

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-Phlx 2009-99 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-Phlx-2009-99. 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 a.m. and 3 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-Phlx 2009-99 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9-29204 Filed 12-7-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61097; File No. SR-BATS-2009-031]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To Establish Rules Governing the Trading of Options on the BATS Options Exchange

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 10, 2009, BATS Exchange, Inc. ("Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change to adopt rules to govern the trading of options on the Exchange (referred to herein as "BATS Options Exchange" or "BATS Options") as described in Items I, II, and III below, which Items have been prepared by the Exchange (the "Trading Rules Proposal"). 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 adopt rules to govern the trading of options on the Exchange. The Exchange represents that the BATS Options Exchange will operate a fully automated, price/time priority execution system built on the core functionality of the Exchange's approved equities platform, meaning that the Exchange will operate its options market much as it operates its cash equities market today.

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. The text of Exhibit 5 of the proposed rule change is also available on the Commission's Web site at <http://www.sec.gov/rules/sro.shtml>.

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 Exchange is proposing to adopt a series of rules in connection with BATS Options, which will be a facility of the Exchange. BATS Options will operate an electronic trading system developed to trade options ("System") that will provide for the electronic display and execution of orders in price/time priority without regard to the status of the entities that are entering orders. All Exchange Members will be eligible to participate in BATS Options provided that the Exchange specifically authorizes them to trade in the System. The System will provide a routing service for orders when trading interest is not present on BATS Options, and will comply with the obligations of the Options Order Protection and Locked/Crossed Market Plan.

BATS Options Members

The Exchange will authorize any Exchange Member who meets certain enumerated qualification requirements to obtain access to BATS Options (any such Member, an "Options Member").

There will be two types of Options Members, Options Order Entry Firms ("OEFs") and Options Market Makers. OEFs will be those Options Members representing orders as agent on BATS Options and non-market maker participants conducting proprietary trading as principal. Options Market Makers are Options Members registered with the Exchange as Options Market Makers and registered with BATS Options in an options series listed on BATS Options. To become an Options Market Maker, an Options Member is required to register by filing a written application. Such registration will consist of at least one series and may include all series traded on the Exchange. The Exchange will not place any limit on the number of entities that may become Options Market Makers.

The Exchange will not list an options series for trading unless at least one Options Market Maker is registered in the options series. In addition, before the Exchange opens trading for any additional series of an options class, it would require at least one Options

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁵ 17 CFR 200.30-3(a)(12).

Market Maker to be registered for trading that particular series.

BATS Options Market Makers will be required to electronically engage in a course of dealing to enhance liquidity available on BATS Options and to assist in the maintenance of fair and orderly markets. Among other things, an Options Market Maker would have to satisfy the following responsibilities and duties during trading: (1) On a daily basis maintain a two-sided market on a continuous basis in at least 75% of the options series in which it is registered; (2) enter a size of at least one contract for its best bid and its best offer; and (3) maintain minimum net capital in accordance with Commission and the Exchange rules. Substantial or continued failure by an Options Market Maker to meet any of its obligations and duties, will subject the Options Market Maker to disciplinary action, suspension, or revocation of the Options Market Maker's registration in one or more options series.

Options Market Makers receive certain benefits for carrying out their duties. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is to be used to finance the broker-dealer's activities as a specialist or market maker on a national securities exchange. Thus, an Options Market Maker has a corresponding obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis to justify this favorable treatment.³

Every Options Member shall at all times maintain membership in another registered options exchange that is not registered solely under Section 6(g) of the Securities Exchange Act of 1934 or in FINRA. OEF's that transact business with customers must at all times be members of FINRA. Pursuant to proposed BATS Rule 17.2(g), every Options Member will be required to have at least one registered Options Principal who satisfies the criteria of that Rule, including the satisfaction of a proper qualification examination. An OEF may only transact business with Public Customers if such Options Member also is an Options Member of another registered national securities exchange or association with which the Exchange has entered into an agreement under Rule 17d-2 under the Exchange Act pursuant to which such other

exchange or association shall be the designated options examining authority for the OEF.

As provided in BATS Rule 16.2, existing Exchange Rules applicable to the BATS equity market contained in Chapters I through XV of the Exchange Rules will apply to Options Members unless a specific Exchange Rule applicable to the options market (Chapters XVI through XXIX of the Exchange Rules) governs or unless the context otherwise requires. Options Members can therefore provide sponsored access to the BATS Options Exchange to a nonmember ("Sponsored Participant") pursuant to Rule 11.3 of the Exchange Rules.

Execution System

The Exchange's options trading system will leverage the Exchange's current state of the art technology, including its customer connectivity, messaging protocols, quotation and execution engine, order router, data feeds, and network infrastructure. This approach minimizes the technical effort required for existing Exchange Members to begin trading options on the BATS Options Exchange. As a result, the BATS Options Exchange will closely resemble the Exchange's equities market, but will differ from most existing options exchanges by, most prominently, offering true price/time priority across all participants rather than differentiating between participant/trading interest.

Like the Exchange system for equities, all trading interest entered into the System will be automatically executable. Orders entered into the System will be displayed anonymously. The System will offer fully anonymous trading, however, options trades are not currently anonymous through settlement. The Exchange will become an exchange member of the Options Clearing Corporation ("OCC"). The System will be linked to OCC for the Exchange to transmit locked-in trades for clearance and settlement.

Hours of Operation. The options trading system will operate between the hours of 9:30 a.m. Eastern Time and 4 p.m. Eastern Time, with all orders being available for execution during that time frame.

Minimum Quotation and Trading Increments. The Exchange is proposing to apply the following quotation increments: (1) If the options series is trading at less than \$3.00, five (5) cents; (2) if the options series is trading at \$3.00 or higher, ten (10) cents; and (3) if the options series is trading pursuant to the Penny Pilot program one (1) cent if the options series is trading at less

than \$3.00, five (5) cents if the options series is trading at \$3.00 or higher, except for QQQQs where the minimum quoting increment will be one cent for all series. In addition, the Exchange is proposing that the minimum trading increment for options contracts traded on BATS Options will be one (1) cent for all series.

