

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65298; File No. SR-BATS-2011-033)

September 8, 2011

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change to Amend and Restate the Second Amended and Restated Certificate of Incorporation of BATS Global Markets, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 29, 2011, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend the Second Amended and Restated Certificate of Incorporation of BATS Global Markets, Inc. (the “Corporation”) in connection with the anticipated initial public offering of shares of its Class A common stock.

The text of the proposed rule change is available at the Exchange’s website at <http://www.batstrading.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 13, 2011, the Corporation, the sole stockholder of the Exchange, filed a registration statement on Form S-1 with the Commission seeking to register shares of Class A common stock and to conduct an initial public offering of those shares, which will be listed for trading on the Exchange (the "IPO"). In connection with its IPO, the Corporation intends to amend and restate its certificate of incorporation and adopt a Third Amended and Restated Certificate of Incorporation (the "New Certificate of Incorporation"). The amendments include, among other things, (i) increasing the total number of authorized shares of stock of the Corporation, (ii) reclassifying the existing common stock of the Corporation into two classes of shares, Class A and Class B, (iii) setting forth the respective voting rights and of Class A and Class B common stock, (iv) setting forth certain limitations on transfer, (v) defining the newly reclassified shares of Class A common stock and Class B common stock as a single class of capital stock of the Corporation for purposes of Article 5 of the New Certificate of Incorporation, entitled "Limitations on Ownership, Transfer & Voting", and (vi) certain requirements for future amendments to the certificate of incorporation and bylaws.

The purpose of this rule filing is to permit the Corporation, the sole stockholder of the Exchange, to adopt the New Certificate of Incorporation. The changes described herein relate to the certificate of incorporation of the Corporation only, not to the governance of the Exchange. The Exchange will continue to be governed by its existing certificate of incorporation and by-

laws. The stock in, and voting power of, the Exchange will continue to be directly and solely held solely [sic] by the Corporation. The governance of the Exchange will continue under its existing structure, which provides for a ten member board of directors reflecting diverse representation of industry, non-industry and exchange members, currently including (i) the chief executive officer of the Exchange, (ii) two industry directors, (iii) two Exchange member directors, and (iv) five non-industry directors.

Background

The Corporation was originally formed as BATS Holdings, Inc. on June 29, 2007 and subsequently changed its name to BATS Global Markets, Inc. On May 4, 2011, the Corporation amended and restated its certificate of incorporation (the “Current Certificate of Incorporation”) to (i) increase the number of authorized shares of common stock, and (ii) designate certain shares as either “Voting Common Stock” or “Non-Voting Common Stock.” Pursuant to the Current Certificate of Incorporation, shares of Non-Voting Common Stock possess the same rights, preferences, powers, privileges, restrictions, qualifications and limitations as the Voting Common Stock, except that Non-Voting Common Stock is generally non-voting. Non-Voting Common Stock is convertible into Voting Common Stock on a one-to-one basis, either (i) automatically upon transfer from the holder thereof to an unrelated person, or (ii) at any time and from time to time at the option of the holder. The Non-Voting Common Stock was created in anticipation of future issuances to stockholders who may wish to increase their economic ownership, but avoid accruing voting power, in the Corporation.

Authorized Shares and Reclassification

The New Certificate of Incorporation will revise the capital structure of the Corporation to increase the number of authorized shares and create two separate classes of shares, Class A

and Class B. In particular, changes proposed to Section 4.01 of the New Certificate of Incorporation would increase the number of shares authorized for issuance to an amount that accommodates the reclassification discussed below, and provides additional shares for future issuances. Pursuant to Section 4.02 of the New Certificate of Incorporation, the Corporation is proposing to designate Class A common stock as either “Class A Common Stock” or “Non-Voting Class A Common Stock,” and Class B common stock will be further designated as either “Class B Common Stock” or “Non-Voting Class B Common Stock.”

