

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61545; File No. SR-BATS-2009-032)

February 19, 2010

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 Physical Ports Used to Connect to BATS Exchange

On December 18, 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 to begin charging for certain physical ports used to connect to the Exchange’s systems. The proposed rule change was published for comment in the Federal Register on January 8, 2010.⁴ The Commission received no comments regarding the proposal. On February 9, 2010, the Exchange filed Amendment No. 1 to the proposed rule change.⁵ This order grants approval of the proposed rule change, as modified by Amendment No. 1.

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. 61260 (December 30, 2009), 75 FR 1109 (“Notice”).

⁵ In Amendment No. 1, the Exchange replaced the bracketed “[September 1, 2009]” with “[February 1, 2010]” in the proposed rule text to reflect the fact that the current fee schedule is dated February 1, 2010. Because the change in Amendment No. 1 is technical in nature, it is not subject to notice and comment.

BATS proposes to begin charging a monthly fee for certain physical ports⁶ used to connect to the Exchange's system for order entry and receipt of data from the Exchange.⁷ BATS states that under its current policy all physical ports are provided free of charge but Members and non-members are only permitted to establish up to four such physical port pairs.⁸ Under the proposal, BATS will continue to provide four pairs of physical ports without charge to any Member or non-member that has been approved to connect to the Exchange. In addition, the Exchange will permit Members and non-members to establish additional physical ports at a charge of \$2,000 for each additional single physical port provided by the Exchange to any Member or non-member in any data center. The proposal applies to all Exchange constituents with physical connections, including 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, Sponsored Participants, and market data recipients.

The Exchange states that very few Members or non-members require four physical ports for their operations related to the Exchange or would utilize more than four physical ports, and thus, the Exchange believes that the proposal should not affect many of the Exchange's constituents. However, the Exchange believes that Members and non-members that wish to pay for additional physical ports outside of those provided for free should have the ability to do so.

⁶ The Exchange states that a physical port is used by a Member or non-member to literally plug into the Exchange at the data centers where the Exchange's servers are located (*i.e.*, either a cross-connection or a private line Ethernet connection to the Exchange's network within the data center).

⁷ The Commission notes that BATS will implement the proposed physical port fees commencing on the first day of the month immediately following Commission approval of this proposed rule change (or on the date of approval, if on the first business day of a month). See Notice, supra note 4.

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.⁹ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,¹⁰ 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,¹¹ 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,¹² 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 proposed rule change is consistent with Rule 603(a) of Regulation NMS,¹³ 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.

⁸ A "pair" of ports refers to one port at the site of the Exchange's primary data center (including the expansion space located adjacent to such data center) and one port at the site of the Exchange's secondary data center.

⁹ 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).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78f(b)(5).

¹² 15 U.S.C. 78f(b)(8).

¹³ 17 CFR 242.603(a).

The Commission believes that the proposed physical 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 physical 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 physical port fees, in light of the highly competitive nature of the market for execution and routing services.¹⁴

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-BATS-2009-032), 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.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁴ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).