Penny Pilot Program. Upon initial operation of BATS Options the Exchange proposes to commence trading, pursuant to the Penny Pilot Program (the "Penny Pilot"), all classes that are, on that date, traded by other options exchanges pursuant to the Penny Pilot, which is scheduled to expire on December 31, 2010. Following the commencement of operations and trading of classes traded by other options exchanges pursuant to the Penny Pilot at that time, the Exchange proposes to expand the classes subject to the Penny Pilot on a quarterly basis, 75 classes at a time through August 2010. For instance, if BATS Options commences operations on February 16, 2010, then the Exchange will trade all classes trading pursuant to the Penny Pilot on other options exchanges as of that date and will add 75 classes in May 2010 and 75 additional classes in August 2010. In order to reduce operational confusion and provide for appropriate time to update databases, the Exchange proposes to add the eligible issues to the Penny Pilot effective for trading on the Monday ten days after Expiration Friday. Thus, as applicable, the quarterly additions would be effective on February 1, 2010; May 3, 2010; and August 2, 2010. For purposes of identifying the issues to be added per quarter, the Exchange shall use data from the prior six calendar months preceding the implementation month, except that the month immediately preceding their addition to the Penny Pilot would not be utilized for purposes of the analysis. The new classes added by the Exchange on a quarterly basis will represent the 75 most actively traded multiply listed options classes based on national average daily volume for the six months prior to selection, closing under \$200 per share on the Expiration Friday prior to expansion, except that the month immediately preceding their addition to the Penny Pilot will not be used for the purpose of the six month analysis.⁴ The Exchange will specify which options trade in the Penny Pilot, and in what increments, in Information Circulars filed with the Commission pursuant to

³ Boston Options Exchange ("BOX") and the NASDAQ Options Market ("NOM") have market maker obligations comparable to those proposed for BATS Options.

⁴ Index products would be included in the expansion if the underlying index level was under 200.

Rule 19b-4 under the Exchange Act and distributed to Members. The Exchange represents that it has the necessary system capacity to support any additional series listed as part of the Penny Pilot.

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and written analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for first the 63 classes traded pursuant to the Penny Pilot by other options exchanges (the "Initial Classes"), and the ten most active and twenty least active options classes added to the Penny Pilot with each quarterly expansion, commencing with the expansion that occurred on November 2, 2009. As the Penny Pilot matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Penny Pilot's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the Initial Classes. This report will include, but is not limited to: (1) Data and written analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Penny Pilot on the capacity of the Exchange's automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Penny Pilot and how the Exchange addressed them.

Additionally, the Exchange proposes that any Penny Pilot issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Penny Pilot, based on trading activity in the previous six months. The replacement issues, as applicable, would be added to the Penny Pilot Program on the second trading day following January 1, 2010 and July 1, 2010. The Exchange will employ the same parameters to prospective replacement issues as approved and applicable under the Penny Pilot Program, including excluding high-priced underlying securities. The replacement issues will be announced in Information Circulars distributed to Members.

Order Types. The proposed System will make available to Options Members Reserve Orders, Limit Orders, Minimum Quantity Orders, Discretionary Orders,

Market Orders, Price Improving Orders, Destination Specific Orders, BATS Only Orders, BATS Post Only Orders, Partial Post Only at Limit Orders, Intermarket Sweep Orders, and Directed Intermarket Sweep Orders, with characteristics and functionality similar to what is currently approved for use in the Exchange's equities trading facility or on other options exchanges.

"Reserve Orders" are limit orders that have both a displayed size as well as an additional non-displayed amount. Both the displayed and non-displayed portions of the Reserve Order are available for potential execution against incoming orders. If the displayed portion of a Reserve Order is fully executed, the System will replenish the display portion from reserve up to the size of the original display amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the timestamp of its original entry.

"Limit Orders" are orders to buy or sell an option at a specified price or better. A limit order is marketable when, for a limit order to buy, at the time it is entered into the System, the order is priced at the current inside offer or higher, or for a limit order to sell, at the time it is entered into the System, the order is priced at the inside bid or lower.

"Minimum Quantity Orders" are orders that require that a specified minimum quantity of contracts be obtained, or the order is cancelled. Minimum Quantity Orders may only be entered with a time-in-force designation of Immediate or Cancel.

"Discretionary Orders" are orders that have a displayed price and size, as well as a non-displayed discretionary price range, at which the entering party, if necessary, is also willing to buy or sell. The non-displayed trading interest is not entered into the BATS Options Book but is, along with the displayed size, converted to an IOC buy (sell) order priced at the highest (lowest) price in the discretionary price range when displayed contracts become available on the opposite side of the market or an execution takes place at any price within the discretionary price range. The generation of this IOC order is triggered by the automatic cancellation of the displayed contracts portion of the Discretionary Order. If more than one Discretionary Order is available for conversion to an IOC order, the System will convert and process all such orders in the same priority in which such Discretionary Orders were entered. If an IOC order is not executed in full, the unexecuted portion of the order is

automatically re-posted and displayed in the BATS Options Book with a new time stamp, at its original displayed price, and with its non-displayed discretionary price range.

"Market Orders" are orders to buy or sell at the best price available at the time of execution.

"Price Improving Orders" are orders to buy or sell an option at a specified price at an increment smaller than the minimum price variation in the security. Price Improving Orders may be entered in increments as small as (1) one cent. Price Improving Orders that are available for display shall be displayed at the minimum price variation in that security and shall be rounded up for sell orders and rounded down for buy orders. Unless a User has entered instructions not to do so, Price Improving Orders will be subject to the "displayed price sliding process." Pursuant to the displayed price sliding process, a Price Improving Order that after rounding to the minimum price variation, or any other order to be displayed on the BATS Book that at the time of entry, would lock or cross a Protected Quotation (collectively, "the original locking price"): (A) Such order will be displayed by the System at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers); and (B) in the event the NBBO changes such that the order at the original locking price would not lock or cross a Protected Quotation, the order will receive a new timestamp, and will be displayed at the original locking price.

