

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65225; File No. SR-BATS-2011-018)

August 30, 2011

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving Proposed Rule Change to Adopt Rules for the Qualification, Listing and Delisting of Companies on the Exchange

I. Introduction

On May 12, 2011, 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 adopt rules for the qualification, listing, and delisting of companies on the Exchange. The proposed rule change was published for comment in the Federal Register on June 1, 2011.³ The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes rules to adopt a program for the qualification, listing, and delisting of companies on the Exchange (“Listing Rules”).⁴ The Exchange proposes to eliminate its current rules related to securities traded on the Exchange pursuant to unlisted trading

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 64546 (May 25, 2011), 76 FR 31660 (June 1, 2011) (“Notice”).

⁴ The Listing Rules are comprised of definitions, the Exchange’s general regulatory authority, the procedures and prerequisites for gaining a listing on the Exchange, the listing standards for units, the disclosure obligations of listed companies, Direct Registration Program requirements, the quantitative listing requirements and standards for listing on the Exchange in Tiers I and II, the corporate governance standards applicable to all listed companies; special listing standards for securities other than common or preferred stock and warrants; the consequences of a failure to meet the Exchange’s listing standards; and the Exchange’s listing fees.

privileges, and to replace such rules with the Listing Rules, which the Exchange notes are primarily based on and substantially similar to the rules of The NASDAQ Stock Market LLC (“NASDAQ”).⁵ The Exchange proposes to adopt two distinct tiers of securities to be listed on the Exchange: Tier I and Tier II. The Exchange represents that the proposed standards for a security’s initial and continued listing on Tier I are nearly identical to the existing standards applicable to listing on The Nasdaq Global Market (“NGM”), and that the proposed standards for a security’s initial and continued listing on Tier II are nearly identical to the existing standards applicable to listing on The Nasdaq Capital Market (“NCM”).⁶ While the quantitative standards for Tier I and II differ, the Exchange notes that the qualitative standards for both tiers are the same and are nearly identical to NGM’s existing qualitative standards.⁷

A. General Regulatory Authority of the Exchange

The Exchange proposes to have general, broad discretionary authority over the initial and continued listing of securities on the Exchange in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Exchange notes that it may use such discretion to deny initial listing, to apply additional or more stringent standards for the initial or continued listing of particular securities, or to suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on the Exchange inadvisable or

⁵ See Notice, supra note 3, 76 FR at 31661. The Exchange is not proposing any changes to the rules of the Exchange’s options market. Id.

⁶ The Notice identifies to which market’s quantitative standards (either NGM or NCM) and the NASDAQ rules the proposed BATS standards are comparable. Id. The Exchange is not proposing to adopt a tier equivalent to the NASDAQ Global Select Market. Id.

⁷ Id.

unwarranted in the opinion of the Exchange, even though the securities meet all enumerated standards for initial or continued listing.⁸

The Exchange also proposes guidance regarding the circumstances in which it would invoke discretionary authority and the types of factors it would consider when making determinations pursuant to such authority. In addition, the Exchange proposes guidance on its use of discretionary authority as it relates to a Company⁹ whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified Companies within a specific period of time. The Exchange would permit the listing of such a Company if the Company were to meet all applicable initial listing standards, as well as the factors considered pursuant to its discretionary authority. The Exchange further proposes guidance on the use of its discretionary authority when a Company files for protection under any provision of the federal bankruptcy laws or comparable foreign laws.

B. General Procedures and Prerequisites for Listing

The Exchange proposes an application process that a Company must complete in order to be listed on the Exchange. To apply for listing on the Exchange, a Company would have to execute a Listing Agreement and a Listing Application on forms made available by the Exchange in order to provide the information required by Section 12(b) of the Act.¹⁰ A Company's qualifications would be determined on the basis of financial statements that are either: (1) prepared in accordance with U.S. generally accepted accounting principles; (2) reconciled to U.S. generally accepted accounting principles as required by the Commission's rules; or (3)

⁸ Id.

