

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61534)

Order Granting Application for Exemption Pursuant to Section 36(a) of the Exchange Act by BATS Exchange, Inc. from the Rule Filing Requirements of Section 19(b) of the Exchange Act with Respect to Certain Rules Incorporated by Reference

February 18, 2010

BATS Exchange, Inc. (“BATS Exchange”) has filed with the Securities and Exchange Commission (“Commission”) an application for an exemption under Section 36(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ from the rule filing requirements of Section 19(b) of the Exchange Act² with respect to certain rules of another self-regulatory organization (“SRO”) that BATS Exchange seeks to incorporate by reference. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors.

On January 26, 2010, the Commission approved new rules governing the trading of options on the BATS Exchange Options Market (“Options Rules”).³ Certain of the Options Rules incorporate by reference existing rules of the Chicago Board Options Exchange, Incorporated (“CBOE”), Financial Industry Regulatory Authority, Inc. (“FINRA”), formerly known as the National Association of Securities Dealers, Inc. (“NASD”),⁴ and NYSE. Thus, for

¹ 15 U.S.C. 78mm(a)(1).

² 15 U.S.C. 78s(b).

³ See Securities Exchange Act Release No. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR-BATS-2009-031).

⁴ Although NASD is now known as FINRA, some rules in the FINRA rule book are still referred to as “NASD rules.” FINRA is in the process of consolidating the member rules of the New York Stock Exchange, LLC (“NYSE”) and NASD rules into a single rule book. For purposes of the FINRA rule book, harmonized rules are referred to as FINRA

certain Options Rules, BATS Exchange members will comply with a BATS Exchange rule by complying with the CBOE, FINRA, or NYSE rule referenced therein.

BATS Exchange has requested, pursuant to Rule 0-12 under the Exchange Act,⁵ that the Commission grant it an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to the Options Rules that are effected solely by virtue of a change to a cross-referenced CBOE, FINRA, or NYSE rule. Specifically, BATS Exchange requests that it be permitted to incorporate by reference changes made to each CBOE, FINRA, or NYSE rule (or series of rules) that is cross-referenced in BATS Exchange Rules 2.12, 18.7, 18.9, 26.16, 28.3, 29.5, and 29.7 without the need for BATS Exchange to file separately the same proposed rule changes pursuant to Section 19(b) of the Exchange Act.⁶ BATS Exchange proposes to incorporate by reference (1) CBOE rules governing position and exercise limits for equity and index options; (2) the margin rules of CBOE and the NYSE; (3) FINRA's rules governing communications with the public; and (4) FINRA's rule governing fidelity bonds, for members for which BATS Exchange is the Designated Examining Authority. BATS Exchange represents that the rules it has incorporated by reference into the Options Rules are categories of CBOE, FINRA, or NYSE rules (rather than individual rules within a category) that are not trading rules. The Exchange has agreed to provide written notice to its members whenever CBOE, FINRA, or NYSE proposes a change to a cross-referenced CBOE, FINRA, or NYSE rule.⁷

rules, while rules that originally were NASD rules, but have yet to be harmonized, are referred to as NASD rules.

⁵ 17 CFR 240.0-12.

⁶ See Letter from Eric Swanson, SVP, General Counsel, BATS Exchange, to Elizabeth M. Murphy, Secretary, Commission, dated January 20, 2010 ("BATS Exemptive Request").

⁷ Id. BATS Exchange states that it will provide this notice on its Web site where it posts its own proposed rule change filings within the same time frame required of its own filings pursuant to Rule 19b-4(l), 17 CFR 240.19b-4(l). Id. at note 8. In addition, BATS

The Commission has issued exemptions to other exchanges similar to BATS Exchange's request.⁸ The Commission stated in 2004, when granting one such exemption, that it would consider similar future exemption requests from other SROs, provided that:

- An SRO wishing to incorporate rules of another SRO by reference has submitted a written request for an order exempting it from the requirement in Section 19(b) of the Exchange Act to file proposed rule changes relating to the rules incorporated by reference, has identified the applicable originating SRO(s), together with the rules it wants to incorporate by reference, and otherwise has complied with the procedural requirements set forth in the Commission's release governing procedures for requesting exemptive orders pursuant to Rule 0-12 under the Exchange Act;⁹
- An incorporating SRO has requested incorporation of categories of rules (rather than individual rules within a category) that are not trading rules (e.g., the SRO has requested incorporation of rules such as margin, suitability, or arbitration); and

Exchange states that the posting will include a link to the location on CBOE, FINRA, or NYSE's Web site where the proposed rule change is posted. Id.

⁸ For example, NYSE Amex LLC (formerly NYSE Alternext U.S., LLC), the International Securities Exchange, LLC ("ISE"), the Municipal Securities Rulemaking Board, and NASDAQ OMX PHLX, Inc. (formerly the Philadelphia Stock Exchange, Inc.) incorporate the FINRA Code of Arbitration Procedure, while the ISE, NYSE Arca, Inc., and the Boston Options Exchange, a facility of NASDAQ OMX BX, Inc. (formerly Boston Stock Exchange, Inc.), incorporate by reference the margin rules of NYSE and CBOE. See Securities Exchange Act Release No. 49260 (February 17, 2004), 69 FR 8500 (February 24, 2004). See also Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521, 14539-40 (March 18, 2008) (order approving SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) and 53128 (January 13, 2006), 71 FR 3550, 3565-66 (January 23, 2006) (File No. 10-131) (approving The NASDAQ Stock Market LLC's exchange application).

⁹ See 17 CFR 240.0-12 and Securities Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998) (Commission Procedures for Filing Applications for Orders for Exemptive Relief Pursuant to Section 36 of the Exchange Act; Final Rule).

- The incorporating SRO has reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO.¹⁰

The Commission believes that BATS Exchange has satisfied each of these conditions. The Commission also believes that granting BATS Exchange an exemption from the rule filing requirements under Section 19(b) of the Exchange Act will promote efficient use of Commission and BATS Exchange resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.¹¹ The Commission therefore finds that it is necessary and appropriate in the public interest and consistent with the protection of investors to exempt BATS Exchange from the rule filing requirements under Section 19(b) of the Exchange Act with respect to the rules it has incorporated by reference. This exemption is conditioned upon BATS Exchange providing written notice to its members whenever CBOE, FINRA, or NYSE proposes to change a rule that BATS Exchange has incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹² that BATS Exchange is exempt from the rule filing requirements of Section 19(b) of the Exchange Act solely with respect to changes to the rules identified in its request that incorporate by reference certain rules of CBOE, FINRA, and NYSE,¹³ provided that BATS Exchange provides

¹⁰ See Securities Exchange Act Release No. 49260, supra note 8.

¹¹ See id., 69 FR at 8502.

¹² 15 U.S.C. 78mm.

¹³ See BATS Exemptive Request, supra note 6.

written notice to its members whenever CBOE, FINRA, or NYSE proposes to change a rule that BATS Exchange has incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(76).