"Destination Specific Orders" are market or limit orders that instruct the System to route the order to a specified away trading center, after exposing the order to the BATS Options Book. Destination Specific Orders that are not executed in full after routing away are processed by the Exchange as described in Rules 21.8 and 21.9.

"BATS Only Orders" are orders that are to be ranked and executed on the Exchange pursuant to Rule 21.8 (Order Display and Book Processing) or cancelled, as appropriate, without routing away to another trading center. A BATS Only Order that, at the time of entry, would cross a Protected Quotation will be repriced to the locking price and ranked at such price in the BATS Options Book. A BATS Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

"BATS Post Only Orders" are orders that are to be ranked and executed on

the Exchange pursuant to Rule 21.8 or cancelled, as appropriate, without routing away to another trading center except that the order will not remove liquidity from the BATS Options Book. A BATS Post Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

"Partial Post Only at Limit Orders" are orders that are to be ranked and executed on the Exchange pursuant to Rule 21.8 or cancelled, as appropriate, without routing away to another trading center except that the order will only remove liquidity from the BATS Options Book under the following circumstances: (a) A Partial Post Only at Limit Order will remove liquidity from the BATS Options Book up to the full size of the order if, at the time of receipt, it can be executed at prices better than its limit price (*i.e.*, price improvement); (b) regardless of any liquidity removed from the BATS Options Book under the circumstances described in paragraph (a) above, a User may enter a Partial Post Only at Limit Order instructing the Exchange to also remove liquidity from the BATS Options Book at the order's limit price up to a designated percentage of the remaining size of the order after any execution pursuant to paragraph (A) above ("Maximum Remove Percentage") if, after removing such liquidity at the order's limit price, the remainder of such order can then post to the BATS Options Book. If no Maximum Remove Percentage is entered, such order will only remove liquidity to the extent such order will obtain price improvement as described in paragraph (A) above. A Partial Post Only at Limit Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process as set forth in Rule 21.1(d)(6).

"Intermarket Sweep Orders" or "ISO" are orders that shall have the meaning provided in Rule 27.1, which relates to intermarket trading. Such orders may be executed at one or multiple price levels in the System without regard to Protected Quotations at other options exchanges (*i.e.*, may trade through such quotations). The Exchange relies on the marking of an order by a User as an ISO order when handling such order, and thus, it is the entering Options Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to ISOs. ISOs are not eligible for routing pursuant to Rule 21.9.

"Directed Intermarket Sweep Orders" or "Directed ISOs" are ISOs entered by a User that bypass the System and are

immediately routed by the Exchange to another options exchange specified by the User for execution. It is the entering Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to Intermarket Sweep Orders.

Time in Force Designations. Options Members entering orders into the System may designate such orders to remain in force and available for display and/or potential execution for varying periods of time. Unless cancelled earlier, once these time periods expire, the order (or the unexecuted portion thereof) is returned to the entering party.

"Good Til Day or "GTD" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time during such trading day specified by the entering User unless canceled by the entering party.

"Immediate Or Cancel" or "IOC" shall mean, for an order so designated, a limit order that is to be executed in whole or in part as soon as such order is received, and the portion not so executed is cancelled.

"DAY" shall mean, for an order so designated, a limit order to buy or sell which, if not executed expires at market close.

"WAIT" shall mean for orders so designated, that upon entry into the System, the order is held for one second without processing for potential display and/or execution. After one second, the order is processed for potential display and/or execution in accordance with all order entry instructions as determined by the entering party. This modifier is designed to enhance compliance with the order exposure requirement set forth in Rule 22.12 (Order Exposure Requirements). Rule 22.12 would prohibit Options Members from executing as principal on BATS Options orders they represent as agent unless (i) agency orders are first exposed on BATS Options for at least one (1) second or (ii) the Options Member has been bidding or offering on BATS Options for at least one (1) second prior to receiving an agency order that is executable against such bid or offer.

One Second Exposure Period. As noted above, proposed Rule 22.12 would require Options Members to expose their customers' orders on the Exchange for at least one second under certain circumstances. During this one second exposure period, other Options Members will be able to enter orders to trade against the exposed order. In

adopting a one-second order exposure period, the Exchange is proposing a requirement that is consistent with the Rules of other options exchanges.⁵ Thus, the exposure period will allow Options Members that are members of other options exchanges to comply with Rule 22.12 without programming separate time parameters into their systems for order entry or compliance purposes. The Exchange believes that market participants are sufficiently automated that a one second exposure period allows an adequate time for market participants to electronically respond to an order. Also, it is possible that market participants might wait until the end of the exposure period, no matter how long, before responding. Thus, the Exchange believes that any longer than one second would not further the protection of investors or market participants, but rather, would potentially increase market risk to investors and other market participants by creating a longer period of time for the exposed order to be subject to market risk.

The Exchange's trading system for BATS Options is identical to the trading system currently used for equities trading on the Exchange today. The Exchange has had ample experience with that trading system to believe that one second is an adequate exposure period.⁶ Further, the Exchange believes that many of its current Members will be Options Members and that such current Members have demonstrated an ability to respond to orders in a timely fashion.

Member Match Trade Prevention Modifiers. As with its equities market, the Exchange will allow Options Members to use Member Match Trade Prevention ("MMTP") Modifiers. Any incoming order designated with an MMTP modifier will be prevented from executing against a resting opposite side order also designated with an MMTP modifier and originating from the same market participant identifier ("MPID"), Exchange Member identifier or Exchange Sponsored Participant identifier.

Market Opening Procedures. The System shall open options, other than

⁵ See, *e.g.*, CBOE Rules 6.45A, 6.45B, 6.74A and 6.74B; ISE Rule 717(d); NOM Chapter VII, Sec. 12.