⁹ For purposes of the Listing Rules, a "Company" would be any issuer of a security listed or applying to list on the Exchange, including an issuer that is not incorporated (e.g., a limited partnership).

¹⁰ 15 U.S.C. 781(b).

prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, for Companies that are permitted to file financial statements using those standards consistent with the Commission's rules.

The Exchange also proposes prerequisites for an applicant Company to become listed on the Exchange: (1) the security would have to be registered pursuant to Section 12(b) of the Act¹¹ or subject to an applicable exemption; (2) the Company would have to be audited by a registered independent public accountant; (3) the securities would have to be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Act,¹² subject to certain exceptions; (4) the Company would have to pay the Exchange's listing fees; (5) the securities would have to be in good standing with the Commission or Other Regulatory Authority;¹³ (6) the Exchange would have to certify to the Commission, and the securities would have to become effective, pursuant to Section 12(d) of the Act;¹⁴ and (7) the securities would have to be depository eligible pursuant to the rules and procedures of a securities depository registered as a clearing agency under Section 17A of the Act.¹⁵

The Exchange proposes to permit Companies, which have securities listed on another national securities exchange, to apply to list those securities on the Exchange. The Exchange represents that this would foster competition among markets and further the development of the

¹¹ Id.

¹² 15 U.S.C. 78q-1. “‘Direct Registration Program’ means any program by a Company, directly or through its transfer agent, whereby a shareholder may have securities registered in the shareholder’s name on the books of the Company or its transfer agent without the need for a physical certificate to evidence ownership.” Proposed BATS Rule 14.1(a)(6).

¹³ See proposed BATS Rule 14.1(t).

¹⁴ 15 U.S.C. 78l(d).

¹⁵ 15 U.S.C. 78q-1.

national market system.¹⁶ The Exchange would make an independent determination of whether such Companies satisfy all applicable listing standards and would require Companies to enter into a dual listing agreement with the Exchange.

While the Exchange would certify such dually listed securities for listing on the Exchange, it would not exercise its authority separately to designate or register such dually listed securities as national market system securities within the meaning of Section 11A of the Act or the rules thereunder. As a result, these securities, which already would be designated as national market system securities under the Consolidated Quotation Service (“CQS”) and Consolidated Tape Association national market system plans (“CQ and CTA Plans”) or the Nasdaq Unlisted Trading Privileges national market system plan (“UTP Plan”), as applicable, would remain subject to those plans. For purposes of the national market system, such securities would continue to trade under their current ticker symbols. The Exchange would continue to send all quotations and transaction reports in such securities to the processor for the CTA Plan or UTP Plan, as applicable.

C. Disclosure Obligations

The Exchange proposes requirements for Companies to provide information to the Exchange, to file financial reports and other documentation required pursuant to the Securities Act of 1933 and the rules and regulations thereunder, and to make public disclosures, including disclosures required pursuant to Regulation FD.¹⁷ Such requirements would include providing the Exchange’s Surveillance Department with notification prior to public release of material information. The Exchange also proposes obligations regarding notification to the Exchange of administrative matters and corporate actions. The Exchange proposes additional guidance to

¹⁶ See Notice, supra note 3, 76 FR at 31662.

¹⁷ 17 CFR 243.100 et seq.

Companies on the importance of them providing prompt and complete notifications. The Exchange represents that such notice is critical to the proper functioning of the capital markets and to investor confidence.¹⁸

D. Quantitative Listing Requirements and Standards for Tier I Securities¹⁹

1. Primary Equity Securities – Initial Listing Requirements and Standards

The Exchange proposes to adopt quantitative initial listing requirements pertaining to the public float, distribution of shares, and trading volume of the security. Specifically, a Company would have to have a minimum bid price of \$4 per share, a minimum of 1.1 million publicly held shares, and a minimum of 400 round lot holders.

