

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61592; File No. SR-BATS-2010-002)

February 25, 2010

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by BATS Exchange, Inc. to Offer Certain BATS Exchange Data Products

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4² thereunder, notice is hereby given that on February 2, 2010, BATS Exchange, Inc. ("BATS" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. On February 22, 2010, BATS filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 offer certain new Exchange data products to Exchange Members³ and other market data recipients. In connection with such data products, the Exchange is proposing to amend the fee schedule applicable to Members and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). 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).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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 on 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 aspects 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 offering three new data products containing Exchange data. Specifically, the Exchange proposes to offer a new Last Sale Feed, Historical Data Products, and a data product called BATS Market Insight. The Exchange currently offers its data products to Members and other data recipients free of charge.⁴

BATS Last Sale Feed

First, the Exchange is proposing to begin offering a new feed, the BATS Last Sale Feed, to Members and non-members. The BATS Last Sale Feed will be a direct data feed product that

⁴ The Exchange currently offers various data feeds free of charge, including, but not limited to, TCP PITCH, Multicast PITCH, and TCP FAST PITCH, which are depth of book data feeds containing real-time quotation and transaction data from the Exchange; TCP DROP, which contains order execution and other information (e.g., modifications and cancellations) specific to the Exchange activity of one or more Users; and TCP TOP, which contains real-time top of book quotation and transaction information from the Exchange.

provides real-time, intraday trade information, including price, volume and time of executions. The BATS Last Sale Feed will not include quotation information.

Currently, the Exchange provides real-time last sale information from its market center to the Security Information Processors (“SIPs”) for the national market system plans governing trading in NYSE listed securities (“Tape A securities”), NASDAQ listed securities (“Tape C securities”), and securities listed on exchanges other than NYSE or NASDAQ (“Tape B securities”). The SIPs then consolidate the Exchange’s last sale information with similar information from other market centers, and disseminate the consolidated last sale data to market participants, including market data vendors. The BATS Last Sale Feed will include last sale information regarding all Tape A, B and C securities with respect to activity occurring solely on the Exchange.

Various data recipients may wish to subscribe to and use the BATS Last Sale Feed. For instance, data recipients that provide real-time market information on public websites or offer dynamic stock tickers, portfolio trackers, price/time graphs and other visual systems can use the Last Sale Feed in lieu of using the Exchange’s existing data feeds. Such data recipients may prefer the BATS Last Sale Feed because the Exchange’s existing data feeds contain a significant amount of additional information that such data recipients may not need, which may result in unnecessary technology costs (e.g., development, telecommunications or storage costs). The Exchange notes that similar market specific last sale data products are offered by other market centers or will likely be offered in the near future.⁵

⁵ See NASDAQ Rule 7039; Release No. 34-59598 (March 18, 2009), 74 FR 12919 (March 25, 2009) (File No. SR-NYSEArca-2009-05) (order approving proposed rule change to establish fees for a NYSE Arca data service, including a last sale product); see also Release No. 34-61112 (December 4, 2009), 74 FR 65569 (December 10, 2009) (File No.

No market participant is required to subscribe to the BATS Last Sale Feed because the same last sale prices are available in the Exchange's other data feeds.⁶ Market participants can also gain access to BATS last sale prices that are integrated with the prices that other markets make available through the SIPs. Indeed, even though the BATS Last Sale Feed may provide to some participants an efficient alternative to the consolidated price information that investors and broker-dealers can receive on a consolidated basis from the SIPs, the Exchange believes that the information that the Exchange contributes to the consolidated tape and the increasingly lower latency of the data feeds offered by the SIPs will continue to satisfy the needs of the vast majority of individual and professional investors. Although certain data recipients might supplement their data feeds by adding the BATS Last Sale Feed, it is unlikely that data recipients or distributors will replace the consolidated last sale feed provided by the SIPs with the BATS Last Sale Feed. The Exchange represents that it will not distribute its last sale feed on a more timely basis than it makes available the data that is provided to the SIPs for consolidation and dissemination.

The proposed cost of the BATS Last Sale Feed is \$5,000 per month for any data recipient that chooses to receive the data feed for internal use only. For data recipients that wish to redistribute the BATS Last Sale Feed, the Exchange will not require such recipients to count, classify (e.g., professional or non-professional) or report to the Exchange information regarding the customers to which they provide the data. Instead, the Exchange proposes a flat fee of \$25,000 per month for any data recipient that wishes to redistribute the BATS Last Sale Feed externally. End users will not have to pay the Exchange for the BATS Last Sale Feed or enter

SR-BX-2009-077) (filing of an immediately effective rule related to introduction of a last sale feed by NASDAQ OMX BX).

⁶ See supra, note 4.

into contracts with the Exchange. The Exchange believes that the proposed pricing model is simple and easy for data recipients to comply with, and thus, will result in a minimal additional administrative burden for data recipients with respect to the BATS Last Sale Feed.

