

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65728, File No. SR-BATS-2011-035)

November 10, 2011

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 1, to Amend and Restate the Amended and Restated Bylaws of BATS Global Markets, Inc.

I. Introduction

On September 7, 2011, BATS Exchange, Inc. (“BATS” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Bylaws of the Exchange’s sole stockholder, BATS Global Markets, Inc. (“Corporation”), in connection with the Corporation’s anticipated initial public offering of shares of its Class A Common Stock (the “IPO”). The proposed rule change was published for comment in the Federal Register on September 26, 2011.<sup>3</sup> On November 3, 2011, the Exchange filed Partial Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comment letters regarding the proposal. This order approves the proposed rule change, as modified by Partial Amendment No. 1.

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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> See Securities Exchange Act Release No. 65353 (September 19, 2011), 76 FR 59472 (September 26, 2011) (“Notice”).

<sup>4</sup> Partial Amendment No. 1 corrects an inconsistency between the Third Amended and Restated Certificate of Incorporation of the Corporation and the Corporation’s proposed amended bylaws concerning actions of stockholders without a meeting. This is a technical amendment and is not subject to notice and comment as it does not materially affect the substance of the rule filing.

## II. Description of the Proposal

On May 13, 2011, the Corporation filed a registration statement on Form S-1 with the Commission to register shares of Class A common stock and to disclose its intention to conduct an IPO offering those shares and to list those shares for trading on the Exchange. In connection with its IPO, the Exchange filed this proposed rule change to amend and restate the Corporation's current Bylaws and adopt these changes as its Second Amended and Restated Bylaws ("New Bylaws"). The proposal would primarily amend and restate various provisions of the Bylaws in a manner that the Exchange believes would reflect changes to conform with provisions that are more customary for publicly-owned companies and also conform the New Bylaws to the Corporation's Certificate of Incorporation.<sup>5</sup>

### A. Stockholders Meetings and Actions Without a Meeting

The Exchange has proposed to revise the current Bylaw procedures to require stockholders to make certain disclosures and representations in notices to the Corporation concerning business proposals and director nominations to be considered at annual meetings.<sup>6</sup> In addition, the Exchange would require that all proposals and nominations comply with applicable requirements of the Act.<sup>7</sup> The Exchange has represented that the purpose of the disclosure and

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<sup>5</sup> See Notice, supra note 3, 76 FR at 59473. The Exchange also filed a proposed rule change to amend the Corporation's Certificate of Incorporation in anticipation of its upcoming IPO, which proposed rule change was recently approved by the Commission. See Securities Exchange Act Release No. 65646 (October 27, 2011), 76 FR 67783 (November 2, 2011) (SR-BATS-2011-033) (order approving proposed rule change to amend and restate the Second Amended and Restated Certificate of Incorporation of BATS Global Markets, Inc.).

<sup>6</sup> See proposed Section 2.02 of the New Bylaws. The New Bylaws also state that such notice requirements would be satisfied if done in compliance with Exchange Act Rule 14a-8. See Notice, supra note 3, 76 FR at 59474. Additionally, the New Bylaws requires stockholders to appear at any meeting to present such proposals or nominations. See id.

<sup>7</sup> See Notice, supra note 3, 76 FR at 59474.

representation requirements is to assure that stockholders asked to vote on stockholder proposals or nominations are more fully informed and are able to consider any proposals or nominations along with the interests of those stockholders or the beneficial owners on whose behalf such proposal or nomination is being made.<sup>8</sup>

In addition, the Exchange has proposed that the New Bylaws would only permit a special meeting of the stockholders to be called by the board of directors pursuant to a resolution adopted by a majority of the board of directors.<sup>9</sup> The Exchange has also proposed to revise certain notice requirements with respect to written consent from stockholders to approve certain corporate actions taken without a meeting.<sup>10</sup> Additionally, the Exchange has proposed to prohibit any action by written consent following a change of ownership, except as provided in the Corporation's Certificate of Incorporation.<sup>11</sup> The Exchange notes that these provisions are designed to prevent any stockholder from exercising undue control over the operation of the Exchange by circumventing the board of directors of the Corporation through a special meeting of the stockholders or action by written consent.<sup>12</sup>

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<sup>8</sup> See id.