The Exchange also proposes to require that the issuer of the security meet at least one of the following standards – income, equity, market value, or total assets/total revenue. The income standard would require that an issuer have annual pre-tax income from continuing operations of at least \$1 million in the most recently completed fiscal year or in two of the three most recently completed fiscal years, \$15 million in stockholders’ equity, a market value of publicly held shares of at least \$8 million, and at least three registered and active Market Makers.²⁰ The equity standard would require that an issuer have stockholders’ equity of at least \$30 million, a two-year operating history, a market value of publicly held shares of at least \$18 million, and at least three registered and active Market Makers. The market value standard for

¹⁸ See Notice, supra note 3, 76 FR at 31662.

¹⁹ The Exchange proposes to divide the quantitative listing standards into two subcategories in the Listing Rules: listing requirements and listing standards. Listing requirements would be quantitative metrics, all of which a Company would have to meet for initial or continued listing on a particular tier. Listing standards would consist of bundles of quantitative metrics; however, unlike listing requirements, a Company only would have to meet at least one listing standard to become listed or to continue listing.

²⁰ “Market Maker” means a member of the Exchange that acts as a market maker on the Exchange. See BATS Rules Chapter XI.

currently publicly traded Companies would require a market value of listed securities of at least \$75 million, a market value of publicly held shares of at least \$20 million, and at least four registered and active Market Makers. Finally, the total assets/total revenue standard would require that total assets and total revenue for the most recent fiscal year and two of the three most recently completed fiscal years be at least \$75 million, that the market value of publicly held shares be at least \$20 million, and that the issuer have at least four registered and active Market Makers.

2. Rights and Warrants, and Preferred Stock and Secondary Classes of Common Stock – Initial Listing Requirements

For initial listing, the Exchange proposes to require that at least 450,000 rights or warrants be issued, and that the underlying security be listed on the Exchange or be a covered security, and that the issuer have at least three registered and active Market Makers. For warrants, the Exchange would also require that there be at least 400 round lot holders. When the primary equity security of an issuer is listed on the Exchange as a Tier I security or is a covered security, the Exchange would require that the preferred stock or secondary classes of common stock meet similar requirements. Specifically, the Exchange would require that there be at least 200,000 publicly held shares with a market value of at least \$4 million, a minimum bid price of \$4 per share, at least 100 round lot holders, and at least three registered and active Market Makers. When the primary equity security of an issuer is not listed on the Exchange as a Tier I security or is not a covered security, the Exchange proposes that the preferred stock and/or secondary class of common stock be listed on the Exchange as a Tier I security so long as the security has met the initial listing requirements and standards for primary equity securities on Tier I.

3. Units – Initial Listing and Maintenance Requirements

The Exchange proposes that all units must have at least one equity component, and that all components of such units must satisfy the requirements for initial and continued listing as Tier I securities, except for debt components.²¹ All components of a unit would have to be issued by the same issuer, and all units and issuers of such units would have to comply with the initial and continued listing requirements of Tier I. For initial listing, a unit would have to have at least three registered and active Market Makers, and, for continued listing, a unit would have to have at least two registered and active Market Makers, one of which could be a Market Maker entering a stabilizing bid.

4. Primary Equity Securities – Maintenance Requirements and Standards

For continued approval of a primary equity security listing, the Exchange proposes to require that there be a minimum bid price of \$1 per share and at least 400 total holders. The Exchange would also require that issuers meet at least one of the following standards – equity, market value, or total assets/total revenue. The equity standard would require that stockholders' equity be at least \$10 million, that there be at least 750,000 publicly held shares with a market value of at least \$5 million, and that there be at least two registered and active Market Makers. The market value standard would require that the market value of listed securities be at least \$50 million, that there be at least 1.1 million publicly held shares with a market value of at least \$15

²¹ The Exchange proposes that all debt components of a unit, if any, must meet the following requirements: (1) the debt issue must have an aggregate market value or principal amount of at least \$5 million; (2) the issuer of the debt security must have equity securities listed on the Exchange as a Tier I security; and (3) in the case of convertible debt, the equity into which the debt is convertible must itself be subject to real-time last sale reporting in the United States, and the convertible debt must not contain a provision which gives the company the right, at its discretion, to reduce the conversion price for periods of time or from time to time unless the company establishes a minimum period of ten business days within which such price reduction will be in effect.

million, and that there be at least two registered and active Market Makers. The total assets/total revenue standards would require that there be total assets and total revenue of at least \$50 million each for the most recently completed fiscal year or two of the three most recently completed fiscal years, at least 1.1 million publicly held shares with a market value of at least \$15 million, and at least four registered and active Market Makers.

