

### III. Discussion and Commission's Findings

After careful review of the proposed rule change, 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 association.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(4) of the Act,<sup>7</sup> which requires that FINRA rules be designed to assure a fair representation of FINRA's members in the selection of its directors and the administration of its affairs.

The FINRA By-Laws provide that the FINRA Board currently must consist of the Chief Executive Officer of FINRA, the Chief Executive Officer of NYSE Regulation, eleven Public Governors and ten Industry Governors, including a Floor Member Governor, an Independent Dealer/Insurance Affiliate Governor, an Investment Company Affiliate Governor, three Small Firm Governors, one Mid-Size Firm Governor, and three Large-Firm Governors.<sup>8</sup> The Small Firm Governors, Mid-Size Firm Governor, and Large-Firm Governors are elected by members of FINRA according to their classification as a Small Firm, Mid-Size Firm or Large Firm.<sup>9</sup>

The proposed rule change would provide that the FINRA Regulation Board continue to consist of between 5 and 15 members,<sup>10</sup> and that FINRA Regulation Board members be elected by, and drawn exclusively from, the FINRA Board. Additionally, the proposed rule change would require that the FINRA Regulation Board, like the FINRA Board, have a greater number of Public Directors than Industry Directors.<sup>11</sup> In addition, to ensure fair representation on the FINRA Regulation Board, the proposed rule change also would require that at least two, and not less than 20%, of the Directors of the FINRA Regulation Board be Small, Mid-Size, or Large Firm Governors.<sup>12</sup> The Commission notes that it previously

found the composition of the FINRA Board to be consistent with the fair representation requirement of Section 15A(b)(4) of the Act.<sup>13</sup> The Commission further notes that it has previously found a requirement that at least 20% of directors represent the exchange's members to be consistent with the fair representation requirement applicable to national securities exchanges under Section 6(b)(3) of the Act.<sup>14</sup> Accordingly, the Commission believes that the requirement that the FINRA Regulation Board be composed of at least two, and not less than 20%, of FINRA Regulation's Directors be Small Firm, Mid-Size Firm or Large-Firm Governors is consistent with Section 15A(b)(4) of the Act.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>15</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed changes to the FINRA Regulation By-Laws should allow the FINRA Regulation Board to operate in a more effective and efficient manner by, among other things, having a similar composition and a complementary governance structure to the FINRA Board.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-FINRA-2009-020) be, and it hereby is, approved.

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. 34-59967; File No. SR-BATS-2009-015]

#### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 11.13, Entitled "Order Execution"

May 21, 2009.

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 May 19, 2009, BATS Exchange, Inc. ("BATS" or the "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. 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 Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 11.13, entitled "Order Execution," to provide Users<sup>5</sup> of the Exchange with another option with respect to the Exchange's method of processing the unfilled balance of a limit order that returns to the Exchange and is posted to the BATS Book after being routed away to one or more away Trading Centers<sup>6</sup> for execution.

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.

#### 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

<sup>6</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78o-3(b)(4).

<sup>8</sup> See FINRA By-Laws, Article VII, Section 4 and XXII, Section 2(a).

<sup>9</sup> See FINRA By-Laws, Article I(z), Article I(dd), Article I(xx) (defining Small Firm Governor, Mid-Size Firm Governor, and Large-Firm Governor), and Article VII, Section 4(a).

<sup>10</sup> See proposed FINRA Regulation By-Laws, Article IV, Section 4.2 (Number of Directors).

<sup>11</sup> See proposed FINRA Regulation By-Laws, Article IV, Section 4.3(a) (Qualifications).

<sup>12</sup> See *id.*

<sup>13</sup> See Consolidation Approval Order, *supra* note 4.

<sup>14</sup> See, e.g., Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936, 46941 (August 12, 2008) (SR-BSE-2008-02, SR-BSE-2008-23, SR-BSE-2008-25, SR-BSECC-2008-01).

<sup>15</sup> 15 U.S.C. 78o-3(b)(6).

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<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.

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

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

<sup>5</sup> As defined in BATS Rule 1.5(bb).

<sup>6</sup> As defined in BATS Rule 2.11.

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 provide Users of the Exchange with another option with respect to the Exchange's method of processing the unfilled balance of a limit order that returns to the Exchange and is posted to the BATS Book after being routed away to one or more away Trading Centers for execution. Specifically, the Exchange will allow Users to designate an order as eligible for re-routing after being posted to the BATS Book if another Trading Center has locked or crossed the posted order.

The Exchange currently allows Users to submit various types of limit orders to the Exchange that are processed pursuant to Rules 11.13(a)(1) and 11.13(a)(2)(B), as set forth below. Rule 11.13(a)(1) describes the process by which an incoming order would execute against the BATS Book.<sup>7</sup> To the extent an order has not been executed in its entirety against the BATS Book, Rule 11.13(a)(2)(B) then describes the process of routing marketable limit orders<sup>8</sup> to one or more Trading Centers, including a description of how the Exchange treats any unfilled balance that returns to the Exchange following the first attempt to fill the order through the routing process. If not filled through routing, and based on the order instructions, the unfilled balance of the order may be posted to the BATS Book. The Exchange is proposing to permit Users to designate the order as eligible to be routed away from the Exchange, after being posted, to the extent another Trading Center locks or crosses the posted order. The Exchange believes that the proposed change to Rule 11.13 will give additional flexibility with respect to the treatment of their orders and may result in such orders being executed more quickly. The proposed option to route a posted order to a locking or crossing market is offered by

at least one of the Exchange's competitors.<sup>9</sup>

2. Statutory Basis

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>10</sup> Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>11</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, by allowing Users to instruct the Exchange to route a posted order away from the Exchange to the extent another market has locked or crossed such order. This functionality will allow the Exchange to seek to execute the resting order if market conditions have changed since such order was originally posted.

