

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60364; File No. SR-BATS-2009-026)

July 22, 2009

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change to Amend BATS Fee Schedule to Impose Fees for Ports Used for Order Entry and Receipt of Market Data

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 July 21, 2009, BATS Exchange, Inc. (“BATS” or the “Exchange”) 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 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 has filed a proposed rule change to amend the fee schedule applicable to Members<sup>3</sup> and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Pursuant to the proposed rule change the Exchange will commence charging fees to Members and non-members for ports used to enter orders into Exchange systems and to receive data from the Exchange. The Exchange will implement the proposed rule change on the first day of the month immediately following Commission approval (or on the date of approval, if on the first business day of a month).

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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> 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 Web site 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 purpose of the proposed rule change is to begin charging a monthly fee for ports used to enter orders in the Exchange's trading system and to receive data from the Exchange. The Exchange proposes to charge \$250.00 per month per pair<sup>4</sup> of any port type other than a Multicast PITCH Spin Server Port or a GRP Port. Thus, this proposed charge will apply to all Exchange FIX, FIXDROP, DROP, TCP PITCH, TCP FAST PITCH and TOP ports.<sup>5</sup> In addition, the Exchange proposes to provide all Exchange constituents that receive the Exchange's Multicast PITCH Feed with 12 pairs of Multicast PITCH Spin Server Ports free of charge and, if such ports are used, one free pair of GRP Ports. The Exchange proposes to charge such customers \$250.00

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<sup>4</sup> Each pair of ports will consist of one port at the Exchange's primary data center and one port at the Exchange's secondary data center.

<sup>5</sup> BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including Multicast PITCH and GRP Ports, permit Members and non-members to receive information from the Exchange.

per month per additional pair of GRP Ports or additional set of 12 pairs of Multicast PITCH Spin Server Ports. The Exchange's proposal to provide certain ports free of charge to Multicast Pitch customers is designed to encourage use of the Exchange's Multicast PITCH Feed because such feed is a relatively new offering by the Exchange and because the Exchange believes that the feed is its most efficient feed, and thus, will reduce infrastructure costs for both the Exchange and those who utilize the feed. Any Member or non-member that has entered into the appropriate agreements with the Exchange is permitted to receive Multicast Pitch Spin Server Ports and GRP Ports from the Exchange.

Based on the proposal, the change applies to Members that obtain ports for direct access to the Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients. The Exchange has previously provided ports free of charge to all Members and non-members that use such ports for order entry to the Exchange or for receipt of market data. However, over time, the Exchange's infrastructure costs have increased. In addition, the Exchange believes that providing ports free of charge has not encouraged Members and non-members to reserve and maintain ports efficiently, but rather, has led to a significant number of ports that are reserved and enabled by such market participants but are never used or are under used. Accordingly, the Exchange believes that the imposition of port fees will help the Exchange to continue to maintain and improve its infrastructure, while also encouraging Exchange customers to request and enable only the ports that are necessary for their operations related to the Exchange.

## 2. Statutory Basis

The rule change proposed in this submission 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(b) of the Act.<sup>6</sup> Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act,<sup>7</sup> because it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that its proposed port fees are reasonable in light of the benefits to members of direct market access and receipt of data, which data, other than the proposed access fee, is currently provided free of charge. In addition, the Exchange believes that its fees are equitably allocated among its constituents based upon the number of access ports that they require to submit orders to the Exchange or receive data from the Exchange. The Exchange believes that its fees for access services will enable it to better cover its infrastructure costs and to improve its market technology and services.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Fees for market access will be a component of the overall fees charged by the Exchange to execute and route orders through the Exchange. As the Commission has recognized, the market for execution and routing services is extremely competitive.<sup>8</sup> Market participants that choose not to connect directly to the Exchange can readily access liquidity available on the Exchange by directing their order flow to other venues that, under Regulation NMS, must route to the Exchange if it has posted the best price. Accordingly, the Exchange must set its fees, including access service fees, at a level that will not deter market participants

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<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

from connecting to the Exchange; otherwise, potential users of the Exchange's services will simply direct order flow to the Exchange's multiple competitors. In addition, the Exchange believes that the proposed port fees are consistent with or less than the port fees charged by its competitors. With respect to market data, the Exchange does not charge any fees for such data. Although it will now begin imposing a fee related to access to such data, for market participants that receive such data directly from the Exchange, the Exchange believes that its free provision of data justifies such market participants paying some amount in order to help the Exchange offset the infrastructure costs of providing such data.

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 35 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 self-regulatory organization consents, the Commission will:

- A. by order approve 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 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-2009-026 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 Number SR-BATS-2009-026. 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 Web site (<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 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 inspection and copying 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 the 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 Number SR-BATS-2009-026 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>9</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).