⁶ For instance, for approximately three months in 2009, the Exchange offered functionality that exposed marketable orders to Exchange Members prior to routing, canceling or posting the order to the Exchange's order book. See Release No. 34-60040 (June 3, 2009), 74 FR 27577 (June 10, 2009). Pursuant to that functionality, orders were exposed to Exchange Members for a variable period of time up to 500 milliseconds. In the Exchange's experience, Exchange Members were able to and frequently did respond to such exposed orders.

index options, for trading based on the first transaction after 9:30 a.m. Eastern Time in the securities underlying the options as reported on the first print disseminated pursuant to an effective national market system plan. With respect to index options, the System shall open such options for trading at 9:30 a.m. Eastern Time. Because the exchange does not propose to adopt an opening cross or similar process, the opening trade that occurs on the Exchange will be a trade in the ordinary course of dealings on the Exchange. Accordingly, the System will ensure that the opening trade in an options series will not trade through a Protected Quotation (as defined in Rule 27.2) at another options exchange, consistent with the general standard regarding trade throughs articulated in proposed Rule 21.6(e).

Order Display/Matching System. The System will be based upon functionality currently approved for use in the Exchange's equities trading system. Specifically, the System will allow Options Members to enter market orders and priced limit orders to buy and sell BATS Options-listed options. The orders will be designated for display (price and size) on an anonymous basis in the order display service of the System.

Routing. The BATS Options Exchange will support orders that are designated to be routed to the National Best Bid and Offer ("NBBO") as well as orders that will execute only within BATS Options. Orders that are designated to execute at the NBBO will be routed to other options markets to be executed when the Exchange is not at the NBBO consistent with the Options Order Protection and Locked/Crossed Market Plan. Subject to the exceptions contained in proposed Rule 27.2(b), the System will ensure that an order will not be executed at a price that trades through another options exchange. An order that is designated by an Options Member as routable will be routed in compliance with applicable Trade-Through restrictions. Any order entered with a price that would lock or cross a Protected Quotation that is not eligible for either routing or the displayed price sliding process as defined in proposed Rule 21.1(d)(6) will be cancelled.

BATS Options shall route orders in options via BATS Trading, Inc. ("BATS Trading"), which serves as the Outbound Router of the Exchange, as defined in Rule 2.11 (BATS Trading, Inc.). The function of the Outbound Router will be to route orders in options listed and open for trading on BATS Options to other options exchanges pursuant to BATS Options rules solely

on behalf of BATS Options. The Outbound Router is subject to regulation as a facility of the Exchange, including the requirement to file proposed rule changes under Section 19 of the Act. Use of BATS Trading or Routing Services (as described below) to route orders to other market centers is optional. Parties that do not desire to use BATS Trading or other Routing Services provided by the Exchange must designate orders as not available for routing.

In the event the Exchange is not able to provide order routing services through its affiliated broker-dealer, the Exchange will route orders to other options exchanges in conjunction with one or more routing brokers that are not affiliated with the Exchange ("Routing Services").

Book Processing. The System, like the equities facility, shall execute trading interest within the System in price/time priority, meaning it will execute all trading interest at the best price level within the System before executing trading interest at the next best price. Trading interest will be executed in the order set forth below, with the order clearly established as the first entered into the System within such category at each price level having priority up to the number of contracts specified in the order. At each price level between displayed trading interest, orders will be executed in the following priority: (a) Price Improving Orders and orders subject to displayed price sliding and then (b) discretionary portion of discretionary orders as set forth in Rule 21.1(d)(4). At each price level that has displayed trading interest, orders will be executed in the following priority: (a) Orders that are displayed within the System, then (b) the Non-Displayed portion of Reserve Orders, and then the (c) discretionary portion of discretionary orders as set forth in Rule 21.1(d)(4). Any order entered with a price that would lock or cross a Protected Quotation that is not eligible for either routing or the displayed price sliding process as defined in Rule 21.1(d)(6) will be cancelled.

Data Feed. The System will include a proprietary data feed which will display without attribution to Members' MPIDs Displayed Orders on both the bid and offer side of the market for price levels then within BATS Options using the minimum price variation applicable to that security.

\$1 Strike Program. Pursuant to proposed Rule 19.6, Supplementary Material .02, the interval between strike prices of series of options on individual stocks may be \$1.00 or greater (" \$1 Strike Prices") provided the strike price

is \$50 or less, but not less than \$1. The listing of \$1 strike prices shall be limited to option classes overlying no more than fifty-five (55) individual stocks (the "\$1 Strike Price Program") as specifically designated by BATS Options. BATS Options may list \$1 Strike Prices on any other option classes if those classes are specifically designated by other national securities exchanges that employ a similar \$1 Strike Price Program under their respective rules.

To be eligible for inclusion into the \$1 Strike Price Program, an underlying security must close below \$50 in the primary market on the previous trading day. After a security is added to the \$1 Strike Price Program, BATS Options may list \$1 Strike Prices from \$1 to \$50 that are no more than \$5 from the closing price of the underlying on the preceding day. For example, if the underlying security closes at \$13, BATS Options may list strike prices from \$8 to \$18. BATS Options may not list series with \$1 intervals within \$0.50 of an existing \$2.50 strike price (e.g., \$12.50, \$17.50) in the same series. Additionally, for an option class selected for the \$1 Strike Price Program, BATS Options may not list \$1 Strike Prices on any series having greater than nine (9) months until expiration. A security shall remain in the \$1 Strike Price Program until otherwise designated by BATS Options.

For options classes selected to participate in the \$1 Strike Program, the Exchange will, on a monthly basis, review series that were originally listed under the \$1 Strike Program with strike prices that are more than \$5 from the current value of an options class and delist those series with no open interest in both the put and the call series having a: (1) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (2) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month. If the Exchange identifies series for delisting pursuant to this policy, the Exchange shall notify other options exchanges with similar delisting policies regarding the eligible series for delisting, and shall work jointly with such other exchanges to develop a uniform list of series to be delisted so as to ensure uniform series delisting of multiply listed options classes.

