

result, FINRA stated that NASD IM-2830-2 no longer serves any useful purpose, and proposed not to incorporate its content into the consolidated FINRA rulebook. Furthermore, FINRA proposed to repeal Incorporated NYSE Rule 413, which requires members to adopt such uniform forms as the NYSE may prescribe to facilitate the orderly flow of transactions within the financial community. FINRA stated that its By-Laws contain several provisions by which FINRA may prescribe processes for members' activities, including the use of uniform forms. Thus, FINRA stated that Incorporated NYSE Rule 413 is duplicative of these provisions and should be repealed. In approving this proposed rule change, the Commission notes that FINRA members and their associated persons are required to comply with all applicable Federal securities laws and that FINRA, as a self-regulatory organization, has the obligation to have the capacity to enforce compliance by its members and their associated persons with the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>6</sup> that the proposed rule change (SR-FINRA-2009-093) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61545; File No. SR-BATS-2009-032]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend BATS Fee Schedule To Impose Fees for Physical Ports Used To Connect to BATS Exchange

February 19, 2010.

On December 18, 2009, 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 fee schedule applicable to Members<sup>3</sup> and non-members of the Exchange to begin charging for certain physical ports used to connect to the Exchange's systems. The proposed rule change was published for comment in the **Federal Register** on January 8, 2010.<sup>4</sup> The Commission received no comments regarding the proposal. On February 9, 2010, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>5</sup> This order grants approval of the proposed rule change, as modified by Amendment No. 1.

BATS proposes to begin charging a monthly fee for certain physical ports<sup>6</sup> used to connect to the Exchange's system for order entry and receipt of data from the Exchange.<sup>7</sup> BATS states that under its current policy all physical ports are provided free of charge but Members and non-members are only permitted to establish up to four such physical port pairs.<sup>8</sup> Under the proposal, BATS will continue to provide four pairs of physical ports without charge to any Member or non-member that has been approved to connect to the Exchange. In addition, the Exchange will permit Members and non-members to establish additional physical ports at a charge of \$2,000 for each additional single physical port provided by the Exchange to any Member or non-member in any data center. The proposal applies to all Exchange constituents with physical connections, including Members that obtain ports for direct access to the Exchange, non-member service bureaus

that act as a conduit for orders entered by Exchange Members that are their customers, Sponsored Participants, and market data recipients.

The Exchange states that very few Members or non-members require four physical ports for their operations related to the Exchange or would utilize more than four physical ports, and thus, the Exchange believes that the proposal should not affect many of the Exchange's constituents. However, the Exchange believes that Members and non-members that wish to pay for additional physical ports outside of those provided for free should have the ability to do so.

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,<sup>10</sup> which requires the equitable allocation of reasonable dues, fees, and other charges among Exchange Members and other persons using the Exchange's facilities, and Section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,<sup>12</sup> which requires that the rules of an exchange not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,<sup>13</sup> which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and not unreasonably discriminatory.

The Commission believes that the proposed physical port fees are equitably allocated among Members and

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange. See BATS Rule 1.5(n).

<sup>4</sup> Securities Exchange Act Release No. 61260 (December 30, 2009), 75 FR 1109 ("Notice").

<sup>5</sup> In Amendment No. 1, the Exchange replaced the bracketed "[September 1, 2009]" with "[February 1, 2010]" in the proposed rule text to reflect the fact that the current fee schedule is dated February 1, 2010. Because the change in Amendment No. 1 is technical in nature, it is not subject to notice and comment.

<sup>6</sup> The Exchange states that a physical port is used by a Member or non-member to literally plug into the Exchange at the data centers where the Exchange's servers are located (*i.e.*, either a cross-connection or a private line Ethernet connection to the Exchange's network within the data center).

<sup>7</sup> The Commission notes that BATS will implement the proposed physical port fees commencing on the first day of the month immediately following Commission approval of this proposed rule change (or on the date of approval, if on the first business day of a month). See Notice, *supra* note 4.