Rule 603(a)(2) of Regulation NMS⁷ requires markets to distribute market data “on terms that are not unreasonably discriminatory.” Regardless of a data recipient’s reasons for subscribing to the BATS Last Sale Feed, the fee for such feed applies equally to all data recipients that wish to use the feed for internal use only and equally to all data recipients that wish to redistribute the feed. Accordingly, the Exchange believes its proposal satisfies Rule 603(a)(2) of Regulation NMS.⁸

BATS Historical Data Products

Second, the Exchange proposes to begin providing historical data to data recipients upon request for a fee. The Exchange currently provides historical data upon request on an ad hoc basis, but proposes to begin charging a fee due to the infrastructure costs of storing and providing such data. Similar to what it does today, the Exchange proposes to provide a data recipient with the requested historical data on an external hard drive provided by the Exchange. As an alternative means to obtain historical data, the Exchange will provide market participants with access to a database from which they can download data that is up to 3 months old. As proposed, the Exchange will offer the following three products through either of these distribution methods: (1) historical top of book data from the Exchange’s TOP data feed (“Historical TOP Data”), (2) historical data from the Exchange’s PITCH data feed (“Historical PITCH Data”), and (3) historical transaction data from the Exchange’s Last Sale Feed (“Historical Last Sale Data”). BATS Historical TOP Data, BATS Historical PITCH Data and

⁷ 17 CFR 603(a)(2).

⁸ Id.

BATS Historical Last Sale Data will be provided to data recipients for internal use only, and thus, no redistribution will be permitted.

Historical data provided by the Exchange can be used for a variety of purposes. For instance, data recipients that wish to back-test certain trading strategies can use Historical PITCH or Historical TOP Data for such purpose. As another example, data recipients that provide market information through public websites or develop dynamic stock tickers, portfolio trackers, price/time graphs and other visual systems can use Historical Last Sale data for such purposes. The Exchange notes that similar historical data products are offered by other market centers.⁹ The proposed cost of user-accessible BATS Historical TOP Data, BATS Historical PITCH Data or BATS Historical Last Sale Data is \$500 per month of data accessed by any individual user. The Exchange's databases will contain up to 90 days of data at any point in time. For data that the Exchange provides on an external hard drive to a market participant the proposed cost is \$2,500 per 1 terabyte (TB) drive generated by the Exchange. Each of the proposed costs set forth above applies per data product. For instance, an individual user that obtained access to BATS Historical Top Data would pay \$500 for access to a particular month's data, and if that user also wanted access to BATS Historical Last Sale Data, the individual user would need to pay another \$500 for such access. Similarly, a market participant would pay \$2,500 for an external hard drive containing BATS Historical TOP Data that fits on a 1 TB drive (internal use only); such participant would have to pay separately for a 1 TB drive containing BATS Historical Last Sale Data or BATS Historical PITCH Data.

⁹ See NASDAQ Rule 7022; see also www.nyxdata.com for information regarding NYSE OpenBook History and ArcaBook FTP, historical data products offered by the NYSE and NYSE Arca, respectively.

BATS Market Insight

Finally, the Exchange proposes to begin offering data that can be used to analyze the depth of liquidity of the Exchange's book, including reserve and hidden interest on a historical basis. This data, referred to by the Exchange as BATS Market Insight, will provide a market participant with information regarding the depth of the market at the Exchange in minute increments. Data will become available for access by market participants 10 days following each trade date (T + 10) and will be available for 30 days. Specifically, a participant using BATS Market Insight will be able to obtain data regarding total order interest, displayed order interest and hidden order interest at each price point in specific Tape A, B and C securities traded on the Exchange. BATS Market Insight will be provided to data recipients for internal use only, and thus, no redistribution will be permitted. BATS Market Insight can be used by market participants to improve their trading and order routing strategies. The Exchange notes that a similar market data product is offered by NASDAQ.¹⁰

The proposed cost for access to BATS Market Insight is \$1,000 per user per month.

Additional Discussion Regarding Proposed Data Products

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data products to the public. The Commission believed this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The data products proposed herein appear to be precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The BATS Last Sale Feed will offer BATS-specific data in a new form not previously available to market data consumers,

¹⁰ See NASDAQ Rule 7023(d).

in a manner similar to that provided by other markets. The Historical Data Products proposed by the Exchange will allow market participants to purchase useful historical data from the Exchange while at the same time enabling the Exchange to better cover its infrastructure costs and to improve its market technology and services. Finally, BATS Market Insight will enable market participants to conduct BATS-specific analysis to meet their needs.

The bases under the Act for the proposed rule change are: (1) the requirement under Section 6(b)(4)¹¹ that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities; and (2) the requirement under Section 6(b)(5)¹² that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

In its recent “Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data” (the “NYSE ArcaBook Approval Order”),¹³ the Commission reiterated its position from its release approving Regulation NMS that it should “allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors.”¹⁴

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(5).

¹³ See Release No. 34-59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (File No. SR-NYSE Arca-2006-21).