Notwithstanding the above delisting policy, the Exchange may grant member requests to add strikes and/or maintain strikes in series of options classes traded pursuant to the \$1 Strike Program that are eligible for delisting.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of option series that may be listed and traded in \$1 strikes.

In addition to \$1 strikes as proposed above, the Exchange proposes to offer options trading on series of options with \$2.50 strike price intervals, consistent with other options exchanges.

Options Order Protection and Locked/Crossed Market Plan Rules

The Exchange will participate in the recently-approved Options Order Protection and Locked/Crossed Market Plan ("New Plan"), and therefore will be required to comply with the obligations of Participants under the New Plan. The Exchange proposes to adopt rules relating to the New Plan that are substantially similar to the rules in place on or proposed by all of the options exchanges that are Participants to the New Plan.

The New Plan replaced the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Old Plan"). The Old Plan required its participant exchanges to operate a stand-alone system or "Linkage" for sending order-flow between exchanges to limit trade-throughs, and the Linkage was operated by the Options Clearing Corporation ("OCC"). The New Plan essentially applies the Regulation NMS price-protection provisions to the options markets. Similar to Regulation NMS, the New Plan requires the New Plan Participants to adopt rules "reasonably designed to prevent Trade-Throughs," while exempting Intermarket Sweep Orders ("ISOs") from that prohibition. The New Plan's proposed definition of an ISO is essentially the same as under Regulation NMS. The remaining exceptions to the trade-through prohibition, discussed more specifically below, either track those under Regulation NMS or correspond to unique aspects of the options market, or both.

The Rules in Chapter XXVII conform to the requirements of the New Plan. Rule 27.1 sets forth the defined terms for use under the New Plan. Rule 27.2 prohibits trade-throughs and exempts ISOs from that prohibition. Rule 27.2 also contains additional exceptions to the trade-through prohibition that track the exceptions under Regulation NMS or correspond to unique aspects of the BATS Options Exchange, or both.

Rule 27.3 sets forth the general prohibition against locking/crossing

other eligible exchanges as well as several exceptions that permit locked markets in limited circumstances; such exceptions have been approved by the Commission for inclusion in the rules of other options exchanges. Specifically, the exceptions to the general prohibition on locking and crossing occur when (1) the locking or crossing quotation was displayed at a time when the Exchange was experiencing a failure, material delay, or malfunction of its systems or equipment; (2) the locking or crossing quotation was displayed at a time when there is a Crossed Market; or (3) the Member simultaneously routed an ISO to execute against the full displayed size of any locked or crossed Protected Bid or Protected Offer.

Rule 27.4 provides that the Exchange will continue to accept Principal Acting as Agent ("P/A") and Principal Orders from options exchanges that continue to use such orders to address trade-throughs via the Linkage for a temporary period.

Securities Traded on BATS Options

General Listing Standards. The Exchange proposes to adopt listing standards for Options traded on BATS Options (Chapter XIX) as well as for Index Options (Chapter XXIX) that are identical to the approved rules of other options exchanges.⁷ The Exchange will join the Options Listings Procedures Plan and will list and trade options already listed on other options exchanges. The Exchange will gradually phase-in its trading of options, beginning with a selection of actively traded options. At least initially, the Exchange does not plan to develop new options products or listing standards.

Quarterly Options Series Program. Pursuant to proposed Rule 29.11(g) the Exchange may list and trade options series that expire at the close of business on the last business day of a calendar quarter ("Quarterly Options Series"). The Exchange may list Quarterly Options Series for up to five (5) currently listed options classes that are either options on exchange traded funds ("ETF") or index options. In addition, the Exchange may also list Quarterly Options Series on any options classes that are selected by other securities exchanges that employ a similar program under their respective rules.

The Exchange may list series that expire at the end of the next consecutive four (4) calendar quarters, as well as the fourth quarter of the next calendar year. For example, if the Exchange is trading Quarterly Options Series in the month

of May 2010, it may list series that expire at the end of the second, third, and fourth quarters of 2010, as well as the first and fourth quarters of 2011. Following the second quarter 2010 expiration, the Exchange could add series that expire at the end of the second quarter of 2011.

For each class of ETF options selected for the Quarterly Options Series program, the Exchange may list strike prices within \$5 from the previous day's closing price of the underlying security at the time of initial listing. Subsequently, the Exchange may list up to 60 additional strike prices that are within thirty percent (30%) of the previous day's close, or more than 30% away from the previous day's close provided demonstrated customer interest exists for such series.⁵ [sic]

The Exchange has also proposed a delisting policy with respect to Quarterly Options Series in ETF options. On a monthly basis, the Exchange will review series that are outside of a range of five (5) strikes above and five (5) strikes below the current price of the ETF, and delist series with no open interest in both the call and the put series having a (1) strike higher than the highest price with open interest in the put and/or call series for a given expiration month; and (2) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month. Notwithstanding the delisting policy, customer requests to add strikes and/or maintain strikes in Quarterly Options Series eligible for delisting shall be granted.

The Exchange also may list Quarterly Option Series based on an underlying index pursuant to similar provisions in Rule 29.11. There are two noteworthy distinctions between the rules for listing Quarterly Options Series based on an ETF versus Quarterly Options Series based on an index. First, whereas the initial listing of Quarterly Options Series based on an underlying ETF is restricted to strike prices within \$5 from the previous day's closing price of the underlying security, the initial listing of strikes for Quarterly Options Series based on an underlying index is restricted to: (i) A price that is within thirty percent (30%) of the previous day's close, and (ii) no more than five strikes above and five strikes below the value of the underlying index. Second, whereas the Exchange may list up to 60 additional strike prices for each Quarterly Options Series based on an ETF, there is no firm cap on the additional listing of strikes for Quarterly Options Series based on an underlying index; rather, additional strike prices

⁷ See Rules of NOM, Chapters IV and XIV and the Rules of BOX, Chapters IV and XIV.

may be listed provided the new listings do not result in more than five strike prices on the same side of the underlying index value as the new listings.

