

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67905; File No. SR-BATS-2012-038)

September 21, 2012

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 September 10, 2012, 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 Substance of the Proposed Rule Change

The Exchange proposes 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). Changes to the fee schedule pursuant to this proposal are effective upon filing.

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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 the "Options Pricing" section of its fee schedule effective September 10, 2012, in order to modify pricing related to executions that occur on the NASDAQ Options Market ("NOM"). NOM implemented certain pricing changes effective September 4, 2012,<sup>6</sup> including: (i) modification of the fee charged to participants classified by NOM as professionals, customers and market makers to remove liquidity in penny pilot options, and (ii) the adoption of specific fees for NOM "Specified Symbols," as described below. In order to maintain routing fees that approximate the routing costs to NOM, the Exchange

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<sup>6</sup> See Nasdaq Options Trader Alert #2012-54, NOM and PHLX Update Pricing, Effective September 4, 2012 (August 31, 2012) (the "NOM Notice").

proposes to modify pricing for Professional,<sup>7</sup> Firm, and Market Maker<sup>8</sup> orders routed to NOM in non-Specified Symbols and to adopt pricing for orders routed to NOM in Specified Symbols. In addition to these changes, the Exchange also proposes renumbering a footnote associated with Physical Connection Charges from 8 to 9.

The Exchange currently charges certain flat rates for routing to other options exchanges that have been placed into three 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”). For routing to options exchanges in the Exchange’s highest price grouping, the Exchange currently assesses fees of \$0.50 per contract for Customer orders and \$0.55 per contract for orders on behalf of all other participants. With the recent change by NOM to charge non-Customer executions a rate of \$0.47 per contract for penny pilot options, the Exchange believes NOM no longer fits in this category. This is due, in part, to the fact that NOM charges \$0.50 per contract for non-Customer orders in non-penny pilot options, and the Exchange incurs various Routing Costs in addition to this fee. Accordingly, the Exchange proposes to adopt a new category for NOM under which it will charge a fee of \$0.57 per contract for Professional, Firm, or Market Maker orders routed to and executed at NOM in options other than Specified Symbols, which are described in further

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<sup>7</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>8</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”).

detail below. This fee will help the Exchange to recoup clearing and transaction charges incurred by the Exchange, as well as other Routing Costs, in connection with routing to NOM.

NOM also recently implemented specific fees for options on specified securities that the Exchange proposes to identify as “NOM Specified Symbols.”<sup>9</sup> Such NOM Specified Symbols, as announced by NOM, will originally include options on Facebook (“FB”), Google (“GOOG”) and Groupon (“GRPN”). As announced by NOM, the fee to remove liquidity in NOM Specified Symbols is \$0.79 per contract for NOM customer and NOM market maker orders and \$0.85 per contract for all other participant capacities. As noted above, the Exchange generally imposes routing fees that approximate the fee to remove liquidity from other options exchanges as well as associated Routing Costs. Accordingly, the Exchange proposes to charge \$0.90 for Customer orders and \$0.95 for Professional, Firm, or Market Maker orders routed to and executed at NOM in Specified Symbols. In addition, the Exchange currently charges a flat fee of \$0.60 per contract for any Directed ISO routed to any options exchange. In order to cover the cost of removing liquidity in Specified Symbols at NOM, including Routing Costs, the Exchange proposes to charge \$0.95 per contract for Directed ISOs to NOM in NOM Specified Symbols.

## 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>10</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>11</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among

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<sup>9</sup> See NOM Notice, *supra* note 4 [sic].

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4).

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 if they deem fee levels at a particular venue to be excessive.

The Exchange believes that the proposed modifications to routing fees applicable for orders routed to and executed at NOM is fair, equitable and reasonable because the fees are an approximation of the cost to the Exchange for routing orders to NOM. 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. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for orders routed to and executed at NOM. 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 NOM. Specifically, the Exchange believes that the proposed routing fees will enable the Exchange to recover the remove fees assessed for the Exchange's routing to NOM, plus other Routing Costs associated with the execution of orders that have been routed to NOM. The Exchange also believes that its increase to fees for Directed ISO's to NOM in Specified Symbols to \$0.95 per contract (from the current charge of \$0.60 per contract for all other Directed ISO's) is fair, equitable and reasonable because the fees are also an approximation of the cost to the Exchange for routing orders to NOM in Specified Symbols. The Exchange also believes that the proposed fee structure for orders routed to and executed at NOM, including Directed ISOs in Specified

Symbols, is not unreasonably discriminatory, again, because it is based on and intended to approximate the cost of routing to NOM.

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. To the contrary, the change to routing fees will assist the Exchange in recouping costs for routing orders to NOM on behalf of its participants, and absent such change, the Exchange would be subsidizing routing to NOM by Exchange participants. The Exchange also notes that Users may choose to mark their orders as ineligible for routing to avoid incurring routing fees.<sup>12</sup>

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

No written comments were solicited or received.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>13</sup> and Rule 19b-4(f)(2) thereunder,<sup>14</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

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

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<sup>12</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).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>14</sup> 17 CFR 240.19b-4(f)(2).

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-2012-038 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-2012-038. 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 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 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-2012-038 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>15</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).