*B. Self-Regulatory Organization's Statement of 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*

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

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

Because the foregoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b 4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>14</sup> However, Rule

19b 4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that BATS' proposal is substantially similar to the rules of another national securities exchanges and does not raise any new substantive issues.<sup>16</sup> BATS expects to have operational and technological changes in place to support the proposed rule change on May 22, 2009.<sup>17</sup> In addition, BATS states that the proposed functionality is completely optional, and will not require any programming changes by Users of the Exchange unless they choose to use the new functionality. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and hereby designates the proposal operative upon filing.<sup>18</sup>

At any time within 60 days of the filing of such 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.

**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 No. SR-BATS-2009-015 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

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.

<sup>15</sup> *Id.*

<sup>16</sup> See *supra* note 9.

<sup>17</sup> See SR-BATS-2009-015, Item 7.

<sup>18</sup> For the 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).

<sup>9</sup> See, e.g., NASDAQ Rule 4758(a)(1)(A)(ii).

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

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

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written

<sup>7</sup> As defined in BATS Rule 1.5(d).

<sup>8</sup> Market orders are also routed away, pursuant to Rule 11.13(a)(2)(A), however the Exchange is not proposing any changes to the treatment of routed market orders at this time.

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

All submissions should refer to File No. SR-BATS-2009-015. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of BATS. 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 No. SR-BATS-2009-015 and should be submitted on or before June 19, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59961; File No. SR-FINRA-2009-018]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change To Adopt IM-2830-1 ("Breakpoint" Sales) in the Consolidated FINRA Rulebook

May 21, 2009.

On March 26, 2009, 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") a proposed rule change 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 of the proposal was published for comment in the Federal Register on April 20, 2009.<sup>3</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

#### I. Description of the Proposed Rule Change

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>4</sup> FINRA proposed to adopt NASD IM-2830-1 ("Breakpoint" Sales), renumbered as FINRA Rule 2342, into the Consolidated FINRA Rulebook with the minor changes discussed below. NASD IM-2830-1 prohibits sales of mutual fund shares in amounts below a "breakpoint" if such sales are made "so as to share in the higher sales charges." In the context of mutual fund sales, a "breakpoint" is that point at which the sales charge is reduced for quantity purchases of fund shares.

The application of the standard in NASD IM-2830-1 depends on the facts and circumstances of particular transactions to determine whether a member executed a transaction for the purpose of earning a higher sales charge. In 1998, NASD IM-2830-1 was amended to address the use of modern portfolio investment strategies that utilize many different mutual funds with varying investment objectives.<sup>5</sup> The amendments specify more precisely those facts and circumstances that FINRA will consider when examining whether trades that miss breakpoints, but are made pursuant to bona fide asset allocation programs, may have violated NASD IM-2830-1. In making such

determinations, the rule provides that FINRA will consider, among other things, whether a member has retained records that demonstrate that the trade was executed in accordance with a bona fide asset allocation program that the member offers to its customers which is designed to meet their diversification needs and investment goals, and under which the member discloses to its customers that they may not qualify for breakpoint reductions that are otherwise available.

Breakpoint issues have been of concern to the regulatory community. On December 23, 2002, FINRA issued *Special Notice to Members* 02-85, which reminded firms of their obligation to apply correctly breakpoint discounts to front-end sales load mutual fund transactions.<sup>6</sup> In 2003, the staffs of FINRA, the SEC, and the NYSE conducted examinations of broker-dealers to assess their ability to deliver breakpoint discounts and memorialized the findings of those examinations in a joint report.<sup>7</sup> Concurrently, FINRA staff and industry members formed a joint task force to consider issues regarding breakpoints. The joint task force issued a report in July 2003 containing recommendations for the industry to facilitate the accurate delivery of breakpoint discounts.<sup>8</sup>

FINRA proposed to adopt NASD IM-2830-1 as FINRA Rule 2342, stating it believes this rule continues to be an important tool in regulating members' sales of mutual fund shares to ensure that they are not sold in dollar amounts just below breakpoints so as to share in higher sales charges. FINRA proposed to eliminate references to "just and equitable principles of trade" and make other minor changes to the text to reflect that it would be a stand-alone rule, rather than Interpretive Material, and to eliminate certain redundant text that is inconsistent with a rules-based format.

FINRA stated that it 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.

<sup>6</sup> NASD *Special Notice to Members* 02-85, NASD Requires Immediate Member Firm Action Regarding Mutual Fund Purchases and Breakpoint Schedules (December 2002).

<sup>7</sup> See Joint SEC/NASD/NYSE Report of Examinations of Broker/Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds (March 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006438>.

<sup>8</sup> See Report of the Joint NASD/Industry Task Force on Breakpoints (July 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006422>.

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

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

<sup>3</sup> See Exchange Act Rel. No. 59754 (Apr. 13, 2009), 74 FR 18007 (Apr. 20, 2009).

<sup>4</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 FINRA *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>5</sup> See Securities Exchange Act Release No. 40659 (Nov. 10, 1998), 63 FR 64136 (Nov. 18, 1998) (Order Approving Proposed Rule Change Relating to Mutual Fund Breakpoint Sales).

<sup>19</sup> 17 CFR 200.30-3(a)(12).