

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–109. 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 Web site 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 a.m. and 3 p.m. Copies of such 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 publicly available. All submissions should refer to File Number SR–Phlx–2010–109 and should be submitted on or before September 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62713; File No. SR–BATS–2010–021]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 23.1, Entitled “Exercise of Options Contracts”

August 12, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on August 3, 2010, BATS Exchange, Inc. (the “Exchange” or “BATS”) 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. The Exchange has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b–4(f)(6)(iii) thereunder,<sup>4</sup> which renders it 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 the Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS 23.1, entitled “Exercise of Options Contracts,” in order to extend the cut-off time to submit contrary exercise advices.

The text of the proposed rule change is available at the Exchange's Web site at <http://www.bats trading.com>, at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at <http://www.sec.gov>.

#### 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 Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of the proposed rule change is to amend Rule 23.1 to extend the cut-off time to submit contrary exercise advices (each a “Contrary

Exercise Advice”, or, “CEA”)<sup>5</sup> to the Exchange. The Exchange also proposes to make certain non-substantive changes to reorganize the text of Rule 23.1 to more clearly present the existing requirements and to eliminate duplicative language.<sup>6</sup>

The Options Clearing Corporation (“OCC”) has an established procedure, under OCC Rule 805, that provides for the automatic exercise of certain options that are in-the-money by a specified amount known as “Exercise-by-Exception” or “Ex-by-Ex.” Under the Ex-by-Ex process, options holders holding option contracts that are in-the-money by a requisite amount and who wish to have their contracts automatically exercised need take no further action. However, under OCC Rule 805, option holders who do not want their options automatically exercised or who want their options to be exercised under different parameters than that of the Ex-by-Ex procedures must instruct OCC of their “contrary intention.”

In addition to the OCC requirement, option holders must file a CEA with the Exchange in accordance with Exchange Rule 23.1. Rule 23.1 is designed, in part, to deter individuals from taking improper advantage of late breaking news by requiring evidence of an option holder's timely decision to exercise or not exercise expiring equity options. Members satisfy this evidentiary requirement by electronically submitting the CEA to the Exchange through OCC's electronic communications system or any other means prescribed by the Exchange. The submission of the CEA allows the Exchange to satisfy its regulatory obligation to verify that the decision to make a contrary exercise was made timely and in accordance with Rule 23.1.

Currently under Rule 23.1, option holders have until 5:30 p.m.<sup>7</sup> on the day prior to expiration to make a final decision to exercise or not exercise an expiring option that would otherwise either expire or be automatically exercised. An Exchange member may

<sup>5</sup> Contrary Exercise Advices are also referred to as Expiring Exercise Declarations (“EED”) in the OCC rules.

<sup>6</sup> The Exchange proposes to reorganize the current rule text so that the requirement that exercise decisions must be made by 5:30 p.m. Eastern Time is specified in paragraph (c), while the requirements pertaining to submitting CEA instructions are contained in new paragraph (d). The language in new paragraph (d) is comprised of language moved from paragraph (b)(2) and paragraph (c) of the current rule. The Exchange also proposes to eliminate Interpretation and Policy .03 to Rule 23.1 because it is duplicative of the language contained in paragraph (c) of the current rule and paragraph (d)(iii) in the proposal.

<sup>7</sup> All referenced times are Eastern Time.

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b–4(f)(6)(iii).

<sup>17</sup> 17 CFR 200.30–3(a)(12).

not accept CEA instructions from its customer or non customer accounts after 5:30 p.m. However, the current rule gives Exchange members an additional one hour, up to 6:30 p.m., to submit these CEA instructions to the Exchange where such member uses an electronic submission process.<sup>8</sup>

The current process allowing members an additional one hour after the decision making cut off time of 5:30 p.m. to submit a CEA to the various options exchanges was approved by the Commission in 2003.<sup>9</sup>

