

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58872; File No. SR-BATS-2008-008)

October 28, 2008

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Limitation of Liability

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 20, 2008, BATS Exchange, Inc. (“BATS” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,³ which renders the proposal effective upon filing with the Commission. BATS has requested that the Commission waive the 5-day notice requirement and the 30-day pre-operative waiting period contained in Rule 19b-4(f)(6)(iii) under the Act.⁴ If such waivers are granted by the Commission, the Exchange will implement this rule proposal immediately upon commencement of its operations as a national securities exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

⁴ Id.

The Exchange is proposing to amend BATS Rule 11.16, entitled “LIMITATION OF LIABILITY,” to codify that it may provide a form of compensation for losses sustained in relation to an Exchange system failure or a negligent act or omission of an Exchange employee.

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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.16 to establish a procedure to compensate Members⁵ in relation to Exchange systems failures or a negligent act or omission of an Exchange employee. The Exchange recognizes that the current industry practice of exchanges that function as SROs is to provide a form of compensation for losses sustained in relation to the use of the exchanges’ systems, and that some exchanges also provide a form of compensation for

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

negligence by the exchanges' employees. As such, the Exchange seeks to amend BATS Rule 11.16 to conform to current industry practice.

Pursuant to the proposed amendment to Rule 11.16, the Exchange would compensate Members for losses resulting directly from: (i) the malfunction of the Exchange's physical equipment, devices, and/or programming, or (ii) the negligent acts or omissions of the Exchange's employees.⁶ Under this proposed rule change, for such malfunctions or negligence, the Exchange would cap its liability: (i) to a single Member at the greater of \$100,000 or the amount recovered under any applicable insurance policy on a single trading day, (ii) to all Members at the greater of \$250,000 or the amount recovered under any applicable insurance policy on a single trading day, and (iii) to all Members at the greater of \$500,000 or the amount recovered under any applicable insurance policy in a single calendar month.

To the extent that all claims resulting from systems failures or negligence by Exchange employees cannot be fully satisfied because in the aggregate they exceed the applicable maximum amount of liability provided for, then the Exchange proposes to allocate the maximum amount among all such claims arising on a single trading day or during a single calendar month, as applicable, based on the proportion that each such claim bears to the sum of all such claims.

In order for a Member to be eligible to receive payment, claims must be made in writing and must be submitted no later than the opening of trading on the next business day following the day on which the use of the Exchange gave rise to such claims. Once in receipt of a claim, the Exchange will verify that: (i) a valid order was accepted into the Exchange's systems; and (ii)

⁶ The Exchange represents that the determination as to whether a Member is compensated or not will be made on an equitable and non-discriminatory basis without regard to the status of that Member, e.g., regardless of whether that Member is registered as a Market Maker with the Exchange.

an Exchange system failure or a negligent act or omission of an Exchange employee occurred during the execution or handling of that order. If all the criteria for submitting a claim have been met, the claim will be qualified for processing with all other claims at the end of the calendar month in which the incident occurred.

2. Statutory Basis

The Exchange believes the proposal 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).⁷ In particular, for the reasons described above, the proposed change is consistent with Section 6(b)(5) of the Act,⁸ because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest, by providing more certainty as to the Exchange's potential liability resulting from systems problems and negligence by Exchange employees.

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

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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

Because the foregoing proposed rule change does not: (1) significantly affect the

⁷ 15 U.S.C. 78(f)(b).

⁸ 15 U.S.C. 78f(b)(5).

protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6) thereunder.¹⁰

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. The Exchange requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay¹¹ is consistent with the protection of investors and the public interest. Given that the Exchange's proposed rule change is substantially similar to the rules of other exchanges previously approved by the Commission,¹² the proposal does not appear to present any novel regulatory issues. Moreover, the proposal would make more certain the Exchange's potential liability for such losses upon commencement of its operation as an exchange. Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6). Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to have been satisfied.

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² See NYSE Arca Equities Rule 13.2, NASDAQ Rule 4626, and ISE Rule 705.

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-2008-008](#) on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number [SR-BATS-2008-008](#). This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing 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-2008-008](#) 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.¹³

Florence E. Harmon
Acting Secretary

¹³ 17 CFR 200.30-3(a)(12).