

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66422; File No. SR-BATS-2012-010)

February 17, 2012

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 8, 2012, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to institute a fee change applicable to securities listed on the Exchange. Changes to the Exchange’s fees pursuant to this proposal will be effective upon filing.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 30, 2011, the Exchange received approval of rules applicable to the qualification, listing and delisting of companies on the Exchange.⁵ The Exchange proposes to modify Rule 14.13, entitled “Company Listing Fees” to: (i) adopt specified pricing for certain exchange traded products (“ETPs”) listed on the Exchange pursuant to Rule 14.11; (ii) provide an exemption from annual listing fees for any security listed on the Exchange that has a consolidated average daily volume (“CADV”) equal to or greater than 2 million shares per day for the prior two (2) calendar months; and (iii) apply all annual fees on the anniversary date of a security’s listing on the Exchange and make other clarifying changes.

Listing Fees for ETPs

The Exchange currently has in place specified fees for listing of Tier I and Tier II securities on the Exchange, including both initial and annual listing fees. The Exchange proposes to amend Rule 14.13(b) to adopt initial and annual fees for ETPs listed pursuant to Rule

⁵ See Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011).

14.11. The Exchange proposes to commence its listings business by charging Initial Listing Fees of \$10,000 for all ETPs. This initial primary listing fee will include a \$5,000 non-refundable application fee. The Exchange also proposes to charge an annual fee of \$35,000 for ETPs, provided, however, that ETPs with CADV equal to or greater than 2 million shares per day for the prior two (2) calendar months will not be assessed an annual fee, as described below. The Exchange also proposes to re-number the remainder of Rule 14.13(b) following the insertion of the proposed fees for ETPs.

Waiver of Annual Listing Fees for Certain Listed Securities

In order to incentivize larger, more established companies and ETP sponsors to list securities on the Exchange and to incentivize companies that list on the Exchange and grow to be more established companies to maintain their listings on the Exchange, the Exchange proposes to waive the annual listing fee for any security that is listed on the Exchange and has had a CADV equal to or greater than 2 million shares per day for the prior two (2) calendar months. This fee waiver will apply equally to securities that transfer from another listings market and become listed on the Exchange as well as those securities already listed on the Exchange when the annual listing fee becomes due (upon the anniversary of the security's listing, as described below).

Billing of Annual Fees and Additional Clarifying Changes

The Exchange proposes to modify its intended billing of annual fees, which the Exchange originally intended to assess on a pro-rated basis. The Exchange proposes to make clear that unless otherwise specified, the Exchange will assess all annual fees set forth in Rule 14.13(b)(2) upon a security's initial listing and then on each anniversary of a security's listing on the Exchange. The Exchange believes that billing each issuer on an annual basis from the date the applicable security is first listed on the Exchange is a more straightforward billing process than

billing on a calendar year basis, which requires pro-rating of annual listing fees in the initial billing cycle.

The Exchange also proposes to delete current paragraphs (F) and (G) of Rule 14.13(b)(2), as such paragraphs are duplicative of existing paragraphs (C) and (D) (which the Exchange proposes to re-number as (D) and (E)).

Finally, the Exchange proposes to correct and expand an internal cross-reference set forth in Rule 14.13(b)(2)(E) (proposed to be re-numbered as sub-paragraph (b)(2)(F)). As currently in effect, BATS Rule 14.13(b)(2)(E), states that the Exchange will not apply the standard annual fee for a dually-listed security but will instead charge an annual fee of \$15,000. Although this was intended and described as applicable to both Tier I and Tier II securities in the Exchange's rule filing that proposed rules applicable to Exchange-listed securities,⁶ the rule text inaccurately limits this dual-listings fee to Tier I securities. The Exchange proposes to expand the cross-reference to include Tier II securities as well as the newly added provision setting forth annual listing fees for ETPs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.⁷ Specifically, the Exchange believes that the proposed rule change is consistent with Sections 6(b)(4) and (b)(5) of the Act,⁸

⁶ See Securities Exchange Act Release No. 64546 (May 25, 2011), 76 FR 31660 (June 1, 2011) (SR-BATS-2011-018); see also id.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(4) and (b)(5).

in that it provides for the equitable allocation of reasonable dues, fees and other charges among issuers, and it does not unfairly discriminate between customers, issuers, brokers or dealers. As proposed, consistent with pricing already in place for Tier I and Tier II securities, the Exchange is proposing a clear-cut and simple pricing structure for ETPs that is not variable based on the number of shares or other metrics. The proposed fees applicable to ETPs are therefore equitable and non-discriminatory because they will apply equally to all ETPs listed on the Exchange. Further, the Exchange believes its proposed pricing for ETPs is reasonable, as the Exchange has not proposed additional fees that issuers incur at other exchanges, including fees for issuance of additional shares, name changes and other corporate actions. Finally, the Exchange notes that its proposed pricing, while not necessarily cheaper for all issuers at all other markets, is in many cases roughly equivalent or less than issuers would pay at other exchanges. For instance, derivative securities products and structured products listed on the NYSE Arca are assessed fees between \$5,000 and \$45,000 initially (depending on the type of product and number of shares) and between \$5,000 and \$55,000 annually, compared to proposed Exchange fees for ETP listings of \$10,000 initially and \$35,000 annually. Also, as noted above, most other listings markets charge multiple other fees applicable to additional shares issued by listed companies, corporate actions and related activities of issuers, whereas the Exchange's proposed fees do not include such additional fees.

The Exchange believes it is equitable, reasonable and non-discriminatory to waive the annual fee for issuers that have consolidated average daily volume ("CADV") equal to or greater than 2 million shares per day for the prior two (2) calendar months. As a general matter, listed companies that are better known and well-established are frequently more actively traded, liquid securities. The Exchange believes that the benefits to both the Exchange and other Exchange

constituents of attracting and retaining such companies to list on the Exchange justifies the Exchange waiving annual listing fees for these issuers. As it relates to other issuers, the ability of the Exchange to attract well-known, recognizable companies to list on the Exchange will help the Exchange to establish its status and reputation as a primary listing market. The Exchange's reputation as a primary listing market, in turn, will positively impact all issuers that are listed on the Exchange. Further, the Exchange believes that additional revenue generated from the Exchange's auction processes for actively traded Exchange-listed securities will offset the cost of operating a program for listed companies on the Exchange. Because issuers with higher CADV are likely to generate additional revenue for the Exchange, the Exchange believes it is reasonable to waive annual listing fees for such issuers. Based on the foregoing, the Exchange believes that waiver of annual listing fees to companies with certain CADV is a fair and equitable allocation of fees to issuers.

Finally, the Exchange believes it is reasonable and equitable to assess annual fees as of a security's initial listing date, rather than pro-rating annual fees and billing on a calendar basis. In particular, the Exchange believes that this annual billing will provide for more certainty to issuers than a billing model that requires proration.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and Rule 19b-4(f)(2) thereunder,¹⁰ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BATS-2012-010 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-BATS-2012-010. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BATS-2012-010 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.¹¹

Kevin M. O'Neill
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).