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None.

Dated: September 1, 2009.

By the Commission.

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60586; File No. SR-BATS-2009-026]

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 Ports Used for Order Entry and Receipt of Market Data

August 28, 2009.

On July 21, 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")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the fee schedule applicable to Members³ and non-members of the Exchange with respect to ports used to enter orders into Exchange systems and to receive data from the Exchange. The proposed rule change was published for comment in the **Federal Register** on July 28, 2009.⁴ The Commission received no comments regarding the proposal. On August 27, 2009, the Exchange filed Amendment

No. 1 to the proposed rule change.⁵ This order grants approval of the proposed rule change.

BATS proposes to begin charging a monthly fee for ports used to enter orders into the Exchange's trading system and to receive data from the Exchange.⁶ Specifically, the Exchange proposes to charge \$250.00 per month per pair⁷ of any port type other than a Multicast PITCH Spin Server Port or a GRP Port. Thus, the proposed charge will apply to all Exchange FIX, FIXDROP, DROP, TCP PITCH, TCP FAST PITCH, and TOP ports.⁸ In addition, the Exchange proposes to provide all Exchange constituents that receive the Exchange's Multicast PITCH feed with 12 pairs of Multicast PITCH Spin Server Ports free of charge and, if such ports are used, one free pair of GRP Ports.⁹ The Exchange proposes to charge such customers \$250.00 per month per additional pair of GRP Ports or additional set of 12 pairs of Multicast PITCH Spin Server Ports. Any Member or non-member that has entered into the appropriate agreements with the Exchange is permitted to receive Multicast PITCH Spin Server Ports and GRP Ports from the Exchange.

The proposed rule change will apply to 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, and market data recipients. The Exchange states that it has previously provided ports free of charge to all Members and non-members that use such ports for order entry to the Exchange or for receipt of market data. However, the Exchange states that its infrastructure costs have increased over time. In addition, the Exchange believes

that providing ports free of charge has not encouraged Members and non-members to reserve and maintain ports efficiently, but rather, has led to a significant number of ports that are reserved and enabled by such market participants, but are never used or are under-used. Accordingly, the Exchange believes that the imposition of port fees will help the Exchange to continue to maintain and improve its infrastructure, while also encouraging Exchange customers to request and enable only the ports that are necessary for their operations related to the Exchange.

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.¹⁰ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,¹¹ 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,¹² 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,¹³ 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,¹⁴ 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 port fees are equitably allocated among Members and non-members and do not unfairly or unreasonably discriminate between

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

⁶ The Commission notes that BATS will implement the proposed 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.

⁷ Each pair of ports will consist of one port at the Exchange's primary data center and one port at the Exchange's secondary data center.

⁸ BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including Multicast PITCH and GRP Ports, permit Members and non-members to receive information from the Exchange.

⁹ The Exchange's proposal to provide certain ports free of charge to Multicast PITCH customers is designed to encourage use of the Exchange's Multicast PITCH feed because it is a relatively new offering by the Exchange and because the Exchange believes that the feed is its most efficient feed and will reduce infrastructure costs for both the Exchange and those who utilize the feed.

¹⁰ 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).

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78f(b)(8).

¹⁴ 17 CFR 242.603(a).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

⁴ Securities Exchange Act Release No. 60364 (July 22, 2009), 74 FR 37285 ("Notice").

customers, issuers, brokers, or dealers because the proposed 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 port fees, in light of the highly competitive nature of the market for execution and routing services.¹⁵ The Commission further notes that the Exchange's proposed port fees are consistent with similar port fees charged by other exchanges.¹⁶

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-BATS-2009-026), 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.¹⁸

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60585; File No. SR-CBOE-2009-053]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit FLEX Options on Securities Eligible for Non-FLEX Options Trading and on Corporate Debt Securities

August 28, 2009.

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 August

¹⁵ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁶ See, e.g., Rule 7015 of The NASDAQ Stock Market LLC ("NASDAQ") (setting forth, among other fees for access services, port fees charged to members and non-members used to enter orders into NASDAQ trading systems). See also Securities Exchange Act Release Nos. 60546 (August 20, 2009), 74 FR 43184 (August 26, 2009) (SR-NASDAQ-2009-058) (increasing the monthly fee for each port used to enter orders in NASDAQ trading systems from \$400 per month to \$500 per month); 59337 (February 2, 2009), 74 FR 6441 (February 9, 2009) (SR-BX-2009-004) (establishing fees for ports used by members to enter orders); 59615 (March 20, 2009), 74 FR 14604 (March 31, 2009) (SR-BX-2009-005) (establishing, among other fees, port fees for accessing market data).

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

19, 2009, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as "non-controversial" pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder, which renders it effective upon filing.⁴ 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

CBOE is proposing to amend certain CBOE rules to (1) permit the Exchange to list Flexible Exchange Options ("FLEX Options") on securities that are eligible for Non-FLEX options trading, even if the Exchange does not list Non-FLEX options on such securities, and (2) designate Corporate Debt Security Options as eligible for FLEX Options trading. The text of the rule proposal is available on the Exchange's website (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary 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 self-regulatory organization 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 those 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 first change being proposed by this filing is to permit CBOE to list FLEX Options on securities that are eligible for Non-FLEX options trading, even if the Exchange does not list Non-FLEX options on such securities. Currently, CBOE's rules only permit FLEX Options on those securities on

which the Exchange lists and trades Non-FLEX options. For various reasons, exchange traded options are not listed on every NMS stock, index or other products approved for options trading. The Exchange recognizes that market participants may want access to options on such securities, in addition to the certainty and safeguards of a regulated and standardized marketplace. As an alternative to the over-the-counter marketplace, CBOE proposes to increase the spectrum of products that are eligible for FLEX Options trading, even if the Exchange does not list Non-FLEX options on such securities. In order to effect this change, the Exchange is proposing to amend its Flexible Exchange Options rules and other product rules (e.g., Range Options, binary options, Credit Options) that currently designate such products as eligible for FLEX Options trading to permit FLEX Options trading even if Non-FLEX options on such securities are not traded.

The second change being proposed by this filing is to designate Corporate Debt Security Options as eligible for FLEX Option trading. To effect this change, the Exchange is proposing to adopt new rule 28.17, which is similar to other FLEX Option designation rules for other products that have stand alone chapters (e.g., Range Options, binary options, Credit Options). The Exchange would like to offer FLEX Option trading on Corporate Debt Security Options as an alternative to similar products trading in the over-the-counter marketplace.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act")⁵ and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.⁶ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁷ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the FLEX Option changes proposed in this rule filing will provide market investors with additional means to manage their risk exposures and carry

⁵ 15 U.S.C. 78s(b)(1).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).