

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65353; File No. SR-BATS-2011-035)

September 19, 2011

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 7, 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 bylaws of the Exchange’s sole stockholder, BATS Global Markets, Inc.

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 proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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, BATS Global Markets, Inc., 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, BATS Global Markets, Inc. intends to amend and restate its Amended and Restated Bylaws (the "Current Bylaws") and adopt these changes as its Second Amended and Restated Bylaws (the "New Bylaws").

The amendments to the Current Bylaws include, among other things, (i) revising the procedures for stockholder proposals and nomination of directors, (ii) revising the authority to call special meetings of the stockholders, (iii) revising the process for action by written consent of stockholders, (iv) revising the requirements for removal of directors, (v) removal of provisions relating to indemnification of officers and directors, (vi) eliminating the authority to make loans to corporate officers, and (vii) revising certain requirements for approval of future amendments to the New Bylaws.

The purpose of this rule filing is to submit for Commission approval the New Bylaws adopted by BATS Global Markets, Inc., the sole stockholder of the Exchange. The changes described herein relate to the bylaws of BATS Global Markets, Inc. 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 by BATS Global Markets, Inc.

The Exchange has separately filed with the Commission a proposed amendment to the certificate of incorporation of BATS Global Markets, Inc. (the “New Certificate of Incorporation”). It is anticipated that the New Bylaws and the New Certificate of Incorporation will become effective (the “Effective Date”) the moment before the closing of the IPO. The amendments to the bylaws primarily reflect (i) changes to conform the Current Bylaws to provisions more customary for publicly-owned companies, (ii) amendments to conform the Current Bylaws to the New Certificate of Incorporation, and (iii) stylistic and other non-substantive changes.

#### Registered Office

Article I of the Current Bylaws designates the initial registered office of BATS Global Markets, Inc. in the State of Delaware as 1209 Orange Street in the City of Wilmington, County of New Castle, Delaware. Section 1.01 of the New Bylaws would amend Article I to state the registered office will continue to be located at the same location and to further provide the board of directors with the authority to designate another location from time to time. This will provide the board with the flexibility to change the registered office in the future if it believes such a change is necessary.

#### Annual Meeting of Stockholders

Section 2.02(a) of the Current Bylaws require that an annual meeting of stockholders for the purpose of election of directors and such other business that comes before the meeting occur on the third Tuesday of January, or such other time as the board of directors may designate. The

Amended Bylaws remove the reference to the third Tuesday of January from Section 2.02(a) and authorize the board of directors to determine the date and time of the annual meeting.

Section 2.02(b) of the Current Bylaws specifies the procedures for stockholders to properly bring matters before the annual meeting, including specifying that stockholders provide timely notice to BATS Global Markets, Inc. of the business desired to be brought before the meeting. In addition to the requirements contained in the Current Bylaws, Section 2.02(b) of the New Bylaws would require that the stockholder's notice (i) disclose the text of the proposal, (ii) disclose the beneficial owner on whose behalf the proposal is being made, (iii) disclose all agreements, arrangements or understandings between the stockholder and any other person pursuant to which the proposal is being made, (iv) disclose all arrangements or understandings (including derivative positions) to create or mitigate loss or manage the risk or benefit of share price changes, or increase or decrease the voting power of the stockholder or any beneficial owner with respect to the securities of BATS Global Markets, Inc., and (v) provide a representation as to whether the stockholder or any beneficial owner intends, or is part of a group that intends, to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the voting power of BATS Global Markets, Inc. needed to approve or adopt the proposal, or otherwise solicit proxies from stockholders in support of the proposal.

Section 2.02(c) of the Current Bylaws specifies the procedures for stockholders to properly nominate persons for the board of directors, including that the stockholder provide timely notice to BATS Global Markets, Inc. In addition to the requirements contained in the Current Bylaws, Section 2.02(c) of the New Bylaws would require that the stockholder's notice (i) disclose all agreements, arrangements or understandings (including derivative positions) to create or mitigate loss or manage the risk or benefit of share price changes, or increase or

decrease the voting power of the stockholder, beneficial owner or any such nominee with respect to the securities of BATS Global Markets, Inc., (ii) provide a representation that such stockholder is a stockholder entitled to vote at such meeting and intends to appear in person or by proxy at the meeting and to bring such nomination or other business before the meeting, and (iii) provide a representation as to whether the stockholder or any beneficial owner intends, or is part of a group that intends, to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the voting power of BATS Global Markets, Inc. needed to elect each such nominee, or otherwise solicit proxies from stockholders in support of the nomination.

The additional disclosure requirements being added to Sections 2.02(b) and 2.02(c) are intended to assure that stockholders asked to vote on a stockholder proposal or stockholder nominee are more fully informed in their voting and are able to consider any proposals or nominations along with the interests of those stockholders or the beneficial owners on whose behalf such proposal or nomination is being made.