5. Rights and Warrants, Preferred Stock and Secondary Classes of Common Stock – Maintenance Requirements and Standards

For continued listing, the Exchange proposes to require that the rights or warrants continue to be listed on the Exchange as a Tier I security or be a covered security, and that there be at least two registered and active Market Makers, one of which could be a Market Maker entering a stabilizing bid. For preferred stock and secondary classes of common stock, the Exchange also proposes that a Company's primary equity security be listed on the Exchange as a Tier I security or as a covered security. The Exchange further proposes that the preferred stock or secondary class of common stock have at least 100,000 publicly held shares with a market value of at least \$1 million, a minimum bid price of \$1 per share, at least 100 public holders, and at least two registered and active Market Makers. When a Company's primary equity security is not listed on the Exchange as a Tier I security or is not a covered security, the Exchange proposes that the preferred stock and/or secondary class of common stock may continue to be listed on the Exchange as a Tier I security so long as the security has met the continued listing criteria for primary equity securities.

E. Quantitative Listing Requirements and Standards for Tier II Securities²²

1. Primary Equity Securities – Initial Listing Requirements and Standards

The Exchange proposes to adopt quantitative initial listing requirements pertaining to the public float, distribution of shares, and trading volume of a security. Specifically, the Exchange would require a Company to have a minimum bid price of \$4 per share, a minimum of one million publicly held shares, at least 300 round lot holders, and at least three registered and active Market Makers.²³

The Exchange would also require that the issuer of the security meets at least one of the following standards – equity, market value, or net income. The equity standard would require stockholders’ equity of at least \$5 million, a market value of publicly held shares of at least \$15 million, and a two-year operating history. The market value standard would require a market value of listed securities of at least \$50 million, stockholders’ equity of at least \$4 million, and a market value of publicly held shares of at least \$15 million. The net income standard would require net income from continuing operations of at least \$750,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years, stockholders’ equity of at least \$4 million, and a market value of publicly held shares of at least \$5 million.

2. Preferred Stock and Secondary Classes of Common Stock; Rights, Warrants, and Convertible Debt – Initial Listing Requirements

When the primary equity security of an issuer is listed on the Exchange as a Tier II security or is a covered security, the Exchange proposes to require that the preferred stock or secondary classes of common stock have at least 200,000 publicly held shares with a market

²² See supra note 19.

²³ For American Depositary Receipts, the Exchange would also require there be at least 400,000 issued.

value of at least \$3.5 million, a minimum bid price of \$4 per share, at least 100 round lot holders, and at least three registered and active Market Makers. When a company's primary equity security is not listed on the Exchange as a Tier II security or is not a covered security, the Exchange proposes that the preferred stock and/or secondary class of common stock be listed on the Exchange as a Tier II security so long as the security has met the initial listing requirements and standards for primary equity securities on Tier II.

For initial listing of rights, warrants, and put warrants, the Exchange also proposes to require that at least 400,000 are issued and that the underlying security is listed on the Exchange or is a covered security. For warrants, the Exchange further proposes to require that there be at least 400 round lot holders, and at least three registered and active Market Makers.