¹⁴ See Release No. 34-51808 (June 9, 2005), 70 FR at 37566-37567 (June 29, 2005) (File No. S7-10-04) (the “Regulation NMS Release”).

trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

In addition, the proposed data products would compete with a number of alternative products. For instance, the BATS Last Sale Feed does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce last sale information products, and many currently do, including Nasdaq and NYSE. In addition, market participants can gain access to BATS last sale prices through free data feeds provided by the Exchange or integrated with the prices of other markets on feeds made available through the SIPs. With respect to BATS Market Insight, the Exchange is proposing to offer a product that, while specific to the Exchange's data, is similar to a product offered by Nasdaq with respect to executions on Nasdaq. Furthermore, a market participant could gain access to the same information provided through the proposed BATS Market Insight product through a combination of: (1) existing, free data feeds from the Exchange (for displayed trading interest), and (2) information gathered by the market participant through its trading activities on the Exchange and/or through the consolidated data published by the SIPs reporting executions that occurred on the Exchange (for non-displayed trading interest).

In setting the level of the proposed data product fees, the Exchange took into consideration several factors, including:

(1) consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the products;

(2) the contribution of market data revenues that the Exchange believes is appropriate for vendors and other entities that provide market data to the investing public;

(3) the contribution that revenues accruing from the proposed fees will make to meeting the overall costs of the Exchange's operations;

(4) investors', broker-dealers' and data vendors' access to the Exchange's last sale prices through existing data feeds; and

(5) the fact that the proposed fees provide an alternative to existing Network A and Network B fees under the CTA Plan and to the fees imposed under the Nasdaq/UTP Plan, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

In the aftermath of the NYSE ArcaBook Approval Order, the Exchange believes that the competition among exchanges for order flow and the competition among exchanges for market data products subject the proposed data product fees to significant competitive forces.

In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the fees fail to meet the requirement of the Act.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

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.¹⁵ Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act,¹⁶ because it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other recipients of Exchange data. The Exchange believes that its proposed fees for the data products described herein are reasonable in light of the benefits to data recipients and the fact that the Exchange's existing data feeds will continue to be provided free of charge. These products are completely optional in that no consumer is required to purchase any of them and only those consumers that deem such products to be of sufficient overall value and usefulness will purchase them. To the extent consumers do purchase the data products, the revenue generated will offset the Exchange's fixed costs of operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. It will also help the Exchange cover its costs in developing and running that platform, as well as ongoing infrastructure costs.

The Exchange also believes that the proposed change is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers. Specifically, the Exchange believes that the fees proposed for the new data products are equitable in that they are optional and apply uniformly to all data recipients irrespective of each recipient's relationship to the Exchange (*e.g.*, Member, non-Member data recipient, etc.).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4).

¹⁷ 15 U.S.C. 78f(b)(5).

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 proposal to introduce certain new data products is designed to increase transparency and the efficiency of executions by enabling data recipients to receive and use Exchange data in new ways. As described above, there is significant competition for the provision of market data to broker-dealers and other market data consumers, as well as competition for the orders that generate the data. In introducing the proposed data products, the Exchange is providing products similar to data products offered by other market centers.

In proposing and adopting Regulation NMS, the Commission rescinded the prior prohibition on SROs from disseminating their trade reports independently,¹⁸ subjecting that distribution to the “fair and reasonable” and “not unreasonably discriminatory” standards that have historically governed the distribution of consolidated data.¹⁹ The Commission stated, “Given that . . . SROs will continue to transmit trades to the Networks pursuant to the Plans . . . , the Commission believe [sic] that SROs and their members also should be free to distribute their trades independently.”²⁰

The Commission rescinded the prohibition in recognition of the fact that competition in the realm of SRO trade-report distribution would produce market forces and innovation that would benefit the investing public. The NYSE ArcaBook Approval Order enforces this finding. By means of the data products proposed herein, the Exchange would provide vendors and broker-dealers with an alternative market data product and fee structure that does not exist today,

¹⁸ See Rule 601 of Regulation NMS.

¹⁹ See Rule 603(b) of Regulation NMS.

²⁰ See Footnote 638 of Regulation NMS Release, supra note 13.

without altering or rescinding any existing market data products. If they believe that the proposed product and fee structure are useful and cost-effective to their business model, they will embrace them. The only change to an existing data product is that the Exchange will now, for the first time, charge for the provision of historical data. The Exchange believes this charge is reasonable, however, given the cost of both maintaining and providing such data.

Given the existence of alternative products containing BATS last sale information, the fact that the Historical Data Products and BATS Market Insight are consistent with products and information provided by the Exchange's competitors and are purely optional sources of information that can be used by data recipients that see value in such information, the Exchange does not believe that the proposed data products will result in 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 not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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 Exchange consents, the Commission shall: (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, as amended, 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 Number SR-BATS-2010-002 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-2010-002. 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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-2010-002 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.²¹

Florence E. Harmon
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).