 2251. In addition, the Exchange notes that it is party to an agreement with FINRA pursuant to which certain regulatory responsibility to examine and enforce common rules of the Exchange and FINRA is allocated to FINRA pursuant to Rule 17d-2 under the Act (the "17d-2 Agreement").<sup>5</sup> The proposed changes to Rule 13.3 may be sufficient to incorporate Rule 13.3 into the 17d-2 Agreement, further reducing duplicative regulation of Members that are also members of FINRA.

## 2. Statutory Basis

Approval of the rule change 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>6</sup> The Exchange believes that proposed Rule 13.3(c) is consistent with Section 6(b)(10)<sup>7</sup> requirements that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Exchange also believes that proposed Rule 13.3(c) is consistent with Section 6(b)(5)

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<sup>5</sup> 17 CFR 240.17d-2.

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(10).

of the Act,<sup>8</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 is adopting proposed Rule 13.3(c) to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule change to be consistent with the Act, particularly with respect to the protection of investors and the public interest.

The Exchange also believes that proposed Rule 13.3(b) is consistent with Section 6(b)(5) of the Act,<sup>9</sup> particularly with respect to removal of impediments to, and perfection the mechanism of, a free and open market and a national market system, because the proposed changes will provide for consistent regulation for Members of the Exchange that are members of other SROs with analogous rules.<sup>10</sup> Moreover, the proposed changes to Rule 13.3(a), proposed Rule 13.3(d), and proposed Interpretation and Policy .01 are consistent with FINRA Rule 2251. Accordingly, the Exchange believes that the proposal fosters cooperation amongst SROs because to the extent the Exchange is able to incorporate Rule 13.3 into the 17d-2 Agreement as a rule in common between the Exchange and FINRA (a “Common Rule”), then FINRA will conduct a review for compliance with the Common Rule to the extent a Member of the Exchange is also a member of FINRA, and the Exchange will not conduct a duplicative review of the same activity by that Member.

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<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> Id.

<sup>10</sup> See, e.g., FINRA Rule 2251, ISE Rule 421, NYSE Arca Rule 9.4, and Nasdaq Rule 2251.

Finally, the Exchange believes that the proposal will contribute to investor protection by defining important requirements to which Members must abide with respect to proxy solicitation, proxy voting and delivery of proxy materials.

(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.

III. 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-BYX-2011-024 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-BYX-2011-024. 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 10:00 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-BYX-2011-024 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

#### IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis so that the Exchange could comply with the requirements imposed by the Dodd-Frank Act, and because the proposed rule text is based upon FINRA Rule 2251, as well as ISE Rule 421, Nasdaq Rule 2251, and NYSE Arca Rule 9.4.<sup>11</sup> After

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<sup>11</sup> See Securities Exchange Act Release 63139 (October 20, 2010), 75 FR 65680 (October 26, 2010) (SR-ISE-2010-99); 61052 (November 23, 2009), 74 FR 62857 (December 1, 2009) (SR-FINRA-2009-066) (finding that the proposed rule change was consistent with the Act because the Rule "will continue to provide

careful consideration, the Commission 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 exchange.<sup>12</sup>

The Commission believes that proposed Rule 13.3(b) is consistent with Section 6(b)(5)<sup>13</sup> of the Act, which provides, among other things, that the rules of the Exchange must be designed to 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, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under proposed Rule 13.3(b), a Member shall be prohibited from voting uninstructed shares unless (1) that Member is the beneficial owner of the stock; (2) pursuant to the written instructions of the beneficial owner; or (3) pursuant to the rules of any national securities exchange or association of which it is also a member, provided that the Member's records clearly indicate the procedure it is following. This provision is based on ISE Rule 421, FINRA Rule 2251 and NYSE Arca Rule 9.4, which were previously approved by the Commission.<sup>14</sup> The Commission notes that the proposed change will provide clarity to Exchange Members going forward on whether broker discretionary voting is permitted by Exchange Members under limited circumstances

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FINRA members with guidance on the forwarding of proxy and other issuer-related materials.”); 62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR- NASDAQ-2010-114); and 48735 (October 31, 2003), 68 FR 63173 (November 7, 2003) (SR-PCX-2003-50).