The interval between strike prices on Quarterly Options Series shall be the same as the interval for strike prices for series in that same options class that expire in accordance with the normal monthly expiration cycle.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of options series pursuant to the above-described Quarterly Options Series program.

Conduct and Operational Rules for Options Members

BATS proposes to adopt rules that are substantially similar to the approved rules of other options exchanges. Thus, BATS proposes to adopt rules that are substantially similar to the rules of NOM regarding: exercises and deliveries (Chapter XXIII); records, reports and audits (Chapter XXIV); and minor rule violations (Chapter XXV).

BATS proposes to adopt rules that are similar to the rules of NOM, with certain proposed changes and omissions, regarding: doing business with the public (Chapter XXVI); and margin (Chapter XXVIII). For example, with respect to its rules applicable to doing business with the public, contained in proposed Chapter XXVI, BATS has not proposed rules consistent with certain NOM rules to the extent the Exchange believes such requirements are contained in other sections of the Exchange's existing Rules or that such requirements are not consistent with the Exchange's existing regulatory structure. For example, the Exchange has consolidated applicable rules requiring options principal registration into proposed BATS Rule 17.2(g) because, as proposed, Options Principal registration is not limited to personnel associated with Options Members that do business with the public. Similarly, the Exchange intends to require Authorized Traders of Options Members to comply with existing Exchange registration requirements applicable to all Authorized Traders.⁸ Accordingly, the Exchange has omitted specific rules applicable to registration of representatives. As another example, the Exchange has not proposed addition of a fidelity bond requirement to its doing

business with the public rules for BATS Options, but rather, as noted below, has proposed addition of a fidelity bond rule (Rule 2.12) to its general membership rules. With respect to its proposed margin rules, contained in proposed Chapter XXVIII, the Exchange has not proposed adoption of a rule applicable to joint back office arrangements because proposed Rule 28.3 requires Options Members to comply with either the margin rules of the New York Stock Exchange or the Chicago Board Options Exchange, and both exchanges have rules that address joint back office requirements. Thus, although the Exchange has proposed rules that differ in certain instances from the rules of NOM, the Exchange does not believe that such differences create any material regulatory gaps between the rules applicable to Exchange Options Members and members of other options exchanges.

BATS further proposes to adopt Business Conduct Rules (Chapter XVIII) that are consistent with the NOM and BOX Business Conduct Rules, with certain exceptions.⁹ Specifically, with respect to Position Limits (Rule 18.7) and Exercise Limits (Rule 18.9), the Exchange is proposing to apply the limits established pursuant to the rules of the Chicago Board Options Exchange ("CBOE"), although the Exchange will establish such limits for products not traded on the CBOE. By expressly incorporating an already-approved limit, the Exchange will ensure that an appropriate limit is in place at all times without the need to continually adjust its rule manually or to disrupt the operations of its Members. With respect to financial and operational rules, the Exchange proposes to adopt rules similar to those of existing options exchanges regarding: exercises and deliveries, margin, net capital, and books and records.

National Market System

The BATS Options Exchange will operate as a full and equal participant in the national market system for options trading established under Section 11A of the Exchange Act, just as its equities market participates today. The BATS Options Exchange will become a member of the Options Price Reporting Authority ("OPRA"), the Options Linkage Authority ("OLA"), the Options Regulatory Surveillance Authority ("ORSA"), and the Options Listing Procedures Plan ("OLPP").

The Exchange expects to participate in those plans on the same terms

currently applicable to current members of those plans, and it expects little or no plan impact due to the fact that the Exchange's market will operate on price/time priority. The Exchange has contacted the leadership of each options-related national market system plan to begin the membership process.

Regulation

The Exchange will leverage many of the structures it established to operate a national securities exchange in compliance with Section 6 of the Exchange Act. As described in more detail below, there will be three elements of that regulation: (1) The Exchange will join the existing options industry agreements pursuant to Section 17(d) of the Exchange Act, as it did with respect to equities, (2) the Exchange's Regulatory Services Agreement with FINRA will govern many aspects of the regulation and discipline of Members that participate in options trading, just as it does for equities regulation, and (3) the Exchange will perform options listing regulation, as well as authorize Options Members to trade on BATS Options, and conduct surveillance of options trading as it does today for equities. Section 17(d) of the Exchange Act and the related Exchange Act rules permit SROs to allocate certain regulatory responsibilities to avoid duplicative oversight and regulation. Under Exchange Act Rule 17d-1, the SEC designates one SRO to be the Designated Examining Authority, or DEA, for each broker-dealer that is a member of more than one SRO. The DEA is responsible for the financial aspects of that broker-dealer's regulatory oversight. Because BATS Options Members also must be members of at least one other SRO, the Exchange would generally not be designated as the DEA for any of its members.

Rule 17d-2 under the Act permits SROs to file with the Commission plans under which the SROs allocate among each other the responsibility to receive regulatory reports from, and examine and enforce compliance with specified provisions of the Act and rules thereunder and SRO rules by, firms that are members of more than one SRO ("common members"). If such a plan is declared effective by the Commission, an SRO that is a party to the plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO.

All of the options exchanges, FINRA, and NYSE have entered into the Options Sales Practices Agreement, a Rule 17d-2 agreement. Under this Agreement, the examining SROs will examine firms that

⁸ See BATS Rule 2.5, Interpretation and Policy .01 and BATS Rule 11.4.

⁹ See Rules of NOM, Chapter III and BOX, Chapter III.

are common members of the Exchange and the particular examining SRO for compliance with certain provisions of the Act, certain of the rules and regulations adopted thereunder, certain examining SRO rules, and certain BATS Options Rules. In addition, BATS Options Rules contemplate participation in this Agreement by requiring that any Options Member also be a member of at least one of the examining SROs.