Further pursuant to Section 4.02, on the date that the New Certificate of Incorporation becomes effective (the “Effective Time”),³ the Corporation is proposing that each authorized, issued and outstanding share of Voting Common Stock will be automatically reclassified into (i) seven shares of Class A Common Stock and (ii) three shares of Class B Common Stock, and each authorized, issued and outstanding share of Non-Voting Common Stock will be automatically reclassified into (i) seven shares of Non-Voting Class A Common Stock and (ii) three shares of Non-Voting Class B Common Stock. Except for voting rights and certain conversion features, as described below, Class A Common Stock, Non-Voting Class A Common Stock, Class B Common Stock, and Non-Voting Class B Common Stock will generally have identical rights, privileges and will rank equally.

Pursuant to changes proposed to Section 4.04(a) of the New Certificate of Incorporation, all voting power will be vested in the Class A Common Stock and the Class B Common Stock (except with regard to certain matters involving only preferred shares as noted in proposed changes to Section 4.03 of the New Certificate of Incorporation), which will vote together as one

³ It is anticipated that the Effective Time will coincide with the date of the closing of the IPO and will occur immediately prior thereto.

class on all matters submitted to a vote or for the consent of the Corporation's stockholders, except that holders of Class A Common Stock will be entitled to one vote per Class A share, while holders of Class B Common Stock will be entitled to two and one-half votes per Class B share. Shares of Non-Voting Class A Common Stock and Shares of Non-Voting Class B Common Stock are non-voting, except with regard to certain matters that would adversely affect their respective rights as described in the proposed changes to Section 4.02(a)(ii) of the New Certificate of Incorporation. Only Class A Common Stock is proposed to be sold in the IPO; Class B Common Stock and Class B Non-Voting Common Stock will not be sold in the IPO and will continue to be held by existing investors.

Pursuant to changes proposed to Section 4.04(b) of the New Certificate of Incorporation, shares of common stock not sold in the IPO will be subject to restrictions on transfer following the Effective Time. In particular, under Section 4.04(b)(i), except for certain permitted transfers as defined in Section 4.04(b)(iii), a holder of shares of Class A Common Stock or Non-Voting Class A Common Stock (including shares subject to an option, warrant or similar right) on the Effective Time may not transfer any of such shares until 180 days following the Effective Time, and then may only transfer up to fifty percent of their total holdings of common stock, but only in the form of Class A Common Stock or Non-Voting Class A Common Stock, until one year following the Effective Time less any shares that were sold in the IPO. In addition, pursuant to Section 4.04(b)(ii), subject to similar permitted transfers as defined in Section 4.04(b)(iii), a holder of Class B Common Stock or Non-Voting Class B Common Stock on the Effective Time may not transfer any of such shares until three years from the Effective Time.

Pursuant to Section 4.04(c), the New Certificate of Incorporation will generally replicate the existing conversion features of Non-Voting Common Stock (described above) and apply

these features to Non-Voting Class A Common Stock. As such, Non-Voting Class A Common Stock will be convertible into Class A Common Stock, on a one-to-one basis, either (i) automatically upon transfer from the holder thereof to an unrelated person, or (ii) at any time and from time to time at the option of the holder. Non-Voting Class B Common Stock will be convertible into Class B Common Stock, on a one-to-one basis, at any time and from time to time at the option of the holder. Subject to certain exceptions (such as transfers among affiliates, or between existing holders), shares of Class B Common Stock and Non-Voting Class B Common Stock will automatically convert into Class A Common Stock, on a one-to-one basis, upon any transfer of such shares. Class A Common Stock will not be convertible into any other class of stock.

Finally, pursuant to changes proposed to Section 4.02(b) and Section 4.04(c)(v)(B) of the New Certificate of Incorporation, upon reclassification and anytime thereafter, a stockholder that, together with its affiliates, owns less than 4,960,491 shares of outstanding common stock (the “Class B Threshold”), will have its Class B Common Stock automatically convert into Class A Common Stock and its Non-Voting Class B Common Stock automatically convert into Non-Voting Class A Common Stock.