<sup>12</sup> In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> See supra note 11.

when the Member is also a member of another national securities exchange or association that permits broker discretionary voting. In approving this portion of the proposal, the Commission notes that Rule 13.3(b) is consistent with the approach taken under the rules of other national securities exchanges or national securities association, and for Exchange Members who are not also members of another national securities exchange or association prohibits broker discretionary voting on any matter, consistent with investor protection and the public interest.

The Commission believes that proposed Rule 13.3(c) is consistent with Section 6(b)(10)<sup>15</sup> of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule.

The Commission believes that proposed Rule 13.3(c) is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which enacted Section 6(b)(10), reflects the principle that “final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.”<sup>16</sup> The proposed rule change will make the Exchange compliant with the new requirements of Section 6(b)(10) by specifically prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares in connection with a shareholder vote on

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<sup>15</sup> 15 U.S.C. 78f(b)(10).

<sup>16</sup> See S. Rep. No. 111-176, at 136 (2010).

the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the member receives voting instructions from the beneficial owner of the shares.<sup>17</sup>

The Commission also believes that proposed Rule 13.3(c) is consistent with Section 6(b)(5)<sup>18</sup> of the Act, which provides, among other things, that the rules of the Exchange must be designed to 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, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the rule assures that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.<sup>19</sup> Based on the above, the Commission finds that the

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<sup>17</sup> The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect the Exchange to adopt coordinating rules promptly to comply with the statute.

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers

Exchange's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also believes that Proposed Rule 13.3(a), (d), and Interpretations and Policies .01 are consistent with Section 6(b)(5) of the Act<sup>20</sup> in that they are designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Commission notes that the proposed changes will further align Rule 13.3 with FINRA Rule 2251, which should reduce regulatory confusion amongst Members that are also members of FINRA, and as the Exchange notes, may also reduce regulatory duplication should the proposed rule become a Common Rule under the 17d-2 Agreement. Finally, we note that the changes to Proposed Rule 13(a), (d), and Interpretations and Policies .01 will also further investor protection and the public interest by setting forth proxy voting requirements as to beneficial owner accounts as well as the requirements that a Member must follow when forwarding proxy or other materials to the beneficial owners of the stock or their designated investment advisors.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. The Commission believes that good cause exists to

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the goal of enfranchising shareholders. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92).

<sup>20</sup> 15 U.S.C. 78f(b)(5).

<sup>21</sup> 15 U.S.C. 78s(b)(2).

grant accelerated approval to the proposed changes to Rule 13.3, because the proposal will conform the Exchange rule to FINRA Rule 2251, in particular, as well as ISE Rule 421, NYSE Arca Rule 9.4 and Nasdaq Rule 2251, which were published for public comment in the Federal Register and approved by the Commission, and for which no comments were received.<sup>22</sup> Further, because proposed Rule 13.3 is substantially similar to the FINRA, ISE, NYSE Arca and Nasdaq rules, we do not believe it raises any new regulatory issues that were not previously considered with adoption of the rules for those other self-regulatory organizations.

Moreover, proposed Rule 13.3(c) will conform the Exchange's rules to the requirements of Section 6(b)(10) of the Act. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. Therefore, the Commission believes that good cause exists to grant accelerated approval to proposed Rule 13.3(c), because it will conform the Exchange rule to the requirements of Section 6(b)(10) of the Act. Moreover, proposed Rule 13.3(c) is substantially similar to ISE Rule 421 and Nasdaq Rule 2251.<sup>23</sup>

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<sup>22</sup> See supra notes 11.

<sup>23</sup> Id.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> that the proposed rule change (SR-BYX-2011-024) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

Elizabeth M. Murphy  
Secretary

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<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</sup> 17 CFR 200.30-3(a)(12).