<sup>9</sup> See proposed Section 2.03 of the New Bylaws. Under the current Bylaws, a special meeting of the stockholders could be called by the chairman of the board of directors, chief executive officer, the majority of the board of directors, or by the stockholders entitled to vote at least ten percent of the votes at the meeting. The Exchange also proposed that, whenever preferred stockholders have the right to elect directors, the preferred stockholders may call a special meeting of preferred stockholders pursuant to a resolution of the board. See id.

<sup>10</sup> See proposed Section 2.10 of the New Bylaws.

<sup>11</sup> See Notice, supra note 3, 76 FR at 59474 n. 4 (defining a "Change of Ownership" as occurring at such time as the beneficial owners of the Class B Common Stock and Non-Voting Class B Common Stock own, in the aggregate, less than a majority of the total voting power of the Corporation) and Partial Amendment 1.

<sup>12</sup> See Notice, supra note 3, 76 FR 59474.

## B. Board of Directors and Board Committees

The Exchange has proposed changing the current Bylaws to revise the process to remove directors and board committees. The proposed rule change would allow the board of directors or any director to be removed by the affirmative vote of at least a majority of voting power of all outstanding shares of the Corporation.<sup>13</sup> The Exchange has represented that the purpose of this change is to align these requirements with Delaware General Corporation Laws.<sup>14</sup> The Exchange also has proposed to eliminate references to executive committees, to authorize the board of directors to create committees, and, so as to ensure that the full board of directors considers significant corporate decisions, to prohibit board committees from (i) approving, adopting, or recommending to stockholders any matter required by Delaware law to be submitted for stockholder approval or (ii) adopting, amending, and repealing the New Bylaws.<sup>15</sup>

Currently, the Corporation's Bylaws provide that either the board of directors or shareholders may adopt, amend, or repeal the Bylaws of the Corporation. The proposal would modify this provision so that, upon a Change in Ownership,<sup>16</sup> stockholders may only adopt, amend, or repeal the New Bylaws upon the affirmative vote of at least 70% of the total voting power of all outstanding shares of the Corporation.<sup>17</sup>

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<sup>13</sup> See proposed Section 3.05 of the New Bylaws.

<sup>14</sup> See Notice, supra note 3, 76 FR at 59474.

<sup>15</sup> See proposed Section 3.10 of the New Bylaws.

<sup>16</sup> See supra note 11.

<sup>17</sup> See generally proposed Section 2.10 of the New Bylaws.

### C. Other Amendments

The proposal will also amend and restate various other provisions such as those relating to the registered office of the Corporation,<sup>18</sup> shares held by the Corporation in a fiduciary capacity,<sup>19</sup> form of stock certificates,<sup>20</sup> loans to officers,<sup>21</sup> and indemnification of directors,<sup>22</sup> among others.

### III. Discussion

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>23</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,<sup>24</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with the provisions of the Act.

The Exchange has represented that the proposed rule change relates solely to the Bylaws of the Corporation and that the Exchange will continue to be governed by its existing certificate of incorporation and by-laws.<sup>25</sup> The Exchange also has represented that the Corporation will continue to directly and solely hold the stock in, and voting power of, the Exchange and that the

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<sup>18</sup> See Notice, supra note 3, 76 FR at 59473.

<sup>19</sup> The Exchange also has proposed that any shares of stock held by the Corporation would have no voting rights, except when such shares are held in a fiduciary capacity. See proposed Section 2.07 of the New Bylaws.

<sup>20</sup> See Notice, supra note 3, 76 FR at 59475.

<sup>21</sup> See id.

<sup>22</sup> See id.

<sup>23</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>24</sup> 15 U.S.C. 78f(b)(1).

<sup>25</sup> See Notice, supra note 3, 76 FR at 59473.

Exchange will continue to operate pursuant to its existing governance structure.<sup>26</sup> The Commission also notes that the Exchange does not propose any new substantive changes to Article 12 of the current Bylaws (relating to SRO Functions of BATS Exchange, Inc. and BATS Exchange, Inc.).

The Commission, therefore, believes that the proposed rule change is consistent with Section 6(b)(1) of the Exchange Act, which requires the Exchange to have the ability to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.<sup>27</sup>

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<sup>26</sup> See id.

<sup>27</sup> 15 U.S.C. 78f(b)(1).

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>28</sup> that the proposed rule change (SR-BATS-2011-035), as modified by Partial Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

Elizabeth M. Murphy  
Secretary

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<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</sup> 17 CFR 200.30-3(a)(12).