<sup>8</sup> A "pair" of ports refers to one port at the site of the Exchange's primary data center (including the expansion space located adjacent to such data center) and one port at the site of the Exchange's secondary data center.

<sup>9</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>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78f(b)(8).

<sup>13</sup> 17 CFR 242.603(a).

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

non-members and do not unfairly or unreasonably discriminate between customers, issuers, brokers, or dealers because the proposed physical port fees do not distinguish among the type of participant but rather are the same for all Members and non-members. The Commission also believes that BATS was subject to significant competitive pressure to act equitably, fairly, and reasonably in setting the physical port fees, in light of the highly competitive nature of the market for execution and routing services.<sup>14</sup>

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-BATS-2009-032), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61543; File No. SR-FINRA-2010-005]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Repeal Incorporated NYSE Rule 405(4) (Common Sales Accounts)

February 18, 2010.

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> notice is hereby given that on January 21, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to repeal Incorporated NYSE Rule 405(4)

(Common Sales Accounts) as part of the process to develop the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA 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, FINRA 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. FINRA 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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to repeal NYSE Rule 405(4) (Common Sales Accounts).<sup>4</sup>

NYSE Rule 405(4) (Common Sales Accounts) requires proper supervision of registered representatives handling common sales accounts. The rule provides that a member may facilitate the isolated liquidation of securities valued at \$1,000 or less registered in the name of an individual who does not have an account, and which are not part of any distribution, through a common sales account set up for the specific purpose of handling such sales. The rule further provides that such sales may be effected on behalf of the customer without requiring the member to send a periodic customer account statement to the individual as otherwise generally required, provided the following conditions are satisfied: (1) The

customer is identified as the individual in whose name the securities are registered; (2) the securities are received by the member, at or prior to the time of the entry of the order, in the exact amount to be sold in good delivery form; (3) a confirmation is sent to the customer; (4) all proceeds of such sales are paid out on or immediately following settlement date; and (5) a record is made in the common sales account that includes certain customer-specific information.

FINRA believes that the rule as written may raise potential investor protection concerns. The term "isolated" is not defined.<sup>5</sup> Further, NYSE Rule 405(4) permits a member to effect sales of securities for customers without expressly requiring prior customer consent and without the need to send periodic account statements to the customer. For these reasons, FINRA proposes to eliminate NYSE Rule 405(4) and not adopt its content into the Consolidated FINRA Rulebook.<sup>6</sup>

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 180 days following Commission approval.

###### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions

<sup>5</sup> NYSE Rule 405(4) was adopted by the NYSE in the late 1960's. In 1977, the NYSE proposed amendments to Rule 405(4) to define the term "isolated" to mean "not exceeding five \$2,000 transactions during any twelve-month period unless otherwise approved by the NYSE," and to allow unsolicited purchases as well as sales of securities. In late 1977, the SEC instituted proceedings to determine whether to disapprove the proposed rule change and identified the potential grounds for disapproval. See Securities Exchange Act Release No. 14143 (November 7, 1977) (Order Instituting Proceedings to Determine Whether Proposed Changes to Rule 405 Should be Disapproved; File No. SR-NYSE-76-34). The SEC expressed concern that "execution of such transactions, and in particular of purchases [as proposed], in the common purchase and sale account may permit opportunities for fraudulent and manipulative acts or practices[.]" In February 1978, the NYSE withdrew the filing. See Securities Exchange Act Release No. 14630 (April 3, 1978) (Order Approving Withdrawal of NYSE's Proposed Changes to Rule 405; File No. SR-NYSE-76-34).

<sup>6</sup> FINRA notes that in the event a member may seek permission not to send customer account statements under certain limited circumstances, proposed FINRA Rule 2231 which relates to customer account statements, would authorize FINRA to exempt members from the provisions of such rule, including the requirement to deliver periodic account statements, pursuant to the Rule 9600 Series. See Securities Exchange Act Release No. 59921 (May 14, 2009), 74 FR 23912 (May 21, 2009) (Notice of Filing; File No. SR-FINRA-2009-028).

<sup>14</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from the New York Stock Exchange ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>4</sup> For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."