The Exchange proposes to extend the current 6:30 p.m. deadline for submitting CEA instructions to the Exchange by one additional hour, up to 7:30 p.m. The Exchange believes that this proposed rule change is necessary to maintain consistency with the rules of other exchanges that have recently, or are in the process of, amending their rules. The Exchange understands that such amendments are intended to address concerns expressed by members of various options exchanges that, given the decrease in the Ex-by-Ex threshold and the increase in trading, the existing deadline for submitting CEAs under existing rules is problematic for timely back-office processing. The proposed additional one hour will address this concern by further enabling firms to more timely manage, process, and submit the instructions to the Exchange. The Exchange also proposes to modify the language in paragraph (g) of the current rule (new paragraph (h)), which allows a member up to 2 hours and 30 minutes to submit a CEA to the Exchange in the event of a modified close of trading on the day of expiration, by removing the two hour and thirty minute restriction and allowing a member to submit a CEA to the Exchange in the event of a modified close of trading of up to the proposed 7:30 p.m. deadline. This will make consistent the submission deadline for both regular and modified close

expiration days. Moreover, this will provide uniformity with submission deadlines for both regular and modified close expiration days which will remove any possibility for error when determining what the submission deadline is on any modified close expiration day.

In addition to the changes described above, the Exchange proposes to add language to Rule 23.1(c) to require that with respect to Quarterly Options Series the 5:30 p.m. Eastern Time deadline applies on the expiration date rather than on the business day immediately prior to the expiration date. Standard options contracts expire on the third Saturday of the applicable expiration month; because the Exchange desires to have all submissions occur on business days rather than weekend days, the Exchange requires Options Members to follow the Contrary Exercise Advice process by no later than 5:30 on the business day immediately prior to expiration for standard options contracts. In contrast, Quarterly Options Series expire on a fixed day that is never a weekend day, specifically the last business day of each calendar quarter, and thus, the Exchange believes it appropriate to require Contrary Exercise Advice filings on the expiration date for any Quarterly Options Series.<sup>10</sup>

It is important to note that this proposed submission deadline does not change the substantive requirement that option holders make a final decision by 5:30 p.m. The Exchange will continue to enforce the 5:30 p.m. decision making requirement, while also allowing additional time to process and submit the CEA instructions. This proposal seeks to increase that additional submission time by one hour, and the Exchange believes that this proposal will be beneficial to the marketplace, particularly as it concerns back-office processing. The initiative to address Exchange member concerns is industry-wide, a rule change regarding this matter has already been approved,<sup>11</sup> and the Exchange anticipates that other options exchanges will also propose a one hour extension for which they will accept a CEA. This proposed additional processing time and Exchange submission deadline will not conflict with OCC submission rules or cause any OCC processing issues.

If the operative date of this proposed rule change is more than 5 business

days prior to the date of the next expiration Friday, *i.e.*, the third Friday of the month ("Expiration Friday"),<sup>12</sup> the Exchange will implement the rule change so as to be effective for that Expiration Friday. If the operative date of this proposed rule change is 5 business days or less prior to the date of the next Expiration Friday, the Exchange will implement the rule change so as to be effective for the following Expiration Friday. The Exchange will notify Members of the implementation date of the rule change via a Regulatory Circular.

## 2. Statutory Basis

Approval of the rule change proposed in this submission 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) of the Act.<sup>13</sup> In particular, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>14</sup> 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. Specifically, the Exchange believes that the proposed amendment will foster coordination with back office personnel engaged in processing information and is consistent with the facilitating of transactions in securities as set forth in Section 6(b)(5) in that it, by providing Exchange Members an additional hour within which to complete the necessary processing of CEAs, will thereby decrease Exchange Members' burden of processing an increasing number of contrary exercise advices and enable them to more easily manage and process these instructions.

### 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 Regarding the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

<sup>8</sup> If members do not employ an electronic submission procedure, they are required to submit CEAs for non-customer accounts by the 5:30 p.m. deadline. This deadline for manual submission is required in order to prevent firms from improperly extending the 5:30 p.m. deadline to exercise or not exercise an option. This requirement is based on the difficulty in monitoring a manual procedure that has different times for deciding whether or not to exercise the option and for the submission of the CEA.