The New Bylaws would further include a new Section 2.02(d) which would require that a stockholder proposal or a stockholder nomination be disregarded if the stockholder (or a qualified representative) does not appear at the annual or special meeting to present the proposal or nomination, notwithstanding that proxies may have been received and counted for purposes of determining a quorum. A “qualified representative” would include a duly authorized officer, manager or partner of the stockholder, or such other person authorized in writing to act as such stockholder’s proxy. The purpose of this requirement is to assure that the stockholders’ time at meetings is used efficiently and only serious stockholder proposals and nominations are considered.

The New Bylaws would also add Section 2.02(e), which would require that a stockholder, in addition to (and in no way limiting) all requirements set forth in Section 2.02 with respect to proposals or nominations, must also comply with all applicable requirements of the Act and the rules and regulations promulgated thereunder.

New Section 2.02(f) of the New Bylaws would note that, notwithstanding anything to the contrary in the New Bylaws, the notice requirements with respect to business proposals or nominations would be deemed satisfied if the stockholder submitted a proposal in compliance with Rule 14a-8 of the Act<sup>3</sup> and the proposal has been included in a proxy statement prepared by BATS Global Markets, Inc. to solicit proxies of the meeting of stockholders. This provision would assure that, in addition to proposals that meet the requirements of Section 2.02(b) of the New Bylaws, BATS Global Markets, Inc. would comply with the provisions of the Act and the rules promulgated thereunder with respect to the inclusion of stockholder proposals in its proxy statement.

#### Special Meetings of Stockholders

Section 2.03 of the Current Bylaws permits a special meeting of the stockholders to be called by any of (i) the chairman of the board of directors, (ii) the chief executive officer, (iii) the board of directors pursuant to a resolution passed by a majority of the board, or (iv) by the stockholders entitled to vote at least ten percent of the votes at the meeting. The New Bylaws would amend Section 2.03 to only permit a special meeting of the stockholders to be called by the board of directors pursuant to a resolution adopted by the majority of the board.

Additionally, whenever any holders of preferred stock have the right to elect directors pursuant to the New Certificate of Incorporation, such holders may call, pursuant to the terms of a

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<sup>3</sup> 17 CFR 240.14a-8.

resolution adopted by the board, a special meeting of the holders of such preferred stock. These amendments are designed to prevent any stockholder from exercising undue control over the operation of the Exchange by circumventing the board of directors of BATS Global Markets, Inc. through a special meeting of the stockholders.

#### Voting Rights

Section 2.07 of the Current Bylaws describes the rights of stockholders of BATS Global Markets, Inc. to vote their shares at a meeting of stockholders. The New Bylaws would amend Section 2.07 to further clarify that any share of stock of BATS Global Markets, Inc. held by BATS Global Markets, Inc. shall have no voting rights, except when such shares are held in a fiduciary capacity.

#### Action without a Meeting

Section 2.10 of the Current Bylaws permits certain actions to be taken by written consent of stockholders if signed by the holders of outstanding stock representing not less than the number of votes necessary to authorize or take such action at a meeting where all shares entitled to vote were present and voted. Section 2.10(c) of the Current Bylaws also require that prompt notice of such actions by less than unanimous consent be given to those stockholders that did not consent in writing. The New Bylaws would amend Section 2.10(c) to clarify that such notice need only be provided to those stockholders who would have been entitled to notice of the meeting if the record date for such notice had been the date the written consent was delivered to BATS Global Markets, Inc.

Section 2.10(c) of the Current Bylaws further provides that no action by written consent may be taken following an initial public offering of the common stock of BATS Global Markets, Inc. The New Bylaws would amend Section 2.10(c) to instead provide that no action by written

consent may be taken following a Change in Ownership, as defined in the New Certificate of Incorporation.<sup>4</sup> This change is consistent with amendments contained in the New Certificate of Incorporation and is designed to prevent any stockholder from exercising undue control over the operation of the Exchange by circumventing the board of directors of BATS Global Markets, Inc. through action by written consent.

#### Removal of Directors

Section 3.05 of the Current Bylaws provides that the board of directors or any director may be removed, with or without cause, by the affirmative vote of at least sixty-six and two-thirds percent of the voting power of all then-outstanding shares of voting stock of BATS Global Markets, Inc. The New Bylaws would amend Section 3.05 to reduce the percentage of the voting power required to remove a director, with or without cause, from sixty-six and two-thirds percent to a simple majority.

The purpose of this amendment is to align BATS Global Markets, Inc.'s requirements for removal of directors with Section 141(k) of the Delaware General Corporation Law, which generally permits a simple majority of stockholders to remove any director or a the board of directors with or without cause.