The purpose for the reclassification of the Corporation’s common stock into Class A common stock and Class B common stock is to encourage the Corporation’s existing strategic investors to remain strategic investors of the Corporation after the IPO. The proposed changes discussed above achieve this goal in several ways. First, the reclassification of each share of the Corporation’s existing common stock into seven shares of Class A Common Stock with one vote each, and three shares of Class B Common Stock with two and one-half votes each, in conjunction with the application of the Class B Threshold and other factors, ensures that in the

aggregate the Class B common stock controls a meaningful, but less than majority, percentage of the vote on matters coming before the stockholders, while simultaneously retaining a significant economic investment (within approximately twenty percentage points of the voting control represented by the Class B common stock) in the Corporation. By allowing the transfer restrictions on the Class A common stock to expire in two tranches at 180 days and one year, while retaining transfer restrictions on the Class B common stock for three years, the proposal balances the ability of existing strategic investors to orderly sell shares in the open market, while at the same time retaining the strategic benefit to the Corporation of their significant ownership for at least three years through their holdings of Class B common stock.

Further, the requirement that the Class B common stock of any holder of less than the Class B Threshold automatically converts to Class A common stock ensures that only investors with a significant economic investment (approximately two percent) in the Corporation own Class B common stock. As such, existing investors that do not have an economic stake in the Corporation above the Class B Threshold will not own Class B common stock after the proposed reclassification, and existing investors who will own Class B common stock after the proposed reclassification will cease to own Class B common stock once their economic stake in the Corporation falls below the Class B Threshold, further ensuring an appropriate balance between an investor's voting control and economic stake in the Corporation.

Limitations on Ownership and Voting Power

Section 5.01(b)(i) of the New Certificate of Incorporation defines the Class A Common Stock, the Non-Voting Class A Common Stock, the Class B Common Stock, the Non-Voting Class B Common Stock and any series of Preferred Stock of the Corporation as a single class of capital stock of the Corporation for purposes of Section 5.01(a)(i) and Section 5.01(a)(ii) of the

New Certificate of Incorporation. As such, for purposes of determining compliance with the ownership limitations set forth in Section 5.01(a)(i) and Section 5.01(a)(ii) of the New Certificate of Incorporation, the Class A and Class B shares, including both voting and non-voting shares, and, if applicable, any Preferred Shares, will be aggregated. As proposed, the New Certificate of Incorporation will not include a provision present in the Current Certificate of Incorporation that excludes non-voting stock from the ownership and voting limitations applicable to non-Member shareholders.⁴ Retaining this provision would have caused an internal inconsistency with respect to aggregation of stock, and the Exchange does not believe that excluding non-voting stock from such limitations is necessary or consistent with the intent of the limitations. The New Certificate of Incorporation will thus maintain and enhance the limitations on aggregate ownership and total voting power that currently exist under the Current Certificate of Incorporation. References to an Investor Rights Agreement are also removed, as the relevant provisions of that agreement are expected to terminate upon the IPO.

Bylaws and Future Amendments to the Certificate of Incorporation

Article 9 and Article 15 of the New Certificate of Incorporation relate to the adoption of, and amendments to, the Corporation's bylaws, and future amendments to the Corporation's certificate of incorporation, respectively. Pursuant to Section 9.01, the New Certificate of Incorporation preserves the existing right of the Corporation's Board of Directors to adopt, amend or repeal the Corporation's bylaws. Pursuant to proposed Section 9.02(a) of the New Certificate of Incorporation, prior to a Change in Ownership, which is defined in Section 6.01(b) of the New Certificate of Incorporation as "a transaction or series of transactions which results in

⁴ The Exchange notes that there is no currently issued and outstanding non-voting stock of the Corporation, nor has the Corporation previously issued non-voting stock.

the beneficial owners of the Class B [common stock] owning in the aggregate less than a majority of the total voting power of [the Corporation's outstanding securities] . . .”, the stockholders may adopt, amend or repeal the bylaws upon the affirmative vote of the majority of the total voting power of the Corporation's outstanding securities entitled to vote generally in the election of directors, voting together as a single class. Pursuant to proposed Section 9.02(b), upon a Change in Ownership, the stockholders may adopt, amend, or repeal the bylaws upon the affirmative vote of not less than seventy percent of the total voting power of the Corporation's outstanding securities entitled to vote generally in the election of directors, voting together as a single class.

