

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-70196; File No. SR-BATS-2013-043)

August 14, 2013

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, 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 August 2, 2013, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members<sup>5</sup> and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on August 5, 2013.

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

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 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

The Exchange proposes to modify pricing applicable to the Exchange's options platform ("BATS Options") with respect to orders routed away by the Exchange and executed at a new options exchange—an affiliate of the International Securities Exchange, LLC ("ISE") that will be called "ISE Gemini."<sup>6</sup> ISE Gemini will commence trading on August 5, 2013.

BATS Options currently charges certain flat rates for routing to other options exchanges that have been placed into groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (i.e., clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, "Routing Costs"). As explained below, the Exchange does not yet know what Routing Costs it will incur in connection with routing to

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<sup>6</sup> The Commission notes that the entity referred to herein as "ISE Gemini" is Topaz Exchange, LLC d/b/a ISE Gemini.

ISE Gemini. Accordingly, the Exchange proposes to impose the same pricing for executions at ISE Gemini as are currently charged by the Exchange for orders routed to and executed at the NASDAQ Options Market (“NOM”) and NYSE Arca, Inc. (“ARCA”) in non-Penny Pilot Securities,<sup>7</sup> which is the most expensive routing category based on Routing Costs.

Based on applicable Routing Costs, the Exchange currently charges \$0.90 per contract for Customer<sup>8</sup> orders and \$0.95 per contract for Professional,<sup>9</sup> Firm, and Market Maker<sup>10</sup> orders executed at NOM and ARCA in non-Penny Pilot Securities. Although ISE Gemini has announced its launch as effective August 5, 2013, ISE Gemini has not released information regarding the prices it will charge for executions. Accordingly, because the Exchange is unable to determine its Routing Costs and does not wish to subsidize executions of orders routed to ISE Gemini, the Exchange proposes to initially place ISE Gemini (all securities) in the same category as NOM and ARCA with respect to non-Penny Pilot Securities. Thus, the Exchange proposes to charge \$0.90 per contract for Customer orders and \$0.95 per contract for Professional, Firm, and Market Maker orders executed at ISE Gemini.

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<sup>7</sup> The Exchange currently charges different fees and provides different rebates depending on whether an options class is an options class that qualifies as a Penny Pilot Security pursuant to Exchange Rule 21.5, Interpretation and Policy .01 or is a non-penny options class. Certain other options exchanges also have different pricing for Penny Pilot Securities and non-Penny Pilot Securities. Accordingly, the Exchange’s routing fees also vary with respect to the fees for orders executed at such exchanges.

<sup>8</sup> As defined on the Exchange’s fee schedule, a “Customer” order is any transaction identified by a Member for clearing in the Customer range at the Options Clearing Corporation (“OCC”), except for those designated as “Professional”.

<sup>9</sup> The term “Professional” is defined in Exchange Rule 16.1 to mean any person or entity that (A) is not a broker or dealer in securities, and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

<sup>10</sup> As defined on the Exchange’s fee schedule, the terms “Firm” and “Market Maker” apply to any transaction identified by a member for clearing in the Firm or Market Maker range, respectively, at the Options Clearing Corporation (“OCC”).

In order to cover the cost of removing liquidity, including Routing Costs, in non-Penny Pilot Securities at NOM and ARCA, and for Professional Firm and Market Maker Orders executed at BX Options and C2, the Exchange currently charges a flat fee of \$0.95 per contract for all executions of Directed ISOs routed to such options exchanges in such securities. The Exchange proposes to charge this same rate, \$0.95 per contract, for all executions of Directed ISOs routed to ISE Gemini. This is the same fee as the Exchange proposes to charge for executions of Professional, Firm and Market Maker orders routed to ISE Gemini generally. The fee of \$0.95 per contract is slightly more than the Exchange's proposed fee of \$0.90 per contract for Customer orders executed at ISE Gemini.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.<sup>11</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>12</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive.

As explained above, the Exchange generally attempts to approximate the cost of routing to other options exchanges, including other applicable costs to the Exchange for routing. The Exchange believes that a pricing model based on approximate Routing Costs is a reasonable, fair

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<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4).

and equitable approach to pricing. In this context, the Exchange believes that its proposal to adopt fees for routing to a new options exchange that has not disclosed its fees to market participants is fair, equitable and reasonable because it will allow the Exchange to commence routing to such exchange without incurring losses from such routing. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at groups of away options exchanges. Under its flat fee structure, taking all costs to the Exchange into account once fees at ISE Gemini are publically available, the Exchange may operate at a gain or loss for orders routed to and executed at ISE Gemini. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to such exchanges. The Exchange also believes that the proposed fee structure for orders routed to and executed at this away options exchange is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members. Although the Routing Costs to the Exchange for routing orders routed to ISE Gemini will likely be less than \$0.90 or \$0.95 per contract, the Exchange believes it is a reasonable fee in that it will allow the Exchange to maintain a relatively simple routing fee structure while it assesses the actual Routing Costs that it incurs for routing to ISE Gemini.

As explained above, the Exchange has also proposed to impose fees for Directed ISOs to ISE Gemini at the same rate as its standard removal fee for Professional, Firm and Market Maker orders executed at ISE Gemini. The Exchange believes that this proposed fee is fair, equitable and reasonable because the fee will allow the Exchange to recoup and cover the costs of providing routing services to ISE Gemini. The Exchange also believes that the proposed fee structure for Directed ISOs routed to and executed at ISE Gemini is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members.

The Exchange reiterates that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive. Finally, the Exchange notes that it constantly evaluates its routing fees, including profit and loss attributable to routing, as applicable, in connection with the operation of a flat fee routing service, and would consider future adjustments to the proposed pricing structure to the extent it was recouping a significant profit from routing to ISE Gemini.

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 not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes will assist the Exchange in recouping costs for routing orders to other options exchanges on behalf of its participants. The Exchange also notes that Members may choose to mark their orders as ineligible for routing to avoid incurring routing fees.<sup>13</sup> As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive.

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.

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<sup>13</sup> See BATS Rule 21.1(d)(8) (describing "BATS Only" orders for BATS Options) and BATS Rule 21.9(a)(1) (describing the BATS Options routing process, which requires orders to be designated as available for routing).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>15</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change 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 Number SR-BATS-2013-043 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.

All submissions should refer to File Number SR-BATS-2013-043. 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

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f).

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 change 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 also will 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 Number SR-BATS-2013-043 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>16</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).