#### Committees of Directors

Section 3.10(a) of the Current Bylaws permit the board of directors to appoint an executive committee with certain enumerated powers of the board, as well as other committees permitted by law. The New Bylaws would amend Section 3.10(a) to eliminate specific reference

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<sup>4</sup> Under the New Certificate of Incorporation, a "Change in Ownership" is deemed to occur at such time as the beneficial owners of the Class B Common Stock and Non-Voting Class B Common Stock own, in the aggregate, less than a majority of the total voting power of BATS Global Markets, Inc.

to an executive committee and authorize the board to designate one or more committees that may exercise the power of the board to the extent permitted in the resolution designating the committee. This amendment would enhance the board's flexibility to create those committees it deems necessary and most efficient for the functioning of the board. Section 3.10(a) would be further amended to provide that no committee would have the power to (i) approve, adopt or recommend to the stockholders any matter required by Delaware law to be submitted to stockholder approval, or (ii) adopt, amend or repeal any bylaw. These amendments are being made to assure that the full board of directors considers and passes upon these significant corporate decisions.

#### Preferred Stock Directors

The New Bylaws would add new Section 3.12 to clarify that whenever the holders of one or more classes or series of preferred stock have the right to elect a preferred stock director, pursuant to the New Certificate of Incorporation, the provisions of Article 3 of the New Bylaws relating to the election, term of office, filling of vacancies, removal, and other features of directorships would not apply to preferred stock directors. Rather, such features would be governed by the applicable provisions of the New Certificate of Incorporation. This amendment is consistent with the New Certificate of Incorporation with respect to the rights of preferred stockholders, should any class or series of preferred stock be issued with director voting rights in the future.

#### Form of Stock Certificates

The New Bylaws would amend Section 6.01 of the Current Bylaws to state that the shares of BATS Global Markets, Inc. shall be represented by certificates, unless the board provides by resolution that some or all of any class or series of stock be uncertificated. Except as

otherwise provided by law, holders of certificated and uncertificated shares of the same class and series would have identical rights and obligations. The board will also have the power to make rules for issuance, transfer and registration of certificated or uncertificated shares, and the issuance of new certificates in lieu of those lost or destroyed. The New Bylaws further amend Section 6.01 to provide that BATS Global Markets, Inc. will not have the power to issue a certificate in bearer form. These amendments are intended to align the bylaws of BATS Global Markets, Inc. with standard provisions for Delaware public companies.

#### Indemnification

Article X of the Current Bylaws contains certain provisions for the indemnification of directors, officers, employees and certain other agents of BATS Global Markets, Inc. The New Bylaws will eliminate such provisions in their entirety. These provisions are being eliminated because provisions regarding indemnification will instead be contained in Article 10 of the New Certificate of Incorporation.

#### Future Bylaws Amendments

In addition to the power of the board to adopt, amend or repeal bylaws provided by Article Eighth of the current certificate of incorporation and Article 9 of the New Certificate of Incorporation, Article XII of the Current Bylaws permit the bylaws to be amended or repealed by the action of stockholders holding seventy percent of the shares entitled to vote. To conform to the New Certificate of Incorporation, Article 11 of the New Bylaws would amend Article XII to provide that, until a Change in Ownership, the bylaws may be adopted, amended or repealed by the stockholders with the affirmative vote of not less than a majority of the total voting power then entitled to vote in the election of directors. Upon the occurrences of a Change in Ownership, the New Bylaws would provide that bylaws may be adopted, amended or repealed

by the stockholders only with the affirmative vote of not less than seventy percent of the total voting power then entitled to vote in the election of directors.

This change is consistent with amendments contained in Section 9.02 of the New Certificate of Incorporation. Section 11.01(c) of the New Bylaws will maintain the provisions contained in Article XII of the Current Bylaws requiring that, for so long as BATS Global Markets, Inc. will control the Exchange, before any amendment to the New Bylaws may become effective, the amendment must be submitted to the board of directors of the Exchange, and if required by Section 19 of the Act,<sup>5</sup> filed with or filed with and approved by the Commission.

#### Loans to Officers

Article XIII of the Current Bylaws authorize BATS Global Markets, Inc. to lend money to or guarantee obligations of any officer of the company under certain circumstances. In order to comply with Section 13(k)(1) of the Act,<sup>6</sup> which will apply to BATS Global Markets, Inc. after the IPO, the New Bylaws eliminate this authority.

#### 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.<sup>7</sup> In particular, Sections 2.03 and 2.10(c) of the proposed New Bylaws, which prohibit the ability of the stockholders to call a special meeting of the stockholders to act by written consent is consistent with Section 6(b)(1) of the Act, because it prevents any stockholder from exercising undue control over the operation of

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<sup>5</sup> 15 U.S.C. 78s.

<sup>6</sup> 15 U.S.C. 78m(k)(1).

<sup>7</sup> 15 U.S.C. 78f(b).

the Exchange and thereby enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

(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](mailto:rule-comments@sec.gov). Please include File No. SR-BATS-2011-035 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-2011-035. 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-2011-035 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.<sup>8</sup>

Elizabeth M. Murphy  
Secretary

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<sup>8</sup> 17 CFR 200.30-3(a)(12).