For those regulatory responsibilities that fall outside the scope of any Rule 17d-2 agreements, the Exchange will retain full regulatory responsibility under the Exchange Act. However, the Exchange has entered into a Regulatory Services Agreement with FINRA, pursuant to which FINRA personnel operate as agents for the Exchange in performing certain of these functions. As is the case with the BATS equities market, the Exchange will supervise FINRA and continue to bear ultimate regulatory responsibility for the BATS Options Exchange.

Consistent with the Exchange's existing regulatory structure, the Exchange's Chief Regulatory Officer shall have general supervision of the regulatory operations of BATS Options, including responsibility for overseeing the surveillance, examination, and enforcement functions and for administering all regulatory services agreements applicable to BATS Options. Similarly, the Exchange's existing Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of Exchange's regulatory and self-regulatory organization responsibilities, including those applicable to BATS Options.

Finally, as it does with equities, the Exchange will perform automated surveillance of trading on BATS Options for the purpose of maintaining a fair and orderly market at all times. As it does with its equities trading, the Exchange will monitor BATS Options to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA.

In addition, the Exchange will oversee the process for determining and implementing trade halts, identifying and responding to unusual market conditions, and administering the Exchange's process for identifying and remediating "obvious errors" by and among its Options Members. BATS proposed rules (Chapter XX) regarding halts, unusual market conditions, extraordinary market volatility, obvious errors, and audit trail are closely

modeled on the approved rules of NOM and BOX.¹⁰

Minor Rule Violation Plan

The Exchange's disciplinary rules, including Exchange Rules applicable to "minor rule violations," are set forth in Chapter VIII of the Exchange's current Rules. Such disciplinary rules will apply to Options Members and their associated persons.

The Commission approved the BATS Exchange's Minor Rule Violation Plan ("MRVP") in 2008.¹¹ The Exchange's MRVP specifies those uncontested minor rule violations with sanctions not exceeding \$2,500 that would not be subject to the provisions of Rule 19d-1(c)(1) under the Act¹² requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.¹³ The Exchange's MRVP includes the policies and procedures included in Exchange Rule 8.15 (Imposition of Fines for Minor Violation(s) of Rules) and in Rule 8.15, Interpretations and Policy .01.

The Exchange proposes to amend its MRVP and Rule 8.15, Interpretation and Policy .01 to include proposed Rule 25.3 (Penalty for Minor Rule Violations).¹⁴ The rules included in proposed Rule 25.3 as appropriate for disposition under the Exchange's MRVP are: (a) Position Limit violations for both customer accounts as well as the accounts of Options Members that are Exchange Members; (b) Order Entry violations regarding restrictions on orders entered by Market Makers, and (c) Continuous Quote violations regarding Market Maker continuous bids and offers. The rules included in Rule

25.3 are the same as the rules included in the MRVPs of other options exchanges.¹⁵

Upon implementation of this proposal, the Exchange will include the enumerated options trading rule violations in the Exchange's standard quarterly report of actions taken on minor rule violations under the MRVP. The quarterly report includes: The Exchange's internal file number for the case, the name of the individual and/or organization, the nature of the violation, the specific rule provision violated, the sanction imposed, the number of times the rule violation has occurred, and the date of disposition.

The Exchange's MRVP, as proposed to be amended, is consistent with Sections 6(b)(1), 6(b)(5) and 6(b)(6) of the Act, which require, in part, that an exchange have the capacity to enforce compliance with, and provide appropriate discipline for, violations of the rules of the Commission and of the exchange.¹⁶ In addition, because amended Rule 8.15 will offer procedural rights to a person sanctioned for a violation listed in proposed Rule 25.3, the Exchange will provide a fair procedure for the disciplining of members and associated persons, consistent with Section 6(b)(7) of the Act.¹⁷

This proposal to include the rules listed in Rule 25.3 in the Exchange's MRVP is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d-1(c)(2) under the Act,¹⁸ because it should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. In requesting the proposed change to the MRVP, the Exchange in no way minimizes the importance of compliance with Exchange Rules and all other rules subject to the imposition of fines under the MRVP. However, the MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Exchange will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is

¹⁰ See Rules of NOM, Chapter V, and BOX, Chapter V.

¹¹ See Release No. 34-58807 (October 17, 2008), 73 FR 63219 (October 23, 2008) (File No. 4-568) ("MRVP Order").

¹² 17 CFR 240.19d-1(c)(1).

¹³ The Commission adopted amendments to paragraph (c) of Rule 19d-1 to allow SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. See Release No. 34-21013 (June 1, 1984), 49 FR 23828 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with and declared effective by the Commission will not be considered "final" for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding \$2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

¹⁴ In the MRVP Order, the Commission noted that the Exchange proposed that any amendments to Rule 8.15.01 made pursuant to a rule filing submitted under Rule 19b-4 of the Act would automatically be deemed a request by the Exchange for Commission approval of a modification to its MRVP. See MRVP Order, *supra* note 11, at note 6.

¹⁵ See, e.g., NOM, Chapter X, Section 7, and BOX, Chapter X, Section 2.

¹⁶ 15 U.S.C. 78f(b)(1), 78f(b)(5) and 78f(b)(6).

¹⁷ 15 U.S.C. 78f(b)(7).

¹⁸ 17 CFR 240.19d-1(c)(2).

appropriate for a violation under the MRVP or whether a violation requires a formal disciplinary action.

Amendments to Existing BATS Exchange Rules

In addition to the Rules proposed above, the Exchange proposes to amend certain of its existing rules in order to provide clarity regarding certain regulatory processes already utilized by the Exchange. Specifically, the Exchange proposes to add Interpretations and Policies .03 and .04 to Rule 2.5, which state that associated persons must register and terminate registration via standard industry forms, Forms U4 and U5, respectively. Such forms must be filed through the Central Registration Depository ("CRD"). In addition, the Exchange currently requires applicants for membership in the Exchange to file information regarding their executive officers, directors, principal shareholders and general partners. The Exchange proposes to add Rule 2.6(g) in order to codify this application requirement and to require applicants approved as Members to keep such information current with the Exchange.