For initial listing of convertible debt securities, the Exchange would require that the principal amount outstanding be at least \$10 million, that the current last sale information be available in the United States with respect to the underlying security into which the bond or debenture is convertible, and that the security have at least three registered and active Market Makers. In addition to these conditions, the Exchange proposes to require that issuers also meet one of the following conditions: (1) that the issuer of the debt has an equity security that is listed on the Exchange, NASDAQ, NYSE Amex LLC ("NYSE Amex"), or the New York Stock Exchange ("NYSE"); (2) that an issuer whose equity security is listed on the Exchange, NASDAQ, NYSE Amex, or NYSE directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security; (3) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or (4) if no NRSRO has assigned a rating to the issue, an NRSRO has currently

assigned: (a) an investment grade rating to an immediately senior issue; or (b) a rating that is no lower than an S&P Corporation “B” rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.

For initial listing of index warrants, the Exchange would require that the minimum public distribution be at least one million warrants, that there be a minimum of 400 public holders, that the market value of the index warrants be at least \$4 million, and that the issuer have a minimum tangible net worth in excess of \$150 million.

3. Units – Initial Listing and Maintenance Requirements

The Exchange proposes that all component parts of units must meet the Tier II requirements for initial and continued listing. Further, the minimum period for listing of the units would be 30 days from the first day of listing, except the period could be shortened if the units are suspended or withdrawn for regulatory purposes. Companies and underwriters seeking to withdraw units from listing would have to provide the Exchange with notice of such intent at least 15 days prior to withdrawal. For initial listing, a unit would have to have at least three registered and active Market Makers, and, for continued listing, a unit would have to have at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid.

4. Primary Equity Securities – Maintenance Requirements and Standards

For continued approval of a primary equity security listing, the Exchange proposes to require a minimum bid price of \$1 per share, at least 300 public holders, at least 500,000 publicly held shares with a market value of at least \$1 million, and at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid.

Additionally, the Exchange proposes to require that issuers meet at least one of the following standards – equity, market value, or net income. The equity standard would require that stockholders’ equity be at least \$2.5 million. The market value standard would require that the market value of listed securities be at least \$35 million. The net income standard would require net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.

5. Preferred Stock and Secondary Classes of Common Stock; Rights, Warrants, and Convertible Debt – Maintenance Requirements

When the primary equity security is listed on the Exchange as a Tier II security or is a covered security, the Exchange proposes that a Company’s preferred stock or secondary class of common stock have a minimum bid price of \$1 per share, at least 100 public holders, at least 100,000 publicly held shares, a market value of publicly held shares of at least \$1 million, and at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid. When a Company’s primary equity security is not listed on the Exchange as a Tier II security or is not a covered security, the Exchange proposes that the preferred stock and/or secondary class of common stock be listed on the Exchange as a Tier II security so long as the security has met the criteria of the continued listing of primary equity securities on Tier II.

For rights, warrants, and put warrants (i.e., instruments that grant the holder the right to sell to the issuing Company a specified number of shares of the Company’s common stock, at a specified price until a specified period of time), the Exchange proposes that the underlying security remain listed on the Exchange or be a covered security, and that there be at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid.

For continued listing of convertible debt securities, the Exchange proposes to require a principal amount outstanding of at least \$5 million, at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid, and current last sale information available in the United States with respect to the underlying security into which the bond or debenture is convertible.

F. Corporate Governance Standards

As noted by the Exchange, in addition to having quantitative listing standards based on the standards applicable to NASDAQ-listed Companies, particularly those designated as NGM or NCM securities, the Exchange proposes nearly identical qualitative standards to those of NGM for both tiers of the Exchange.²⁴ Specifically, the Exchange proposes to adopt corporate governance standards relating to a Company's board of directors, audit committee requirements, independent director oversight of executive compensation, a mandatory code of conduct, shareholder meetings (including proxy solicitation and quorum), review of related party transactions, and shareholder approval (including voting rights). The Exchange believes that preliminarily adopting uniform corporate governance standards to those of NASDAQ would assist issuers and their advisors in determining the Exchange's requirements.²⁵

G. Listing Standards for Other Securities

The Exchange proposes listing standards applicable to "other securities," including exchange traded funds, index-linked securities, selected equity-linked debt securities, trust issued receipts, and index warrants. The Exchange notes that the proposed standards for these securities

²⁴ See Notice, supra note 3, 76 FR at 31665.