Similarly, pursuant to proposed Section 15.01 of the New Certificate of Incorporation, prior to any Change in Ownership, and subject to Section 15.03, which requires any proposed amendment to be reviewed by the Board of Directors of the Exchange and filed with the Commission if required under Section 19 of the Act, the certificate of incorporation can be amended in any manner permitted by the General Corporation Law of the State of Delaware, as amended (“Delaware Law”), which today generally allows for the amendment of a certificate of incorporation by the affirmative vote of the majority of the outstanding stock entitled to vote thereon. Pursuant to proposed Section 15.02 of the New Certificate of Incorporation, upon a Change in Ownership, and again subject to Section 15.03, certain provisions of the certificate of incorporation can only be amended upon the affirmative vote of not less than seventy percent of the total voting power of the Corporation's outstanding securities entitled to vote generally in the election of directors, voting together as a single class. These provisions include Sections 4.04(b) and 4.04(c), relating to transfer restrictions and conversion rights, and Article 5 through Article 15, relating to limitations on ownership, transfer, and voting, defined terms, board of directors,

duration of the Corporation, bylaws, indemnification, meetings and actions of stockholders, forum selection, compromise or other arrangement, Section 203 opt-out, and amendments, respectively.

The purpose for the distinction in the stockholders' ability to adopt, amend, or repeal the bylaws, or amend the certificate of incorporation, prior to versus upon a Change in Ownership is to maintain the existing ability of the Corporation's strategic investors to take such actions so long as they continue to control, through their aggregate ownership of Class A Common Stock and Class B Common Stock, a majority of the voting power of the Corporation's outstanding securities, and to adopt common public company supermajority requirements upon a Change in Ownership to deter actions being taken that the Corporation believes may be detrimental to the Corporation, including any actions which could detrimentally effect the Corporation's ability to comply with its unique responsibilities under the Act as the sole owner of two registered national securities exchanges in the United States. The purpose for limiting the application of the supermajority voting requirements to certain specified provisions of the certificate of incorporation is to focus such requirements on the most critical provisions of the certificate of incorporation.

Other Amendments

The New Certificate of Incorporation will amend and restate various other provisions of the Current Certificate of Incorporation in a manner that the Exchange believes are intended to reflect provisions that are more customary for publicly-owned companies (such as those relating to the indemnification of directors and business combinations, among others).

In particular, pursuant to changes proposed to Section 4.01 of the New Certificate of Incorporation, the Corporation will have the authority to issue 40 million shares of Preferred

Stock, par value \$0.01 per share (the “Preferred Stock”), which the Corporation’s Board of Directors may, by resolution from time to time, issue in one or more classes or series by filing a certificate pursuant to Delaware Law fixing the terms and conditions of such class or series of Preferred Stock. The Preferred Stock may be used by the Corporation to raise capital or to act as a safety mechanism for unwanted takeovers.

Pursuant to Section 4.04(c)(vii) of the New Certificate of Incorporation, the Corporation will be required to reserve and keep available out of its authorized but unissued capital stock shares of Class A common stock and Class B common stock solely for the purpose of effecting the conversion of such shares of capital stock. In addition, pursuant to Section 4.04(c)(viii), the Corporation may establish certain policies and procedures relating to the conversion of capital stock and the general administration of the Corporation’s multi-class common stock structure.

Also, Article 6 of the New Certificate of Incorporation includes certain defined terms that are used in the New Certificate of Incorporation, such as “Change in Ownership”, “Change of Control”, and “Related Persons”, among others.

Pursuant to Section 7.04 of the New Certificate of Incorporation, cumulative voting in the election of directors will be prohibited. If the Corporation were to permit cumulative voting, stockholders would be entitled to as many votes as are equal to the number of votes which such stockholder would be entitled to cast for the election of directors with respect to such stockholder's shares of stock, multiplied by the number of directors to be elected by such holder, and such stockholder may cast all of such votes for a single director or may distribute them among the number to be voted for, as such stockholder may see fit. In contrast, in “regular” or “statutory” voting (i.e., when cumulative voting is prohibited), stockholders may not give more than one vote per share to any single director nominee.

