

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60586; File No. SR-BATS-2009-026)

August 28, 2009

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend BATS Fee Schedule to Impose Fees for Ports Used for Order Entry and Receipt of Market Data

On July 21, 2009, BATS Exchange, Inc. (“BATS” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the fee schedule applicable to Members³ and non-members of the Exchange with respect to ports used to enter orders into Exchange systems and to receive data from the Exchange. The proposed rule change was published for comment in the Federal Register on July 28, 2009.⁴ The Commission received no comments regarding the proposal. On August 27, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.⁵ This order grants approval of the proposed rule change.

BATS proposes to begin charging a monthly fee for ports used to enter orders into the Exchange’s trading system and to receive data from the Exchange.⁶ Specifically, the Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A Member is any registered broker or dealer that has been admitted to membership in the Exchange. See BATS Rule 1.5(n).

⁴ Securities Exchange Act Release No. 60364 (July 22, 2009), 74 FR 37285 (“Notice”).

⁵ In Amendment No. 1, the Exchange replaced the bracketed “[July]” with “[August]” in the proposed rule text to reflect the fact that the current fee schedule is dated August 1, 2009. Because the change in Amendment No. 1 is technical in nature, it is not subject to notice and comment.

⁶ The Commission notes that BATS will implement the proposed port fees commencing on the first day of the month immediately following Commission approval of this proposed

proposes to charge \$250.00 per month per pair⁷ of any port type other than a Multicast PITCH Spin Server Port or a GRP Port. Thus, the proposed charge will apply to all Exchange FIX, FIXDROP, DROP, TCP PITCH, TCP FAST PITCH, and TOP ports.⁸ In addition, the Exchange proposes to provide all Exchange constituents that receive the Exchange's Multicast PITCH feed with 12 pairs of Multicast PITCH Spin Server Ports free of charge and, if such ports are used, one free pair of GRP Ports.⁹ The Exchange proposes to charge such customers \$250.00 per month per additional pair of GRP Ports or additional set of 12 pairs of Multicast PITCH Spin Server Ports. Any Member or non-member that has entered into the appropriate agreements with the Exchange is permitted to receive Multicast PITCH Spin Server Ports and GRP Ports from the Exchange.

The proposed rule change will apply to Members that obtain ports for direct access to the Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients. The Exchange states that it has previously provided ports free of charge to all Members and non-members that use such ports for order entry to the Exchange or for receipt of market data. However, the Exchange states that its infrastructure costs have increased over time. In addition, the Exchange believes that providing

rule change (or on the date of approval, if on the first business day of a month). See Notice, supra note 4.

⁷ Each pair of ports will consist of one port at the Exchange's primary data center and one port at the Exchange's secondary data center.

⁸ BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including Multicast PITCH and GRP Ports, permit Members and non-members to receive information from the Exchange.

⁹ The Exchange's proposal to provide certain ports free of charge to Multicast PITCH customers is designed to encourage use of the Exchange's Multicast PITCH feed because it is a relatively new offering by the Exchange and because the Exchange believes that the feed is its most efficient feed and will reduce infrastructure costs for both the Exchange and those who utilize the feed.

ports free of charge has not encouraged Members and non-members to reserve and maintain ports efficiently, but rather, has led to a significant number of ports that are reserved and enabled by such market participants, but are never used or are under-used. Accordingly, the Exchange believes that the imposition of port fees will help the Exchange to continue to maintain and improve its infrastructure, while also encouraging Exchange customers to request and enable only the ports that are necessary for their operations related to the Exchange.

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁰ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,¹¹ which requires the equitable allocation of reasonable dues, fees, and other charges among Exchange Members and other persons using the Exchange's facilities, and Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,¹³ which requires that the rules of an exchange not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the

¹⁰ In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78f(b)(8).

proposed rule change is consistent with Rule 603(a) of Regulation NMS,¹⁴ which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and not unreasonably discriminatory.

The Commission believes that the proposed port fees are equitably allocated among Members and non-members and do not unfairly or unreasonably discriminate between customers, issuers, brokers, or dealers because the proposed port fees do not distinguish among the type of participant but rather are the same for all members and non-members. The Commission also believes that BATS was subject to significant competitive pressure to act equitably, fairly, and reasonably in setting the port fees, in light of the highly competitive nature of the market for execution and routing services.¹⁵ The Commission further notes that the Exchange's proposed port fees are consistent with similar port fees charged by other exchanges.¹⁶

¹⁴ 17 CFR 242.603(a).

¹⁵ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁶ See, e.g., Rule 7015 of The NASDAQ Stock Market LLC ("NASDAQ") (setting forth, among other fees for access services, port fees charged to members and non-members used to enter orders into NASDAQ trading systems). See also Securities Exchange Act Release Nos. 60546 (August 20, 2009), 74 FR 43184 (August 26, 2009) (SR-NASDAQ-2009-058) (increasing the monthly fee for each port used to enter orders in NASDAQ trading systems from \$400 per month to \$500 per month); 59337 (February 2, 2009), 74 FR 6441 (February 9, 2009) (SR-BX-2009-004) (establishing fees for ports used by members to enter orders); 59615 (March 20, 2009), 74 FR 14604 (March 31, 2009) (SR-BX-2009-005) (establishing, among other fees, port fees for accessing market data).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-BATS-2009-026), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

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

Florence E. Harmon
Deputy Secretary

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).