²⁵ Id.

are both similar to the Exchange's current standards applicable to securities traded on the Exchange pursuant to unlisted trading privileges, as well as NASDAQ's standards.²⁶

H. Failure to Meet Listing Standards

The Exchange proposes that securities of a Company that do not meet the listing standards set forth in the Listing Rules are subject to delisting from, or denial of initial listing on, the Exchange. Accordingly, the Exchange proposes procedures for the independent review, suspension, and delisting of Companies that fail to satisfy one or more requirements or standards for initial or continued listing, and thus are deficient with respect to the listing standards.

The Listings Qualifications Department would be responsible for identifying deficiencies that could lead to delisting or denial of a listing application, notifying the Company of the deficiency or denial, and issuing Staff Delisting Determinations and Public Reprimand Letters. The Exchange also proposes various responsibilities when a Company receives notice of a deficiency, including public notification responsibilities.

The Hearings Panel, upon timely request by a Company, would review a staff delisting determination, denial of a listing application, or public reprimand letter at an oral or written hearing, and issue a decision that could, among other things, grant an exception to the Exchange's listing standards or affirm a delisting. The Exchange Listing and Hearings Review Council, upon timely appeal by a Company or on its own initiative, could review the decisions of the Hearings Panel. Finally, the Exchange Board of Directors could exercise discretion to review a Listing Council decision.

²⁶

Id.

The Exchange also proposes procedures related to Commission notification of the Exchange's final delisting determinations, rules applicable to adjudicators and advisors, and general information relating to the adjudicatory process.

A Company's failure to maintain compliance with the applicable provisions of the Listing Rules would result in the termination of the listing unless an exception is granted to the Company. The termination of the Company's listing would become effective in accordance with the procedures set forth in the Listing Rules.

I. Listing Fees

The Exchange proposes to commence its listings business by charging entry fees of \$100,000 and \$50,000 for Companies listed on Tiers I and II, respectively. The initial primary listing fee for both tiers would include a \$25,000 non-refundable application fee. The Exchange also proposes to charge annual fees of \$35,000 and \$20,000 for Companies listed on Tiers I and II, respectively, on a prorated basis.

The Exchange proposes to waive the entry fee for any Company that is listed on another national securities exchange if such Company transfers its listing to the Exchange, is dually-listed on the Exchange and another national securities exchange but ceases to maintain its listing on that other national securities exchange, or is listed on another national securities exchange but not listed on the Exchange, if the issuer of such securities is acquired by an unlisted Company and, in connection with the acquisition, the unlisted Company lists exclusively on the Exchange. Annual dual listing fees would be \$15,000 for both tiers and would be prorated.²⁷

²⁷ The Exchange does not propose to charge for ministerial changes implemented by a Company (e.g., name changes and symbol changes), nor does the Exchange propose to charge a fee for necessary work related to corporate actions of a Company (e.g., a reverse stock split, re-incorporation, etc.).

III. Discussion

After careful review of the proposal, 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.²⁸ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,²⁹ which requires, among other things, that the rules of an 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.

The Exchange has proposed an extensive program for the qualification, listing, and delisting of Companies on the Exchange and has represented that its rules are nearly identical to listing rules of an existing national securities exchange. As the Commission has noted, the development and enforcement of adequate standards governing the initial listing and maintenance of listing of securities is an activity of critical importance to financial markets and the investing public. Listing standards serve as a means for a marketplace to screen issuers and to provide listed status only to bona fide companies with sufficient float, investor base, and trading interest to maintain fair and orderly markets. Once an issuer has been approved for initial listing, the maintenance criteria allow a marketplace to monitor the status and trading characteristics of that issue to ensure that it continues to meet standards for market depth and liquidity.³⁰

²⁸ 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).

