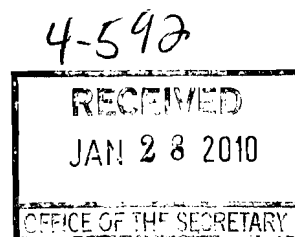




**FEDERAL EXPRESS**

January 27, 2010

Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street N.E.  
Washington, DC 20549



RE: Petition to Amend Rule 146(b)

Dear Ms. Murphy:

BATS Exchange, Inc. ("BATS" or "Exchange") hereby petitions the U.S. Securities and Exchange Commission ("Commission") to amend Rule 146(b) under Section 18(b)(1)(B) of the Securities Act of 1933, as amended ("Securities Act"), to designate securities listed on BATS as covered securities for the purpose of Section 18 of the Securities Act.

**Background**

On October 11, 1996, the National Securities Markets Improvement Act of 1996 ("NSMIA") was signed into law. Among other changes made to the federal securities laws, NSMIA amended Section 18 of the Securities Act to provide for exclusive federal registration of securities listed (or authorized for listing) on the New York Stock Exchange ("NYSE"), listed (or authorized for listing) on the American Stock Exchange ("Amex")<sup>1</sup>, quoted (or authorized for quoting) on the National Market System of the Nasdaq Stock Market<sup>2</sup> ("Nasdaq/NMS"; NYSE, Amex and Nasdaq/NMS collectively, "Named Markets"), or listed (or authorized for listing) on any other national securities exchange designated by the Commission to have substantially similar listing standards to those markets. More specifically, Section 18(a) provides that "no law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that -- (A) is a covered security . . ." Covered securities are defined in Section 18(b)(1) to include those securities specified above.

On January 21, 1998, the Commission adopted Rule 146(b) under Section 18 of the Securities Act designating securities listed on Chicago Board Options Exchange ("CBOE"), Tier I of the Pacific Exchange, ("PCX")<sup>3</sup>, and Tier I of the Philadelphia Stock Exchange ("Phlx");

<sup>1</sup> Amex is now known as NYSE Amex.

<sup>2</sup> Nasdaq/NMS is now known as NASDAQ Global Markets.

<sup>3</sup> PCX is now known as NYSE Arca.



CBOE, PCX/Tier 1 and Phlx/Tier 1 collectively, “Designated Markets”)<sup>4</sup> as covered securities for the purpose of Section 18 of the Securities Act. BATS, which did not exist in 1998, is an options exchange not specifically enumerated in Rule 146(b).

As a preliminary matter, BATS concurs with the position of The Options Clearing Corporation (“OCC”) that was articulated at the time Rule 146(b) was adopted that all of the standardized options issued and guaranteed by the OCC are already “covered securities” under NSMIA pursuant to Section 18(b)(1)(C) of the Securities Act. That section defines a covered security to include “a security of the same issuer that is equal in seniority . . . to a security listed on a Named Market or an exchange that the Commission determines to have substantially similar listing standards.” All options issued by OCC are “equal in seniority” irrespective of where the options are listed because the performance of all OCC-issued options is equally guaranteed by OCC’s backup system. The OCC backup system consists of the obligations of OCC’s Clearing Members, which are required to meet stringent minimum financial requirements, and the margin and clearing fund deposits that those Clearing Members are required to make in order to collateralize their obligations to OCC. Nevertheless, since the Commission did not address this position when it adopted Rule 146(b), BATS submits this petition to the Commission to amend Rule 146(b) to specifically designate securities listed on BATS as covered securities for the purpose of Section 18 of the Securities Act.

#### Basis for Requested Action

The securities that will be listed for trading on BATS consist of standardized options issued and guaranteed by OCC that are also listed on at least one of the other options exchanges that is either a Named or Designated Market. Therefore, these securities listed for trading on BATS are, by definition, “covered securities” for the purpose of Section 18 of the Securities Act. However, the Exchange may, in the future, list standardized options issued and guaranteed by OCC that may not listed on a Named or Designated Market. In anticipation of such listings, BATS submits this petition to the Commission to amend Rule 146(b) to designate securities listed on BATS as covered securities for the purpose of Section 18 of the Securities Act.

BATS’ options listing standards are substantially identical to the listing standards of the other options exchanges. In fact, in the Commission’s proposal to adopt Rule 146(b), it stated: “[t]he Commission notes that no exchange has standards establishing qualifications for issuers of exchange-traded options since all such options are issued by OCC. All of the exchanges that trade standardized options have minimum standards for the selection of underlying stocks and other underlying interests, and these standards are essentially the same on all exchanges that trade a particular type of option.” Since BATS’ options listing standards are substantially identical to the listing standards of the other options exchanges, it is appropriate for the

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<sup>4</sup> Phlx is now known as NASDAQ OMX PHLX.



Commission to amend Rule 146(b) to designate securities listed on BATS as covered securities for the purpose of Section 18 of the Securities Act.

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Please contact me at 212-378-8523 or [eswanson@batstrading.com](mailto:eswanson@batstrading.com) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Swanson', followed by a long horizontal line extending to the right.

Eric Swanson  
SVP & General Counsel