The Exchange also proposes to adopt new Rules 2.12 and 3.22, related to fidelity bonds and gratuities, respectively, to achieve more consistency with the regulatory structure of other exchanges. Proposed Rule 2.12 is based on NASDAQ Rule 3020, and proposed Rule 3.22 is identical to ISE Rule 406. Finally, in order to accommodate potential exemption requests pursuant to the proposed fidelity bond rule, Rule 2.12, the Exchange proposes adoption of Rule 1.6, which will provide a framework for requests for exemptions.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of the Act,¹⁹ in general and with Section 6(b)(5) of the Act,²⁰ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers,

or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

The BATS Options Exchange will benefit individual investors, options trading firms, and the options market generally. The entry of an innovative, low-cost competitor such as BATS Options will promote competition, spurring existing markets to improve their own execution systems and reduce trading costs. BATS Options will differentiate its market by offering executions in price/time priority, a feature that should increase order interaction and yield better executions. The execution system of the BATS Options Exchange will be designed to quote in penny increments where consistent with the Commission's penny pilot program for options, advancing the Commission's efforts to move the industry to penny quoting in an orderly fashion and helping to narrow spreads, reduce payment for order flow, and enhance price competition.

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. The Exchange operates in an intensely competitive global marketplace for transaction services. Relying on its array of services and benefits, the Exchange competes for the privilege of providing market services to broker-dealers. The Exchange's ability to compete in this environment is based in large part on the quality of its trading systems, the overall quality of its market and its attractiveness to the largest number of investors, as measured by speed, likelihood and cost of executions, as well as spreads, fairness, and transparency.

BATS Options will incorporate the best functional elements from the Exchange's equity market. The proposed rule change will reduce overall trading costs and increase price competition, both pro-competitive developments, and will promote further initiative and innovation among market centers and market participants.

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

Written comments were neither solicited nor received.

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:

- (1) By order approve such proposed rule change, or
- (2) 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. Please include File Number SR-BATS-2009-031 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-2009-031. 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

¹⁹ 15 U.S.C. 78a et seq.

²⁰ 15 U.S.C. 78f(b)(5).

between the hours of 10 a.m. and 3 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-2009-031 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E9-29203 Filed 12-7-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61091; File No. SR-NYSE-2009-117]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Listing Fees for Structured Products

December 1, 2009.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on November 19, 2009, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 apply a maximum fee in any calendar year (including initial and annual listing fees) of \$500,000 in connection with the listing under Section 902.05 of the Listed Company Manual (the "Manual") of any individual issuance of securities.

The text of the proposed rule change is available on the Exchange's Web site

at <http://www.nyse.com>, at the Exchange's Office of the Secretary 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 self-regulatory organization 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 those 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to apply a maximum listing fee in any calendar year (including initial and annual listing fees) of \$500,000 in connection with the listing under Section 902.05 of the Manual of any individual issuance of securities.

Section 902.05 sets forth listing fees applicable to securities traded on the equity floor of the Exchange and listed under Section 703.18, the equity criteria set out in Section 703.19, and Section 703.21. Section 902.05 currently provides that issuers of "retail debt securities" (i.e., debt securities that are listed under the equity criteria set out in Section 703.19 and traded on the equity floor of the Exchange) are subject to an annual maximum aggregate listing fee of \$500,000 for all retail debt securities issued in a calendar year. Companies are also subject under Section 902.02 to the maximum of \$500,000 per issuer for initial and annual fees payable on listed equity securities. In addition, as stated in Sections 902.02 and 902.05, the total maximum fee of \$500,000 billable to an issuer in a calendar year under the fee cap in Section 902.02 includes all annual fees billed to an issuer for listed retail debt securities. By contrast, securities listed under Section 902.05 other than retail debt securities are not subject to the maximum fees set forth in Section 902.02 or any maximum fee established in Section 902.05 itself. Consequently, the Exchange believes that it is appropriate to establish a maximum fee in any calendar year (including both initial and annual listing fees) per issuance listed under

Section 902.05 of \$500,000. Doing so addresses an anomaly under the Exchange's fee structure, whereby issuers of securities listed under Section 902.05 (other than retail debt securities) could pay fees in excess of \$500,000, while their fees for all other categories of securities would be capped. The Exchange notes that—based on historical experience—it is quite rare for a transaction to be subject to initial or annual listing fees under Section 902.05 that exceed \$500,000, [sic] As such, the Exchange does not believe that the revenue it would forego as a result of the proposed fee cap would negatively affect its ability to fund its regulatory program. The Exchange believes it is appropriate to have a separate fee cap for each individual issuance of structured products, as many companies (especially in the financial sector) list multiple new classes of structured products within a calendar year, requiring the repeated utilization of the Exchange's operational and regulatory resources to a degree that is not normally the case with respect to equity securities subject to the cap under Section 902.02.

The Exchange proposes to apply Section 902.05 as amended by this filing retroactively to any securities listed on or after the date of original submission of this filing. The Exchange believes this approach is appropriate, as it will enable companies to benefit from the proposed fee cap without having to delay their listing until after Commission approval of the filing solely for the purpose of benefitting from that fee reduction. The Exchange notes that no company will pay higher initial or annual listing fees in connection with the listing of structured products as a result of the proposed amendment and some companies will pay less if their fees in relation to an individual structured product would exceed \$500,000 in the absence of the proposed cap.

2. Statutory Basis

The bases under the Act for this proposed rule change are the requirement under Section 6(b)(4)⁴ that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, listed companies and other persons using its facilities and the requirement under Section 6(b)(5)⁵ that an exchange have rules that are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The

²¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78f(b)(4).

⁵ 15 U.S.C. 78f(b)(5).