Pursuant to the changes proposed to Section 11.03 of the New Certificate of Incorporation, prior to a Change in Ownership, any action may be taken by the stockholders without a meeting, by written consent to the extent permitted under Delaware Law. Following a Change in Control, any action required or permitted to be taken at any meeting of the stockholders may be taken only upon the vote of stockholders at a meeting of the stockholders in accordance with Delaware Law and the New Certificate of Incorporation, and may not be taken by written consent without a meeting, except under certain circumstances.

Pursuant to Article 14 of the New Certificate of Incorporation, prior to any Change in Ownership, the Corporation will not be governed by Section 203 of Delaware Law; however, following a Change in Ownership, the Corporation will be governed by Section 203 of Delaware Law. In general, Section 203 prohibits a publicly-held Delaware corporation from engaging in a business combination with anyone who owns at least fifteen percent of its common stock. This prohibition lasts for a period of three years after that person has acquired the fifteen percent ownership. The corporation may, however, engage in a business combination if it is approved by its board of directors before the person acquires the fifteen percent ownership or later by its board of directors and two-thirds of the stockholders of the public corporation. The restrictions contained in Section 203 do not apply if, among other things, the corporation's certificate of incorporation contains a provision expressly electing not to be governed by Section 203.

The New Certificate of Incorporation also makes various non-substantive, stylistic changes throughout.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and rules and regulations thereunder that are applicable to a national securities exchange, and, in

particular, with the requirements of Section 6(b) of the Act.⁵ In particular, the proposal is consistent with Section 6(b)(1) of the Act, because it retains and enhances existing limitations on ownership and total voting power that currently exist and that are designed to prevent any stockholder from exercising undue control over the operation of the Exchange and to assure that the Exchange is able to carry out its regulatory obligations under the Act. Under the proposal, the Corporation is reclassifying its existing voting common stock into shares of Class A Common Stock and shares of Class B Common Stock, and is authorizing the potential future issuance of Preferred Stock. Class A Common Stock and Class B Common Stock have identical economic rights, and the only distinction between the Class A Common Stock and the Class B Common Stock, other than the transfer restrictions and conversion provisions applicable to such shares, is the number of votes attributable to each share. The consideration of Class A Common Stock, Non-Voting Class A Common Stock, Class B Common Stock, Non-Voting Class B Common Stock and any series of Preferred Stock as a single class of capital stock of the Corporation under the proposal for purposes of Section 5.01(a)(i) and Section 5.01(a)(ii) is consistent with and enhances the limitations on ownership in place under the Current Certificate of Incorporation. In other words, aggregation of all the capital stock of the Corporation for purposes of the ownership and voting limitations is consistent with the policy concerns sought to be addressed by these provisions of the Current Certificate of Incorporation and the proposed New Certificate of Incorporation. Specifically, these ownership and voting limitations ensure that no single Exchange Member or other person can exercise undue influence over the Exchange through ownership of a combination of different classes of stock issued by the Corporation.

⁵ 15 U.S.C. 78f(b).

Moreover, the voting limitations contained in Section 5.01(a)(iii) of the New Certificate of Incorporation are unaffected by the reclassification of the Corporation's common stock into Class A Common Stock and Class B Common Stock or the potential issuance of Preferred Stock in the future. To determine any stockholder's compliance with such voting limitations all Class A Common Stock, Non-Voting Class A Common Stock, Class B Common Stock, Non-Voting Class B Common Stock and Preferred Stock, would be aggregated under the Current Certificate of Incorporation as well as the proposed New Certificate of Incorporation.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-BATS-2011-033 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-BATS-2011-033. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File No. SR-BATS-2011-033 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Elizabeth M. Murphy
Secretary

⁶ 17 CFR 200.30-3(a)(12).