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ See Securities Exchange Act Release No. 55642 (April 18, 2007), 72 FR 20395 (April 24, 2007) (granting accelerated approval to certain NCM listing standards); Securities Exchange Act Release No. 37481 (July 25, 1996), 61 FR 40270, 40273-74 (August 1, 1996) (granting accelerated approval to establish new quantitative and qualitative listing standards of Chicago Stock Exchange, Incorporated ("Chx")) ("Chx Listing Standards Approval"); Securities Exchange Act Release No. 34429 (July 22, 1994), 59 FR 38998, 39002 (August 1, 1994) (granting accelerated approval to new quantitative and qualitative listing standards of Pacific Stock Exchange, Inc. ("PSE")) ("PSE Listing Standards Approval").

In addition to the quantitative standards, the qualitative requirements, such as audit committees, independent director oversight of executive compensation, a mandatory code of conduct, shareholder meetings (including proxy solicitation and quorum), review of related party transactions, shareholder approval (including voting rights), and disclosure policies are designed to ensure that companies trading on the Exchange will adequately protect the interests of public shareholders.³¹ The Commission also notes that, because extensive listing and maintenance standards are being adopted, only companies suitable for exchange listing are eligible for trading on the Exchange.³²

The Commission believes that inclusion of a security for listing on an exchange should not depend solely on meeting quantitative criteria, but should also entail an element of judgment given the expectations of investors and the imprimatur of listing on a particular market.³³ The Commission believes that this rule provides the necessary flexibility to determine whether to list an issuer while ensuring that certain minimum standards must be met. Thus, the Commission believes that the listing and maintenance standards strike the appropriate balance between protecting investors and providing a marketplace for issuers satisfying the disclosure requirements under the federal securities laws. The standards will provide important guidance on the Exchange review process, and will alert issuers seeking to list on the Exchange of its specific standards.

³¹ Id.

³² Id.

³³ See Chx Listing Standards Approval, supra note 30, 61 FR at 40274; PSE Listing Standards Approval Order, supra note 30, 59 FR at 39002.

The Commission also believes the proposal is consistent with Section 6(b)(9) of the Act³⁴ because the rules will prohibit the listing of any security issued in a limited partnership rollup transaction (as defined in Section 14(h) of the Act), unless such transaction satisfies the criteria of Section 6(b)(9) and a broker-dealer that is a member of a national securities association subject to Section 15A(b)(12) of the Act participates in the rollup transaction.

Finally, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,³⁵ which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers, and other persons using its facilities. Specifically, as proposed, the Exchange will establish a pricing structure that is not variable based on the number of shares or other metrics. The fees are designed to be equitable in that they will be the same amongst issuers seeking to list Tier I securities and the same amongst issuers seeking to list Tier II securities. Further, the Commission notes the Exchange will not charge additional fees that issuers incur at other exchanges, including fees for issuance of additional shares, name changes, and other corporate actions. Finally, the Commission also notes that the Exchange's pricing, in general, will be roughly equivalent to or less than what issuers would pay at other national securities exchanges,³⁶ and will not include multiple other fees applicable on other national securities exchanges to additional shares issued by listed companies, corporate actions, and related activities of issuers.

³⁴ 15 U.S.C. 78f(b)(9).

³⁵ 15 U.S.C. 78f(b)(4).

³⁶ For instance, issuers listing on NGM pay between \$125,000 and \$225,000 initially (depending on the number of shares) and between \$35,000 and \$99,500 annually, compared to proposed Tier I fees of \$100,000 initially and \$35,000 annually. See NASDAQ Rule 5910(a) and (c). Similarly, issuers listing on NCM pay either \$50,000 or \$75,000 initially (depending on the number of shares) and between \$17,500 and \$75,000 annually, compared to proposed Tier II fees of \$50,000 initially and \$20,000 annually. See NASDAQ Rule 5920(a) and (c).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁷ that the proposed rule change (SR-BATS-2011-0118) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Elizabeth M. Murphy
Secretary

³⁷ 15 U.S.C. 78s(b)(2).

³⁸ 17 CFR 200.30-3(a)(12).