<sup>9</sup> See Securities Exchange Act Release No. 47885 (May 16, 2003), 68 FR 28309 (May 23, 2003) (SR-AMEX-2001-92); Securities Exchange Act Release No. 48505 (September 17, 2003), 68 FR 55680 (September 26, 2003) (SR-ISE-2003-20); Securities Exchange Act Release No. 48640 (October 16, 2003), 68 FR 60757 (October 23, 2003) (SR-PCX-2003-47); and Securities Exchange Act Release No. 48639 (October 16, 2003), 68 FR 60767 (October 23, 2003) (SR-Phlx-2003-65).

<sup>10</sup> See BATS Rule 19.6, Interpretation and Policy .04.

<sup>11</sup> See Securities Exchange Act Release No. 61710 (March 15, 2010), 75 FR 13636 (March 22, 2010) (SR-ISE-2010-02) (order approving proposed rule change submitted by ISE relating to the cut-off time for submitting contrary exercise advices).

<sup>12</sup> For example, Expiration Friday for August 2010 options will be August 20, 2010; Expiration Friday for September options will be September 17, 2010.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup>

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](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2010-021 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-2010-021. 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 Web site 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 a.m. and 3 p.m. Copies of such 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 publicly available. All submissions should refer to File Number SR-BATS-2010-021 and should be submitted on or before September 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62702; File No. SR-FINRA-2010-026]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change To Adopt FINRA Rule 5121 (Public Offerings of Securities With Conflicts of Interest) in the Consolidated FINRA Rulebook

August 12, 2010.

#### I. Introduction

The Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") on May 20, 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> a proposal to adopt FINRA Rule 5121 (Public Offerings of Securities With Conflicts of Interest) ("Rule") in the Consolidated FINRA Rulebook. This

proposal was published for comment in the **Federal Register** on June 4, 2010.<sup>3</sup> The Commission received one comment on the proposal,<sup>4</sup> and a letter from FINRA responding to the comment letter.<sup>5</sup> This order approves this proposed rule change.

### II. Description of the Proposed Rule Change

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>6</sup> FINRA proposed to adopt NASD Rule 2720 (Public Offerings of Securities With Conflicts of Interest) without material change as FINRA Rule 5121 in the Consolidated FINRA Rulebook.

NASD Rule 2720 governs public offerings of securities in which a member with a conflict of interest participates. The rule generally prohibits a member with a "conflict of interest," as defined in the rule,<sup>7</sup> from participating in a public offering, unless certain other requirements are met.<sup>8</sup>

<sup>3</sup> Exchange Act Release No. 62199 (June 1, 2010), 75 FR 31825 (June 4, 2010) (SR-FINRA-2010-026).

<sup>4</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Jeffrey W. Rubin, Chair, Committee on Federal Regulation of Securities, American Bar Association dated June 22, 2010 ("ABA letter").

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Stan Macel, Assistant General Counsel, FINRA, dated July 23, 2010 ("FINRA Response Letter").

<sup>6</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("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>7</sup> As defined in NASD Rule 2720(f)(5), a conflict of interest exists, if at the time of a member's participation in an entity's public offering, any of the following four conditions applies: (1) The securities are to be issued by the member; (2) the issuer controls, is controlled by or is under common control with the member or the member's associated persons; (3) at least five percent of the net offering proceeds, not including underwriting compensation, are intended to be (i) used to reduce or retire the balance of a loan or credit facility extended by the member, its affiliates and its associated persons, in the aggregate; or (ii) otherwise directed to the member, its affiliates and associated persons, in the aggregate; or (4) if, as a result of the public offering and any transactions contemplated at the time of the public offering (i) the member will be an affiliate of the issuer; (ii) the member will become publicly owned; or (iii) the issuer will become a member or form a broker-dealer subsidiary. NASD Rule 2720 defines several terms for purposes of the rule, including "entity," "control," and "common control."

<sup>8</sup> The rule requires prominent disclosure of the nature of the conflict, and in certain circumstances,

Continued

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 Exchange has satisfied this requirement.

<sup>17</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.